Chapter 6

**OTHER STATUTORY EXEMPTIONS**

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I. Overview

In addition to the exemptions discussed in Chapter 5, White-Collar Exemptions, the Fair Labor Standards Act (FLSA) contains a number of other exemptions from its minimum wage, overtime, recordkeeping, and child labor restrictions. The exemptions discussed in this chapter include those found in Section 213(a), (b), (d), and (f), and Section 207(b), (i), (n), and (s). Section 213(a) exempts employees from the minimum wage and overtime provisions of the FLSA, whereas Sections 213(b) and 207(b), (i), (n), and (s) provide exemptions (or partial exemptions) from only the overtime provision. Section 213(d) exempts employees from the minimum wage, overtime, and child labor requirements. Section 213(f) exempts employees from minimum wage, overtime, child labor, and recordkeeping requirements.

The various exemptions discussed in this chapter cover a broad range of activities in many diverse industries and occupations. Their widely divergent subject matter notwithstanding, most of these exemptions are the subject of extensive and in some cases quite detailed regulations issued by the U.S. Department of Labor (DOL), augmented by a modest body of case law. In addition, the Wage and Hour Division’s (WHD’s) *Field Operations Handbook* “provides [WHD] investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. … The [*Field Operations Handbook*] reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.”[[1]](#footnote-2)

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

• 29 C.F.R. Part 516, Subpart B, Records Pertaining to Employees Subject to Miscellaneous Exemptions Under the Act; Other Special Requirements;

• 29 C.F.R. Part 551, Local Delivery Drivers and Helpers; Wage Payment Plans;

• 29 C.F.R. Part 552, Application of the Fair Labor Standards Act to Domestic Service;

• 29 C.F.R. Part 570, Child Labor Regulations, Orders and Statements of Interpretation;

• 29 C.F.R. Part 575, Waiver of Child Labor Provisions for Agricultural Employment of 10 and 11 Year Old Minors in Hand Harvesting of Short Season Crops; and

• 29 C.F.R. Part 579, Child Labor Violations—Civil Money Penalties.

The following DOL interpretations are also directly relevant to the matters covered in this chapter:

• 29 C.F.R. Part 779, The Fair Labor Standards Act As Applied to Retailers of Goods or Services;

• 29 C.F.R. Part 782, Exemption From Maximum Hours Provisions for Certain Employees of Motor Carriers;

• 29 C.F.R. Part 783, Application of the Fair Labor Standards Act to Employees Employed As Seamen;

• 29 C.F.R. Part 784, Provisions of the Fair Labor Standards Act Applicable to Fishing and Operations on Aquatic Products;

• 29 C.F.R. Part 786, Miscellaneous Exemptions and Exclusions From Coverage;

• 29 C.F.R. Part 788, Forestry or Logging Operations in Which Not More Than Eight Employees Are Employed;

• 29 C.F.R. Part 793, Exemption of Certain Radio and Television Station Employees From Overtime Pay Requirements Under Section 13(b)(9) of the Fair Labor Standards Act; and

• 29 C.F.R. Part 794, Partial Overtime Exemption for Employees of Wholesale or Bulk Petroleum Distributors Under Section 7(b)(3) of the Fair Labor Standards Act.

In addition, this chapter addresses the following *Field Operations Handbook* chapters:

• Chapter 21: Retail or Service Establishment Exemptions From Sections 6 and 7;

• Chapter 23: Newspaper and Other Communication Exemptions;

• Chapter 24: Transportation Exemptions;

• Chapter 25: Other Exemptions; and

• Chapter 33: Child Labor: FLSA.

II. The Establishment Requirement

The exemptions codified in Sections 213(a)(3), 213(b)(10), 213(b)(27), 213(b)(29), 207(b)(3), and 207(i) of the FLSA apply only to persons employed by an “establishment.” This section defines the characteristics of an establishment, regardless of the specific exemption at issue.

The DOL interpretive bulletin “29 C.F.R. Part 779, The FLSA as Applied to Retailers of Goods or Services,”[[2]](#footnote-3) describes the attributes of an “establishment:”

As used in the Act, the term “establishment,” which is not specifically defined therein, refers to a “distinct physical place of business” rather than to “an entire business or enterprise” which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation. As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.[[3]](#footnote-4)

This interpretive bulletin post-dates the U.S. Supreme Court’s decision in *A.H. Phillips, Inc. v. Walling*,[[4]](#footnote-5) where the issue was whether employees working in the warehouse and central office building of an interstate grocery chain consisting of 49 stores were “‘engaged in any retail … establishment’ within the meaning of Section 13(a)(2).”[[5]](#footnote-6) In reaching its decision, the Court acknowledged the hybrid nature of the company’s operations, finding that a warehouse and a central office were vital factors in the “integration of the retail and wholesale functions” and were necessary instruments for the wholesale aspects of a multi-function business.[[6]](#footnote-7) The Court explained that

[e]ven if, as petitioner urges, the word “establishment” referred to an entire business or enterprise, the combined retail-wholesale nature of petitioner’s interstate business would prevent it from properly being classified as a local “retail establishment.” But if, as we believe, Congress used the word “establishment” as it is normally used in business and in government—as meaning a distinct physical place of business, petitioner’s enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, Section 13(a)(2) is plainly irrelevant.[[7]](#footnote-8)

**A. The Exemption Depends on the Character of the Establishment**

The establishment requirement focuses in the first instance on the character of the establishment.[[8]](#footnote-9) Thus, the term “establishment” and the characteristic of an “establishment” are specific to each of the following exemptions:

• amusement or recreational establishments;[[9]](#footnote-10)

• nonmanufacturing establishments engaged in the retail sales and service of automobiles, trucks, or farm implements;[[10]](#footnote-11)

• motion picture theater establishments;[[11]](#footnote-12)

• amusement or recreational establishments located in national parks;[[12]](#footnote-13)

• independently owned and controlled local enterprises engaged in the wholesale or bulk distribution of petroleum products;[[13]](#footnote-14) and

• commissioned salespersons working in a retail or sales establishment.[[14]](#footnote-15)

**B. “Establishment” As Distinguished From “Enterprise” and “Business”**

“Establishment” and “enterprise” are distinct terms under the FLSA and its regulations.[[15]](#footnote-16) The term “establishment … refers to a ‘distinct physical place of business’ rather than ‘an entire business or enterprise’ which may include several separate places of business.”[[16]](#footnote-17) One court has noted that “the only reason for defining ‘establishment’ as a distinct physical place of business was so that it could be distinguished from an integrated business enterprise.”[[17]](#footnote-18) This conclusion flows from the repeated comparisons throughout the regulations between “enterprises” and “establishments.”[[18]](#footnote-19) To determine whether a business constitutes a covered enterprise under Section 203(s)(1) of the FLSA, it must first be determined whether the business comes within the definition of “enterprise” in Section 203(r)(1).[[19]](#footnote-20)

An enterprise may be composed of a single establishment or a multi-unit operation.[[20]](#footnote-21) In a multi-unit operation, some of the establishments may qualify for exemption and others may not.[[21]](#footnote-22) For example, in *Chao v. Double JJ Resort Ranch*,[[22]](#footnote-23) the Sixth Circuit found that the resort hotel’s bars, restaurants, dining rooms, conference center, lodging facilities, and gas stations were not exempt establishments, but its golf course and horseback riding might qualify as separate recreational establishments.[[23]](#footnote-24) The court explained that “Double JJ is not in the recreation business. Its primary purpose is to sell foods and rent beds; the recreational activities are just a carrot enticing people to make the trip.”[[24]](#footnote-25)

Unit stores, such as department stores, will ordinarily constitute a single establishment.[[25]](#footnote-26) Where a store has a back room that produces goods (e.g., bakery shop or tailor shop) and sells those goods in an adjoining front room, such shops will be considered a single establishment if there is a unity of ownership and the back and front rooms are operated as a single store.[[26]](#footnote-27)

According to the regulations, two or more physically separated portions of a business, although located on the same premises, may constitute multiple establishments provided (1) they are engaged in operations that are physically separated from the other activities; (2) they are functionally operated as a separate unit having separate records and separate bookkeeping; and (3) there is no interchange of employees between the units.[[27]](#footnote-28)

**C. “Employed By”**

As used in Section 213 of the FLSA, the phrases “employee of” and “employed by” are synonymous.[[28]](#footnote-29) When applicable, these exemptions apply to all employees employed by the establishment regardless of where the work is performed.[[29]](#footnote-30) On the other hand, the exemptions will not extend to employees who, although actually working “in” the establishment, are not “employed by” the exempt establishment. For example, a manufacturer’s employee who demonstrates product at a customer’s exempt retail establishment will not be exempt.[[30]](#footnote-31)

To be “employed by” the establishment, an employee, whether performing work inside or outside the establishment, must be engaged in activities within the scope of the exempt business.[[31]](#footnote-32) For example, in *Gieg v. DDR, Inc*.,[[32]](#footnote-33) finance and insurance managers employed by retail automobile dealerships were deemed to be within the scope of the exemption because the finance and insurance packages they sold were an integral part of the dealerships’ retail business.[[33]](#footnote-34)

The regulations provide that

[w]here the employer’s business operations are conducted in more than one establishment, as in the various units of a chain-store system or where branch establishments are operated in conjunction with a main store, the employer is entitled to exemption … for those of his employees in such business operations, and those only, who are “employed by” an establishment which qualifies for exemption under the statutory tests. For example, the central office or central warehouse of a chain-store operation even though located on the same premises as one of the chain’s retail stores would be considered a separate establishment for purposes of the exemption, if it is physically separated from the area in which the retail operations are carried on and has separate employees and records.[[34]](#footnote-35)

Employees employed by an exempt establishment are exempt even though their employer also operates one or more nonexempt establishments.[[35]](#footnote-36) However, where an employee of such an employer performs work for both exempt and nonexempt establishments during the same workweek, the employee is not “employed by” an exempt establishment during that workweek.[[36]](#footnote-37)

III. Section 213(a) Exemptions From the Minimum Wage and Overtime   
Requirements of the FLSA

**A. Employees Employed by Amusement or Recreational Establishments, Organized Camps, or Religious or Nonprofit Educational Conferences**

Section 213(a)(3) provides an exemption from the minimum wage and overtime requirements of the FLSA for any employee employed by an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center that satisfies one of the two “seasonal test” requirements:

(A) it does not operate for more than seven months in any calendar year, or

(B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year … .[[37]](#footnote-38)

According to the Tenth Circuit, the exemption’s purpose is “to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the Fair Labor Standards Act.”[[38]](#footnote-39) However, according to the Fifth Circuit: “While that appears to be a logical theory, we can find nothing in the legislative history to confirm it. The legislative history simply does not directly address the purpose of the amusement-recreation exemption.”[[39]](#footnote-40)

The FLSA does not define the term “amusement or recreational establishment,” and for that reason many courts seeking to resolve cases under Section 213(a)(3) have turned to the legislative history.[[40]](#footnote-41) The exemption originally appeared in the statute in 1961[[41]](#footnote-42) as part of Section 213(a)(2). The FLSA’s 1961 amendments extended minimum wage and overtime coverage to employees in retail trade enterprises with sales exceeding $1 million annually.[[42]](#footnote-43) However, the 1961 amendments also exempted from the minimum wage and overtime requirements certain types of “retail or service establishments” such as hotels, motels, restaurants, movie theaters, and *seasonal amusement or recreational establishments*.[[43]](#footnote-44) The Senate Committee Report described the exemption for amusement and recreational establishments:

Amusement and recreational establishments operating on a seasonal basis.—A similar exemption, without regard to the annual sales volume of the enterprise, is provided for employees of amusement and recreational establishments operating on a seasonal basis. These establishments are typically those operated by concessionaires at amusement parks and beaches and are in operation for 6 months or less a year.[[44]](#footnote-45)

In 1966, a stand-alone amusement or recreational exemption was added to the statute, designated as Section 213(a)(3).[[45]](#footnote-46) During floor debates on this new section, Representative John Dent acknowledged the amendment under consideration “retain[ed] the existing exemption for amusement or recreational establishments, such as amusement parks, sports events, pari-mutuel racing, sport boating or fishing and similar activities.”[[46]](#footnote-47)According to the First Circuit, “[t]he current wording [of Section 213(a)(3)] seems to have been intended to establish criteria for seasonality, and—by eliminating the ‘retail and service’ language—to make plain that employees of seasonal amusement or recreational companies generally are exempt.”[[47]](#footnote-48)

The 1977 amendments to Section 213(a)(3) added the words “organized camp, or religious or non-profit educational conference center” after “recreational establishment” and inserted an exception for private entities under contract with the Secretary of the Interior or the Secretary of Agriculture to provide services or facilities in a national park, national forest, or on land in the National Wildlife Refuge System,[[48]](#footnote-49) although these entities may qualify for a separate statutory exemption from the FLSA’s overtime requirements under Section   
213(b)(29).[[49]](#footnote-50)

***1. The Character of an Amusement or Recreational Establishment***[[50]](#footnote-51)

In *Chen v. Major League Baseball Properties, Inc*.,[[51]](#footnote-52) the Second Circuit interpreted the term “establishment” in the context of the exemption for amusement or recreational establishments:

While the Supreme Court construed “establishment” for purposes of the retail establishment exemption in *A.H. Phillips*, we perceive no basis to conclude that Congress intended a different meaning under the amusement or recreational establishment exemption, in particular as the latter provision was originally enacted as part of the former. *See* Pub. L. No. 87-30, 75 Stat. 65, 71 (1961). In addition, a House Committee Report discussing the 1961 amendment indicates that Congress understood establishment to have the same meaning with respect to the FLSA more generally. *See* H.R. Rep. No. 87-75, 13 (1961).[[52]](#footnote-53)

The DOL has opined that “the nature of the employer’s business, not the work performed by a particular employee, determines whether establishment-based exemptions … apply.”[[53]](#footnote-54) The Tenth Circuit has likewise looked to the character of the organization to determine whether the exemption applies. In *Hamilton v. Tulsa County Public Facilities Authority*,[[54]](#footnote-55) maintenance and security employees of a public trust that managed a county fairground were found to be exempt under Section 213(a)(3) where the primary purpose of the trust was to “establish, provide, maintain, and promote recreational centers, agricultural and industrial expositions, fairs, trade shows and other recreational facilities and activities,”[[55]](#footnote-56) and more than 50 percent of the trust’s income was derived from recreational or amusement activities, including the Tulsa State Fair, horse racing, amusement and water parks, and baseball. The fact that maintenance and security work was not a traditional amusement or recreational activity held no sway with the Tenth Circuit:

By its own terms, §213(a)(3) of the FLSA exempts employees employed by amusement or recreational establishments; it does not exempt employees on the basis of the work performed at an amusement or recreational establishment. It is the character of the revenue producing activity which affords the employer the protection of the exemption. Since [the Tulsa County Public Facilities Authority] is in the business of providing “amusement and recreation” to the public and it has satisfied the requirements of §213(a)(3)(B), its employees are exempt.[[56]](#footnote-57)

A House of Representatives committee report, issued during the period the exemption was part of Section 213(a)(2), listed the following as exempt amusement or recreational activities: “amusement parks, carnivals, circuses, sports events, pari-mutuel racing, sport boating or fishing.”[[57]](#footnote-58) In a series of opinion letters, the WHD Administrator found the following activities to be eligible for the Section 213(a)(3) exemption: golf courses;[[58]](#footnote-59) amusement parks, baseball parks, racetracks, and dog tracks;[[59]](#footnote-60) and overnight vacation cruises.[[60]](#footnote-61)

Augmenting these opinion letters, the *Field Operations Handbook* includes a comprehensive list of the types of entities that fall within the scope of the exemption, so long as the seasonal tests are also met:

• *Beach and Boardwalk Facilities:* The Section 213(a)(3) exemption for amusement parks and recreational areas is applicable in the case of either private or public amusement and recreational activities *directly* related to the operation of a beach and boardwalk. Lifeguards on a beach, drivers of a motorized train along a boardwalk, and comfort station attendants at those stations operated solely for the convenience of the persons patronizing the beach come within the exemption. In the case of a public agency, those employees solely employed in the cleaning of the beach may also come within the exemption as long as they are not engaged in any work related to the cleaning of the city’s streets or other parks.[[61]](#footnote-62)

• *State or* *County Fairs:* The activities of the usual state or county fair are analogous to those of an amusement park, carnival, or circus (i.e., it has rides, exhibitions, side shows, etc.) and its revenues are derived principally from selling admissions to such events. State and county fairs may thus qualify for the Section 213(a)(3) exemption if the seasonal tests are met.[[62]](#footnote-63)

• *Drive-in Theaters:* Drive-in theaters may qualify for the Section 213(a)(3) exemption if either of the tests is met.[[63]](#footnote-64)

• *Riverboat Cruises:* Businesses engaged in conducting riverboat cruises for sightseeing and entertainment purposes may qualify for the Section 213(a)(3) exemption where the tests for the exemption are met and the majority of the firm’s revenue is derived from ticket sales and entertainment, rather than food, drink, concessions, and gifts. For purposes of applying the exemption, riverboats, docking, and ticketing facilities are treated as one establishment.[[64]](#footnote-65)

• *Summer Programs of Schools:* Some elementary or secondary schools or institutions of higher education that are academically accredited during the fall through spring semesters operate establishments that provide summer recreation or summer camp programs. Where such programs meet the seasonal tests for the exemption and are not a part, continuation, or extension of the accredited academic program of the school, such an establishment may qualify as “an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” pursuant to the exemption, even though some credit courses may be offered on a voluntary basis along with the recreational activities. The applicability of Section 213(a)(3) to employees of such an establishment is not defeated by the fact that the same distinct physical place of business is for part of the year a school and for part of the year “an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center.”[[65]](#footnote-66)

• *State and Local Government Facilities:* Golf courses, swimming pools, summer camps, ice skating rinks, and similar establishments are the type that may qualify for exemption under Section 213(a)(3). Activities conducted during the summer months in a city’s parks, such as playground activities, arts and crafts, sports programs, and related activities that are in operation for not more than 7 months of the year, may also come within this exemption. Playground counselors, arts and crafts instructors, and games leaders are the type of employees who may be exempt as long as they work solely in a park or parks in such exempt activities. As provided in *Field Operations Handbook* 25j04(b), the exemption is not applicable to central office employees of the parks or recreation department or to maintenance crews who operate out of a central facility responsible for the maintenance and cleaning of all the city’s parks.[[66]](#footnote-67)

• *Campsites and Campgrounds:* Campsites and campgrounds provide facilities where the general public may camp in tents, campers, recreational vehicles, travel trailers, or motor homes. They may include paved driveways and furnish water, waste and electrical outlets, picnic benches and tables, restrooms and showers, laundry facilities, ice houses, bottled gas and grocery facilities, and provide for handling mail and various recreational pursuits. The camping season usually runs from the end of May through the Labor Day weekend, but in milder climates some campgrounds have a longer season, and others are open year-round.

An exempt campsite or campground operates and maintains its establishment as a functional amusement or recreational unit (i.e., providing facilities for camping as a recreational activity). It may provide swimming, boating, or fishing facilities as well as facilities for various other amusement or recreational activities such as volleyball, horseshoes, miniature golf, movies, dances, contests, bonfires, and the like. It may be located on either state or local government or private land. Such a campsite or campground may be considered an amusement or recreational establishment for the purpose of Section 213(a)(3) and tested for exemption under the seasonal tests of that section.[[67]](#footnote-68)

According to the *Field Operations Handbook*, the Section 213(a)(3) exemption would *not* apply to the following:

• *Employees at a Convention:* Employees at a convention (including those employed by a concessionaire) are not within the scope of the Section 213(a)(3) exemption because a convention is not considered an exempt establishment.[[68]](#footnote-69)

• *Resort Hotels:* Resort hotels are generally not considered amusement or recreational establishments for purposes of Section 213(a)(3). However, if a resort hotel operates a particular facility (i.e., a golf course or swimming pool) as a separate establishment, employees of such an establishment might qualify for exemption under Section 213(a)(3) if the seasonal tests are met.[[69]](#footnote-70)

• *Marinas:* A marina is an establishment that typically is engaged in providing boat storage for rent and selling boating supplies, fishing tackle, oil, fuel, grocery items, new and used boats, as well as providing refinishing and repair service for boats. Such an establishment is not considered an amusement or recreational establishment within the meaning of Section 213(a)(3). Such an establishment is used by persons engaged in recreation but does not itself provide the recreation.[[70]](#footnote-71)

The DOL has issued several opinion letters finding that certain establishments lack the characteristics required to qualify for the Section 213(a)(3) exemption:

• “[H]otels, motels and eating places do not have an amusement or recreational character. Nor do gas stations.”[[71]](#footnote-72)

• A dude ranch “falls within the category of a resort hotel [and is not covered by the exemption].”[[72]](#footnote-73)

• “Restricted indoor pool facilities within penthouse suites or pools with poolside food and beverage service from hospitality or residential staff” do not constitute amusement or recreational establishments.[[73]](#footnote-74)

The DOL has opined that various seasonal programs sponsored by state and local governments that operate for not more than seven months in a year may qualify as amusement or recreational establishments, even if their operating costs are met with tax funds, including: “stadiums, golf courses, swimming pools, summer camps, ice skating rinks, zoos, beaches, and boardwalk facilities. … For example, lifeguards on a beach and other employees who are engaged in work solely connected with the operation of the beach would come within the exemption.”[[74]](#footnote-75)

On the other hand, according to the DOL, parks department employees of a central, non-recreational agency facility do not qualify for the exemption even if they only work seasonally.[[75]](#footnote-76) But, so long as the seasonal tests are met, employees working solely at a separate and distinct amusement or recreational facility operated by a municipality qualify for the exemption.[[76]](#footnote-77)

In *Brennan v. Texas City Dike & Marina, Inc.*,[[77]](#footnote-78) the defendant argued that its principal activity was not selling recreational equipment; rather, its principal activity was providing the means for recreational boating and fishing in and on the Gulf of Mexico.[[78]](#footnote-79) The Fifth Circuit disagreed. Reversing the district court, it found that the Section 213(a)(3) exemption did not cover establishments whose sole or primary activity was selling goods.[[79]](#footnote-80)

The Fifth Circuit reasoned that, unlike a national park, the Gulf was not set aside for recreational use. The court acknowledged that “enterprises that solely or primarily sell goods” may qualify for the Section 213(a)(3) exemption if they contract to and operate in a “geographically delimited” area designated for recreational use.[[80]](#footnote-81) “Examples are pro shops at golf courses and dry goods stores in national parks.”[[81]](#footnote-82)

Similarly, the exemption did not apply to a corporation that operated more than 100 roadside firework stands.[[82]](#footnote-83) Although the “products provide amusement,” this was equally true of “retailers of other seasonal and recreational items such as fishing tackle, shot gun shells, or ski equipment,” that did not qualify for the exemption because, as with the firework stands, the products were not sold for use in a nearby “geographically delimited” area.[[83]](#footnote-84)

The Eleventh Circuit held that a recreational vehicle (RV) park principally engaged in selling RV lots and RVs was not an exempt recreational establishment.[[84]](#footnote-85) That the establishment’s patrons came for recreation “does not transform the business itself into a recreational entity” because, by that “reasoning, an establishment that provides recreation, but is not in the business of recreation, like a store that sells pool supplies and toys, would qualify,” thereby “permit[ting] an exemption to swallow the FLSA.”[[85]](#footnote-86)

Expressing a similar concern about the exception swallowing the rule, the Sixth Circuit in *Chao v. Double JJ Resort Ranch*[[86]](#footnote-87) held that a resort hotel offering a variety of recreational activities—including lodging and dining facilities; a conference center; bars; a general store; a gift shop; campsites; swimming pools; three lakes; and facilities related to horseback riding, canoeing, archery, shuffleboard, climbing walls, fishing, and water slides, among other activities—did not have an amusement or recreational character where the great bulk of the resort’s revenue came from the sale of food, drink, and lodging, not from the sale of recreational activities.[[87]](#footnote-88)

Having concluded that the resort hotel was “not in the recreation business” because “[i]ts primary purpose is to sell foods and rent beds; the recreational activities are just a carrot enticing people to make the trip,”[[88]](#footnote-89) the Sixth Circuit, unlike the Fifth Circuit in *Texas City Dike*,[[89]](#footnote-90) declined to follow the Secretary’s suggestion and adopt an “income test”[[90]](#footnote-91) to determine whether providing recreation constituted an enterprise’s principal activity.

The Second and Tenth Circuits have also declined to require that an enterprise derive a certain percentage of revenue from strictly recreational activities to be considered recreational. In *Chessin v. Keystone Resort Management, Inc*.,[[91]](#footnote-92) the issue was whether Keystone’s facilities were primarily recreational. The plaintiffs argued that Keystone derived substantial revenue from allegedly non-recreational sources, such as hotels, restaurants, retail stores, and a convention center. In fact, lodging and food sales represented Keystone’s second-largest revenue source, aside from ski operations.[[92]](#footnote-93) However, the Tenth Circuit distinguished *Chessin* from *Texas City Dike* on the ground that Keystone was located on national forest land and that Keystone had obtained a special permit from the Department of Agriculture authorizing it to maintain a “four season recreation resort” in the White River National Forest.[[93]](#footnote-94) Finally, the court decided that it was not going to use a percentage-of-revenue test to make its determination as to whether Keystone was a recreational establishment.

We decline to require an enterprise to derive a certain percentage of revenue from strictly recreational activities in order to be considered recreational. Although the *Texas City Dike* court used an income test to determine whether providing recreation constitutes an enterprise’s principal activity, … the Tenth Circuit has never held that financial percentages are the only relevant factors. We prefer to examine the totality of the circumstances, including but not limited to the establishment’s primary purpose; activities and services, such as restaurants and shops, that it offers incidental to its recreational facilities; its relationship to land set aside for recreational use; and its revenue sources.[[94]](#footnote-95)

In the Second Circuit, the court found that “revenues mattered” in reaching a conclusion as to whether an establishment was “recreational.” In *Jones v. Bryant Park Market Events, LLC*,[[95]](#footnote-96) the plaintiff worked at a restaurant that operated in Winter Village, which included not only the restaurant, but also a skating rink and some 120 temporary shops. The plaintiff argued that Winter Village was not a recreational establishment because the nonrecreational portion of its income generated more than the recreational portion. The defendant, on the other hand, asked the court to look at the totality of the circumstances as the Tenth Circuit had done in *Chessin.* The court agreed that that approach more closely comported with the approach it had taken in *Chen v. Major League Baseball Properties, Inc*.[[96]](#footnote-97) However, in applying this test, the Second Circuit noted that the district court had conspicuously failed to discuss the 120 shops that were part of the Winter Village establishment. “Defendant has failed to demonstrate that the revenue it derives from the rink is not dwarfed by the revenue it derives from the shops.”[[97]](#footnote-98) The court also found that comparing the revenue from the skating rink to the revenue of the restaurant was not as straightforward as it might appear, because the defendant made profits on the rink by renting ice time to private parties, which may “undercut the significance of the revenue.”[[98]](#footnote-99) In remanding the case to the district court, the Second Circuit opined:

One reason why relative revenues matter is that if recreational activities generate more revenue than non-recreational activities, it suggests that the public is drawn to the establishment for the purpose of recreation. But if [Defendant’s] revenues are skewed by the presence of corporate events attended by relatively few people, its revenues may tell us less about whether most people who visited Winter Village did so because they wanted to ice-skate or because they wanted to dine and shop.[[99]](#footnote-100)

***2. The Establishment Must Be “Frequented by the Public”***

The DOL’s position is that, to qualify as an exempt establishment, an amusement or recreational establishment must be “frequented by the public for its amusement or recreation.”[[100]](#footnote-101) This reading of Section 213(a)(3) flows from the DOL’s interpretive bulletins regarding retail or service establishments. Until the repeal of Section 213(a)(2), both the DOL and the courts consistently took the position that public accessibility was essential to the retail or service establishment exemption,[[101]](#footnote-102) a conclusion drawn primarily from the WHD Administrator’s opinions holding that private clubs were not retail establishments because they lacked public accessibility[[102]](#footnote-103) and the DOL regulations providing that retail or service establishments must be open to the general public to qualify for the exemption.[[103]](#footnote-104)

However, in *Brock v. Louvers & Dampers, Inc*.,[[104]](#footnote-105) the Sixth Circuit found the DOL’s view unpersuasive, reasoning that

[t]he agency assumes without analysis that the public accessibility requirement of the retail exemption must also be included in the seasonality exemption. The agency’s bald statement that the legislative history is clear does not make it so. The department’s legislative history relies only on statements made during the passage of the 1961 exemption, before the seasonality exemption was separated from the retail exemption in the 1966 amendments. And even those statements do not mandate a public accessibility requirement, but simply give as examples of exempted facilities those which cater to the general public such as concessionaires at amusement parks and beaches.[[105]](#footnote-106)

Despite the *Louvers & Dampers* decision, the DOL has maintained its position that a facility must be open to the public to qualify for the Section 213(a)(3) exemption.[[106]](#footnote-107) However, the DOL has interpreted this requirement somewhat broadly. In an opinion letter, the WHD Administrator wrote that “merely charging a fee for access does not preclude an establishment from being ‘frequented by the public.’”[[107]](#footnote-108) Subsequently, the DOL opined that a pool maintenance company’s “operations [maintaining swimming pool facilities at hotel, motel, apartment, and condominium buildings] will qualify for the exemption … if the pool facilities are generally accessible to nonresidential occupants. This is true even if access is restricted to paying customers.”[[108]](#footnote-109) Additionally, the *Field Operations Handbook* provides that “[a] country or town club whose membership fees are nominal (*e.g.*, $100 per year) would be considered to be open to the general public and may qualify for the section 13(a)(3) exemption … .”[[109]](#footnote-110)

***3. A Distinct Physical Place of Business***[[110]](#footnote-111)

The DOL has interpreted “establishment” as it is used in Section 213(a)(3) and throughout the FLSA as a “distinct physical place of business,” in contrast to “an entire business or enterprise,” which may include several separate places of business.[[111]](#footnote-112) In a 2021 opinion letter, the DOL addressed a situation where an entity organized, led, and facilitated a variety of nature walks, hikes, day trips, and other backpacking and overnight camping excursions for children, primarily those 13 years of age or younger.[[112]](#footnote-113) The entity employed three full-time and 17 part-time employees who facilitated and led the events, trips, and other outings. The events took place throughout nearby forests, rivers, mountains, fields, and beaches. The entity leased office space solely for administrative purposes; no events or meetings were held there, nor did outings leave from or return to the office. The entity’s bookings were conducted online; its website posted upcoming events and allowed customers to sign up and submit payment online.[[113]](#footnote-114)

The DOL concluded that the entity had an amusement or recreational character, but, because it did not have a distinct physical place of business, it was not an amusement or recreational establishment under Section 213(a)(3).[[114]](#footnote-115) While reaching this conclusion, the Administrator said “the Department’s long standing interpretative regulations, which have been in place and acknowledged by the courts for nearly 50 years, explicitly require that an establishment be a ‘distinct physical place of business.’”[[115]](#footnote-116) The opinion letter went on to explain that, “to constitute an exempt establishment, an entity that offers amusement or recreational services must have a physical location that is in some way used in any of the activities that comprise its amusement or recreational character … . Here, the entity’s only distinct physical location—the office it leases—is entirely divorced from the functions that afford its amusement or recreational character.”[[116]](#footnote-117)

The Administrator also noted that the entity was not transformed into a multi-site employer because some of its trips and events occurred in different locations or, on multiple days, involved setting up camp overnight at a location. It noted “a discrete location that an entity uses on a temporary, non-recurring basis may constitute a distinct physical place of business but only if, as in the case of a fixed location, the entity takes possession of it, exercises control over it, and uses it for a business purpose.”[[117]](#footnote-118) The opinion letter concluded that the entity’s outdoor events were not comparable to carnivals or festivals. The hikes, excursions, and other events that it facilitated were not confined to discrete locations that it controlled like a fairground or amphitheater.[[118]](#footnote-119)

The same opinion letter also addressed the situation where a family-owned and operated business produced up to 2,400 events in a normal year for individuals, companies, nonprofits, schools, universities, and a variety of public entities across the state in which it was located.[[119]](#footnote-120) The entity helped plan the activities and provided the requested amusement rides, attractions, entertainment, concession equipment, personnel, and related items—e.g., delivering, installing, and often operating them at the event site. The vast majority of these events lasted no more than a single day. The entity maintained a warehouse and administrative offices at which it stored and maintained inventory and conducted necessary year-round sales and business activities. It did not offer any of the above services to the public at this location. The Administrator concluded that the entity did not qualify for the Section 213(a)(3) exemption because it did not meet the regulatory definition of an establishment.[[120]](#footnote-121) The Administrator found that, although the entity had a warehouse and administrative offices, it used them exclusively in a support capacity. Moreover, the Administrator also concluded that the entity’s production of temporary events at various locations did not convert it into a multi-site employer because the entity did not convert the location into its temporary place of business by taking possession of it, exerting control over it, and using it to generate revenue.[[121]](#footnote-122)

In the context of more permanent multi-unit operations, however, some of the establishments may qualify for the exemption, whereas others may not. Each physically separate place of business is considered a separate establishment and must be analyzed separately.[[122]](#footnote-123) Thus, the Sixth Circuit held that while the exemption clearly did not apply to a resort hotel’s bars, restaurants, dining facilities, conference center, lodging facilities, and gas station, the golf course on site was covered by the exemption and the horseback facilities may or may not have met the exemption’s requirements.[[123]](#footnote-124)

In some settings, such as an amusement park, baseball park, or racetrack, food and souvenir vendors are often employed by a concessionaire on the premises. If the operations of the concessionaire constitute a separate establishment, the seasonal tests of Section 213(a)(3) are applied to the concessionaire’s establishment separately without regard to the operations of the host establishment.[[124]](#footnote-125) On the other hand, if the concessionaire and host constitute a single establishment, the seasonal tests for exemption account for all the operations of the establishment, including those of the concessionaire.[[125]](#footnote-126)

In *Hill v. Delaware North Cos. Sportservice, Inc*.,[[126]](#footnote-127) the Second Circuit considered whether an establishment operating on the premises of an amusement or recreational host, selling goods or services to the host’s customers for their consumption or use as they engaged in the host’s amusement or recreational activities, was a “concessionaire” with an “amusement or recreational” character. The court noted that “the legislative history of Section 213(a)(3) treats concessionaires as core examples of amusement or recreational establishments, even when analyzed separately from the amusement or recreational sites they serve,”[[127]](#footnote-128) and therefore held “that the concessionaires at amusement or recreational establishment will qualify on their own as exempt establishments if they meet at least one of the seasonality tests in 29 U.S.C. §213(a)(3).”[[128]](#footnote-129)

***4. Separate Establishments on the Same Premises***

DOL regulations recognize that “two or more physically separated portions of a business though located on the same premises, and even under the same roof in some circumstances may constitute more than one establishment for purposes of exemptions.”[[129]](#footnote-130) To be considered distinct establishments, “physical separation is a prerequisite” and “the physically separated portions of the business also must be engaged in operations which are functionally separated from each other.”[[130]](#footnote-131)

As such, the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purpose of the exemption if

(a) it is physically separated from the other activities; and

(b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and

(c) there is no interchange of employees between the units.[[131]](#footnote-132)

In *Marshall* v. *New Hampshire Jockey Club, Inc.*,[[132]](#footnote-133)the First Circuit noted that “both the Secretary of Labor’s regulations and the case law indicate that ownership and control are not dispositive in determining whether or not an ‘establishment’ is single or multiple.”[[133]](#footnote-134) In support of its holding that two companies operating a shared racetrack, one running thoroughbred flat racing during the summer months and the other conducting harness racing during the spring and fall, operated separate establishments, the court found that (1) each business used the same facilities at a different season, with no overlap, and so temporal separation provided for physical separation; (2) the operations were functionally separated from each other; and (3) even though many of the same individuals were employed in different seasons by both businesses, each business hired the employees it needed and there was no simultaneous sharing of the same employees.[[134]](#footnote-135)

The DOL has opined that 45 base camps owned by the same organization were likely separate establishments because they were physically remote from one another.[[135]](#footnote-136) Similarly, the Tenth Circuit held that a company that contracted with the Secretary of the Interior to operate concessions, including hotels, inns, lodges, cabins, and restaurants, in widely separated places within Yellowstone National Park did not constitute a single establishment but, rather, a number of separate and distinct establishments.[[136]](#footnote-137)

Physical separateness was likewise crucial to the Tenth Circuit’s conclusion in *Chessin v. Keystone Resort Management, Inc*.,[[137]](#footnote-138) which also rejected the argument that two ski areas should be treated as one establishment because they were administratively and economically integrated. “Given the six-mile separation between Arapahoe Basin and Keystone, we hold that they constitute separate establishments.”[[138]](#footnote-139)

And in *Chen v. Major League Baseball Properties, Inc.*,[[139]](#footnote-140) the Second Circuit “conclude[d] that Congress used the term ‘establishment for purposes of the exemption at Section 213(a)(3), 29 U.S.C. § 213(a)(3), to mean a distinct, physical place of business as opposed to an integrated multiunit business or enterprise.”[[140]](#footnote-141) Following this distinction, the court held that FanFest, a five-day baseball theme park organized in conjunction with the 2013 All-Star Game and held at the Javits Center on West 34th St. in New York City, was a separate establishment from Major League Baseball, headquartered at 245 Park Ave. The court explained: “This physical separation is determinative in deciding whether these business units constitute a single establishment or multiple ones. Where such business units are not located at the same premises, overlap in operations and personnel is immaterial to determining whether they are separate establishments.”[[141]](#footnote-142)

By contrast, the DOL opined that a nonprofit charitable organization that operated a horseback-riding lesson program throughout the calendar year and a summer day camp for nine weeks between June and August were not separate “establishments” because the camp’s riding and horse care instruction were not physically separated from the stables’ riding instructions within the meaning of 29 C.F.R. §779.305.[[142]](#footnote-143)

The DOL again addressed the “separate establishment” requirement when it considered whether swimming pool facilities at hotels, motels, apartments, and condominiums were physically separated enough from the buildings to qualify as separate establishments.[[143]](#footnote-144)Citing as common examples of a physically separated pool facility “a rooftop or adjacent outdoor pool,”[[144]](#footnote-145) and noting that examples of physically ­integrated pool facilities are “restricted indoor pools within penthouse suites or pools with poolside food and beverage service from hospitality or residential staff,”[[145]](#footnote-146) the DOL found that because the company that operated and maintained the swimming pool facilities employed “its own staff at each swimming pool to exclusively perform pool services, its business operations appear[ed] functionally independent.”[[146]](#footnote-147)

Finally, the fact that various other businesses are located on an entity’s grounds will not defeat the exemption. In *Hamilton v. Tulsa County Public Facilities Authority*,[[147]](#footnote-148) the Tenth Circuit found that a public trust that managed a county fairground for purposes of “establish[ing], provid[ing], maintain[ing], and promot[ing] recreational centers, agricultural and industrial expositions, fairs, trade shows and other recreational facilities and activities”[[148]](#footnote-149) was exempt under Section 213(a)(3), even though the trust leased property to other businesses on the fairgrounds that were not amusement or recreational in nature where the trust did not own or operate those other businesses.[[149]](#footnote-150) The Eleventh Circuit held that the fact that an entity does not own the real property on which it operates does not bear on the amusement or recreational establishment exemption.[[150]](#footnote-151)

***5. Organized Camps, or Religious or Nonprofit Educational Conference Centers***

The *Field Operations Handbook* defines the term “Organized Camp” as follows:

An organized camp characteristically provides room and board in a rustic setting over a sustained period of time. An organized camp is one with a program of activities and sustained supervision, provided for a set fee. The American Camping Association defines a “camp” as “a sustained experience which provides a creative recreational and educational opportunity in group living in the out of doors. It utilizes trained leadership and the resources of natural surroundings to contribute to each camper’s mental, physical, social, and spiritual growth.”[[151]](#footnote-152)

The *Field Operations Handbook* defines the term “religious or non-profit educational conference center” as follows:

A “religious or non-profit educational conference center” is a meeting center providing for religious, educational, and leadership growth experiences for both youth and adults. They are usually built in secluded and scenic areas and often provide residence accommodations, meal service and recreational facilities. Most are under the sponsorship of religious denominations and are operated on a non-profit and tax-exempt basis.[[152]](#footnote-153)

***6. The Seasonality Tests Under the Section 213(a)(3) Exemption***

An “amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” will be exempt from the minimum wage and overtime requirements under Section 213(a)(3) of the FLSA “if it meets *either*” Test A or Test B of the statute’s seasonality requirement.[[153]](#footnote-154)

*a. Test A: Does Not Operate for More Than Seven Months in Any Calendar Year*

An amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center will be exempt if “it does not operate for more than seven months in any calendar year.”[[154]](#footnote-155) Whether an establishment “operates” during a particular month depends on whether it operates as an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center.[[155]](#footnote-156) “If an establishment engages only in activities such as maintenance operations or ordering supplies during the dead season, it is not considered to be operating for purposes of the exemption.”[[156]](#footnote-157) For example, the WHD has held that the fact that some lifeguards may work more than seven months in the year maintaining the equipment would not serve to deny the exemption under Section 213(a)(3), provided the establishment (the beach) was not open as a recreational facility (i.e., protected swimming) for more than seven months in any calendar year.[[157]](#footnote-158)

In *Jeffery v. Sarasota White Sox, Inc*.,[[158]](#footnote-159) the Eleventh Circuit held that a facility need not shut down completely, or terminate every employee, in order to establish that it is inoperative for the requisite five months during a year.[[159]](#footnote-160) The court reasoned that because the exemption is based on the revenue-producing operation of a business, the inquiry focuses on the length of the seasonal operation, not on the length of time that the employee in question performed the work.[[160]](#footnote-161) Thus, the exemption applied to a groundskeeper employed in the off-season months to prepare and maintain the baseball fields because it was the revenue-producing operation of the Sarasota White Sox as a professional baseball franchise that afforded it the protection of the exemption.[[161]](#footnote-162)

Reaching a different result in another baseball case, the Sixth Circuit ruled that a Major League Baseball club did not qualify for the Section 213(a)(3) exemption where it employed 120 workers (out of a total of 700) year-round, notwithstanding the fact that baseball games were played for fewer than eight months during the year:[[162]](#footnote-163)

In view of the stipulated facts, it seems to us that the parties incorrectly focus on the duration of the Reds’ activities at Riverfront rather than on the duration of the Reds’ overall operation. An entity seeking to invoke the Sec. 213(a)(3) exemption must both be an amusement or recreational establishment and operate for fewer than eight months per year. The Reds would have us conflate these separate requirements and instead ask whether the Reds are an establishment that stages amusement activities for fewer than eight months per year. There is nothing in the Act that would suggest that this is the correct approach. The proper inquiry is, assuming *arguendo* that the Reds are an amusement or recreational establishment, whether the Reds operate for more than seven months per year, not whether they are an entity that provides amusement or recreation for its customers for more than seven months per year.[[163]](#footnote-164)

The court concluded that, “[w]hile a truly seasonal business that employs an insignificant number of workers year round could conceivably qualify for the exemption, the fact that the Reds employ 120 year-round workers compels the conclusion that they ‘operate’ year round.”[[164]](#footnote-165)

*b. Test B: The 33 1/3% Test*

An amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center will be exempt if “during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.”[[165]](#footnote-166) The *Field Operations Handbook* provides guidance on identifying the six-month periods for comparison:

Since the language of the statute refers to receipts for any 6 months (not necessarily consecutive months), the monthly average based on total receipts for the 6 individual months in which the receipts were smallest should be tested against the monthly average for 6 individual months when the receipts were largest to determine whether this test is met.[[166]](#footnote-167)

By way of example, the Field Operations Handbook

consider[s] an amusement or recreational establishment … [that] operated for nine months in the preceding calendar year. The establishment was closed during December, January, and February. The total receipts for May, June, July, August, September, and October (the 6 months in which the receipts were largest) totaled $260,000, a monthly average of $43,333; the total receipts for the other 6 months totaled $75,000, a monthly average of $12,500. Since the average receipts of the latter 6 months [$12,500] were not more than 33 1/3 percent of the average receipts for the other 6 months of the year [$14,430], the section 13(a)(3) exemptions will apply.[[167]](#footnote-168)

In *Bridewell v. Cincinnati Reds*,[[168]](#footnote-169) the ballclub argued that its average receipts from the six-month off-season did not amount to more than 33 1/3 percent of its average receipts during the six-month baseball season, so that the exemption applied. “[T]he Reds receives [sic] money in the off-season for season-tickets and tickets for specific games, but does not record that money as income until the specific games are actually played.”[[169]](#footnote-170) Consequently, the case turned on whether “receipts” were properly calculated when the cash was received or at the time the revenue was recorded as income (the accrual method of accounting).[[170]](#footnote-171) The Sixth Circuit noted that a cash accounting method, where a company records money as income the moment it is received, “often fails accurately to reflect the nature of the business, especially where the company’s customers pay for products or services in advance.”[[171]](#footnote-172) Nevertheless, the Sixth Circuit ruled that the term “receipts” as used in the statute refers to money as it is actually received by the amusement establishments, and deemed the exemption inapplicable.[[172]](#footnote-173)

In some cases, the “receipts” test cannot be used by a government entity in determining seasonality. The *Field Operations Handbook* provides that under Section 213(a)(3)(B), “‘receipts’ are fees received from admissions.”[[173]](#footnote-174) Therefore, a state or local government-operated amusement or recreational establishment whose operating costs are met primarily from tax funds fails to qualify for the exemption based on the receipts test.[[174]](#footnote-175) However, as the Tenth Circuit ruled in *Hays v. City of Pauls Valley*,[[175]](#footnote-176) where a government-operated establishment, in this case a city golf course, had “substantial private receipts,” it will “qualif[y] as an exempt recreational establishment.”[[176]](#footnote-177)

In a 2021 opinion letter, the Administrator addressed the application of the “receipts test” to a nonprofit religious ministry that ran a ranch-style camp and retreat center that operated year-round but had distinct high and slow seasons.[[177]](#footnote-178) The entity used an accrual accounting method in which revenue was recognized as received at the time the entity provided the corresponding service. In addition, the organization received both solicited and unsolicited charitable donations throughout the year and asked whether it must include all types of charitable donations when calculating its average receipts. The Administrator determined that in Section 213(a)(3)(B), “receipts” refers to money actually received by the employer in exchange for goods and/or services at the time it was received:

Although WHD has neither squarely answered this question in its regulations nor addressed the issue in its opinion letters, this opinion aligns with numerous letters cited above that recount the requirements of Section 13(a)(3)(b). WHD has never applied the Receipts Test based on revenue or in an accrual accounting context.[[178]](#footnote-179)

With respect to the question of charitable gifts and donations counting as receipts, the Administrator concluded:

For purposes of the Receipts Test, an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center must include all payments received in exchange for an amusement or recreational product or service provided by the entity to the giver. Bona fide charitable gifts and donations are not such payments and, therefore are not counted under the Receipts Test.[[179]](#footnote-180)

*c. Application of Tests A and B: “New Business”*

The *Field Operations Handbook* provides guidance for applying Tests A and B to a new business.

**(a)** Tests A and B refer to a calendar year throughout which the operations of [an] establishment can be tested to determine its character as a seasonally operated place of business. In the case of a new business, Tests A and B are to be applied as follows:

(1) Test A

Generally, Test A is not met by a new business establishment which has operated for no more than 7 months in a calendar year for the reason that its business operations did not start until a considerable portion of the year had elapsed. If, however, the character of the establishment is that of an “amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” whose operations are shown by acceptable evidence to be subject to seasonal factors which would require the establishment to cease operations for 5 months or more in the calendar year even if it had been in business for the entire calendar year, the new business establishment may meet the requirements of Test A so that its employees will be exempt. For example, an employer may open a new ski slope establishment in November under circumstances where it is clear that the establishment would have operated less than 7 months in the year regardless of the date it began operations. In such a case the establishment could claim the exemption under Test A.

(2) Test B

Test B is based on the establishment’s experience “during the preceding calendar year.” Generally this requires an entire year’s experience to apply Test B in order to make the necessary calculation. However, in the case of a new business where there is no preceding calendar year on which to apply Test B, the WHD will apply the following criteria in determining the applicability of section 13(a)(3)(B):

a. If the enterprise of which the new establishment is a part operates other seasonal amusement or recreational establishments, organized camps, or religious or non-profit educational conference centers of the same type in the same general area under substantially the same conditions and *all* such establishments conclusively and clearly meet the condition of Test B; *or*

b. If such employer does not have other such establishments but other employers operating the same type of establishment in the same general area under substantially the same conditions and manner of operation clearly are entitled to exemption under Test B.

**(b)** The WHD will consider the exemption applicable in the year the new establishment begins operation if either of these tests are met *provided,* however, that in the event after a year’s operation the establishment does not qualify under Test B, proper minimum wage and overtime is paid retroactively.[[180]](#footnote-181)

The Second Circuit, in *Hill v*. *Delaware North Cos*. *Sportservice, Inc*.,[[181]](#footnote-182) applied New Business Test B in holding that an operator of food, beverage, and merchandise concessions at a seasonally operated ballpark qualified for the amusement or recreational establishment exemption. The court granted the New Business Test B *Skidmore* deference, noting “the ‘thoroughness evident in [DOL’s] consideration’ and ‘validity of its reasoning’ and because we have not found any contrary interpretive statements from the DOL.”[[182]](#footnote-183)

*d. Revenue-Producing Activities; Maintenance and Construction Work in the “Off Season”*

In *Hill v*. *Delaware North Cos*. *Sportservice, Inc*.,[[183]](#footnote-184) the Second Circuit noted that while most of the business at Oriole Park, a Major League Baseball park, was tied to baseball games occurring during a baseball season lasting no more than seven months, the concessionaire continued to operate a team store and brew pub during the off season. Although not agreeing with the proposition that a “recreational establishment is not operating if it is ‘not open as a recreational facility,’” at least, as in this case, where the off-season activities were revenue-  
producing, as opposed to maintenance, the court found it unnecessary to adopt a “bind[ing] … rule as to whether and when revenue-producing operations that are not for amusement or recreational purposes should count toward the seasonal operations test’s seven month limit,” because the concessionaire satisfied the receipts test.[[184]](#footnote-185)

The WHD Administrator has stated that “employees of a Section 213(a)(3) exempt establishment who engage in construction or reconstruction work do not qualify for the Section 213(a)(3) exemption in any workweek in which they are so engaged.”[[185]](#footnote-186) In *Brennan v. Six Flags Over Georgia, Ltd.*,[[186]](#footnote-187) the Fifth Circuit held that maintenance employees erecting new structures, buildings, and places of entertainment at an amusement park were not exempt from the FLSA’s overtime provision because if a general contractor had been hired to do that work, the contractor would not have been operating a recreational establishment.[[187]](#footnote-188)

On the other hand, “maintenance employees who engage in maintenance and repair work which is a routine, normal incident to the operation of the exempt summer camp would come within the [Section 213(a)(3)] exemption for the entire year.”[[188]](#footnote-189) In *McMillan v. Boy Scouts of* *America-Aloha Council*,[[189]](#footnote-190)the district court found that a properties superintendent/camp ranger who worked year-round came within the Section 213(a)(3) exemption where his duties included a variety of maintenance functions such as servicing the swimming pool, lodging areas, and the campsite’s vehicles; performing yard work; inspecting safety equipment; checking in guests; and scheduling service projects.[[190]](#footnote-191)

**B. Employees Engaged in Fishing or First Processing at Sea of Aquatic Products**

Section 213(a)(5) exempts employees who engage in fishing or first processing at sea of aquatic products from the FLSA’s minimum wage and overtime provisions. The 1961 amendments removed from the exemption the so-called onshore activities and left “the exemption applicable to ‘offshore’ activities connected with the procurement of the aquatic products.”[[191]](#footnote-192)

According to DOL regulations,

the purpose of the section 13(a)(5) exemption [was] to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry which are controlled or materially affected by natural factors or elements such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained.[[192]](#footnote-193)

Thus, the exemption applies to:

any employee employed in the catching, taking, propagating, harvesting, cultivating, or farmingof any kind of fish, shell-fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and ­returning from work and loading and unloading when performed by any such employee.[[193]](#footnote-194)

The exemption is applicable only to those employees who are “employed in” the named operations.[[194]](#footnote-195) An employee is considered to be “employed in” such an operation where (1) the employee’s work “is an essential and integrated step in performing such named operation,” or (2) the employee is engaged in activities that are “functionally so related to a named operation under the particular facts and circumstances that they are necessary to the conduct of such operation and [the] employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended.”[[195]](#footnote-196) For example in *Do v. Ocean Peace, Inc*.,[[196]](#footnote-197) a “housekeeper” on a fishing trawler came within the scope of the exemption given her concession that the processing operation could not go on without her housekeeping functions.

It is also possible for an employee to come within the scope of the exemption even though the employee does not directly participate in the physical acts performed on the enumerated marine products in carrying on the operations named in Section 213(a)(5).[[197]](#footnote-198) However, it is not enough to simply be hired by an employer engaged in one or more of the named operations or employed by an establishment or in an industry in which operations enumerated in Section 213(a)(5) are performed.[[198]](#footnote-199)

To meet the requirements for “first processing, canning, or packing of marine products,” there must be a showing that such operations are performed as an incident to, or in conjunction with, fishing operations of the vessel; that such operations are performed at sea; and that such operations are performed on the marine products specified in the statute.[[199]](#footnote-200) In *Do v. Ocean Peace, Inc*.,[[200]](#footnote-201) the Ninth Circuit rejected a proffered interpretation of the word “first” in Section 213(a)(5) to imply that, for the exemption to apply, there must be some sort of “second” or final processing beyond the immediate measures required to preserve the fish,[[201]](#footnote-202) as inconsistent with the operative DOL regulations:

The regulations define “first processing” as the “first operation or series of continuous operations” that effectuate change from a marine product’s natural state. 29 C.F.R. §784.133. In illustrating typical first processing operations, §784.133 describes operations that are virtually identical to those performed on the Ocean Peace and Seafreeze: cleaning, washing, and grading in preparation for first processing, and then gutting and freezing.[[202]](#footnote-203)

However, in *Worthington v. Icicle Seafoods, Inc.*,[[203]](#footnote-204) the Ninth Circuit held that employees of an ocean-going fish-processing barge were not covered by the Section 213(a)(5) exemption where, although the employees were engaged in “first processing,” the fish were harvested by other vessels, as DOL regulations require processing to be done by the catcher vessel.[[204]](#footnote-205)

The exemption does not extend to employees who work on products falling beyond the description of “any kind of fish, shellfish, crustacea, sponge, seaweed or other aquatic forms of animal and vegetable life.”[[205]](#footnote-206) Accordingly, the manufacture of buttons from clam shells or the dredging of shells to be made into lime and cement are not exempt operations because the shells are not living things.[[206]](#footnote-207) Nor does the exemption apply to employees responsible for making commodities from ingredients only partially consisting of aquatic products if a “substantial amount” of other products not enumerated in the statute is contained in the commodity so produced.[[207]](#footnote-208) In addition, work related to fishing or processing operations performed in “off” or “dead” seasons normally does not give rise to the exemption, except where the work is carried out “so close in point of time and function” to the performance of covered operations that the employment “is, as a practical matter, necessarily and directly a part of carrying on the operation for which the exemption was intended.”[[208]](#footnote-209)

The exemption is lost in the case of an employee who, during any workweek, spends more than 20 percent of his or her time on nonexempt work.[[209]](#footnote-210) Moreover, the exemption will not apply if the exempt and nonexempt work “is not or cannot be segregated so as to permit separate measurement of the time spent in each.”[[210]](#footnote-211)

**C. Employees Employed in the Publication of Limited Circulation Newspapers**

Under Section 213(a)(8), the FLSA’s minimum wage and overtime compensation requirements do not apply to employees of local, small-circulation newspapers. Specifically, the exemption covers “any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto.”[[211]](#footnote-212) In *Oklahoma Press Publishing Co. v. Walling*,[[212]](#footnote-213) the Supreme Court held that the exemption’s geographic- and circulation-based distinctions were constitutionally permissible.[[213]](#footnote-214)

“The exemption applies only where the major part of the newspaper’s circulation is within the county in which it is published, within contiguous counties, or within some combination of these counties.”[[214]](#footnote-215) A “contiguous county” for purposes of Section 213(a)(8) means a county sharing a common boundary with the county where the newspaper is published.[[215]](#footnote-216)

A daily publication that contains news of the local courts, legal notices, other matters pertaining to court proceedings, and advertisements is a “newspaper” within the meaning of the Section 213(a)(8) exemption.[[216]](#footnote-217) A newspaper also includes a “shopping news or guide” that contains some news, even though small in amount, and some advertising copy.[[217]](#footnote-218) Circulars ordinarily lack the characteristics of a newspaper. However, work performed by a publisher that publishes circulars for incorporation into a Section 213(a)(8)–exempt newspaper would be exempt even if the printing of such circulars was “jobbed out.”[[218]](#footnote-219)

“Job printing” refers to printing work for outside customers and does not include printing done by the employer at its own establishment for its own business operations.[[219]](#footnote-220) The printing of a newspaper published by others is to be regarded as “job printing” for purposes of Section 213(a)(8).[[220]](#footnote-221) As long as an employee’s primary duties relate to publication of the newspaper, he or she qualifies for the exemption even if the business generates more income from unrelated printing activities than from newspaper publication.[[221]](#footnote-222)

The WHD takes the enforcement position that “an employee is within the exemption even though he is also engaged in job printing activities, if less than 50 percent of the employee’s worktime during the workweek is spent in job printing work, some of which is subject to the Act. If none of the job printing activities are within the general coverage of the Act, the exemption applies even if the job printing activities equal or exceed 50 percent of the employee’s worktime. However, this exemption is not applicable if the employee spends 50 percent or more of his worktime in a workweek on job printing, any portion of which is within the general coverage of the Act on an individual or enterprise basis.”[[222]](#footnote-223)

According to a 1965 DOL opinion letter, “when a company publishes more than one newspaper, each newspaper is tested separately in order to determine whether the circulation is less than four thousand, provided that, in addition to their separate mastheads, the several newspapers carry different local news items.”[[223]](#footnote-224)

The Third Circuit provided further guidance on this point in *Reich v. Gateway Press, Inc*.,[[224]](#footnote-225) drawing on the enterprise concept and explaining that

in applying the small newspaper exemption to publishers of more than a single publication, the court should aggregate the circulation of those publications that are (1) related, (2) have a unified operation or control, and (3) have a common publishing purpose. In evaluating the first two factors, the focus should be on the different business operations of the publications. The court should look to see to what extent the publisher is taking advantage of significant economies of scale in running the publications. Particularly important would be the use of the same editorial staff and reporters for the different publications. Also important would be the degree to which the publications are after the same market niche in the different communities, the centralization of the publication decisions, the centralization of advertising sales, and other administrative functions of the publisher. The focus of the third consideration should be on the content of the papers—the extent to which the articles, advertisements, and editorials differ among the publications. Minor variations among the publications—different stories on only one page, for example—will not be enough [to] require a court to measure their circulations separately.[[225]](#footnote-226)

Applying this analysis, the court found that the Gateway newspapers within each geographic group should be aggregated. First, the court determined that the newspapers were engaged in related activities because the focus of each was on local happenings in the different communities. Second, the newspapers satisfied the unified operation or common control requirement because major decisions about administration and editorial policy were made from the central office. In addition, circulation numbers of the groups—not the individual papers—were cited when selling advertising space. Third, the newspapers within each geographic group had a common publishing purpose.[[226]](#footnote-227) “Although the papers within each of the five regional groups have some different local news items, they are otherwise identical,” the court said, noting, “[t]he papers within each group are just slight variations of each other. Indeed, they seem to be different editions of the same paper in much the same way major metropolitan daily papers have different regional editions.”[[227]](#footnote-228)

**D. Switchboard Operators Employed by Small Public Telephone Companies**

Under Section 213(a)(10), the FLSA’s minimum wage and overtime provisions do not apply to “any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations.”[[228]](#footnote-229) The exemption extends only to companies with 750 or fewer “receiving and transmitting instruments” served by a particular exchange[[229]](#footnote-230) and covers only switchboard operators employed by small “public” telephone companies serving or willing to serve the entire public within the area in which the organization’s facilities are located.[[230]](#footnote-231) Telephone answering services lack the requisite public component and do not qualify under the FLSA exemption.[[231]](#footnote-232)

**E. Seamen on Non-American Vessels**

Under Section 213(a)(12), the FLSA’s minimum wage and overtime provisions do not apply to any employee employed as a seaman on a vessel other than an American vessel.[[232]](#footnote-233) Whether a seaman is exempt pursuant to either Section 213(a)(12) or Section 213(b)(6) will depend on whether he or she is a “seaman” working on a “vessel,” as those terms are defined in the regulations.[[233]](#footnote-234)

In *Kaluom v. Stolt Offshore, Inc.*,[[234]](#footnote-235) the court observed that “in the right circumstances, a vessel not formally documented as an American vessel could be an American vessel under the FLSA,”[[235]](#footnote-236) and ultimately concluded there was a factual dispute on the point where there was evidence that a foreign-flagged vessel was controlled by a U.S. company that employed the barge superintendent.[[236]](#footnote-237)

At least two courts have skirted the issue of whether a foreign-flagged vessel qualifies as an American vessel under Section 213(a)(12), finding the seamen exempt under Section 213(f)’s foreign workplace exemption.[[237]](#footnote-238)

**F. Casual-Basis Babysitters and Domestic Companionship Service Providers**

Under Section 213(a)(15), the FLSA’s minimum wage and overtime compensation requirements do not apply to casual-basis babysitters and domestic companions. Specifically, the exemption applies to

any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).[[238]](#footnote-239)

This exemption was not in the original version of the FLSA, primarily because, with few exceptions,[[239]](#footnote-240) domestic service employees were not covered by the FLSA until 1974. In that year, Congress extended the FLSA to “domestic service” employees, but exempted from the FLSA’s minimum wage and overtime provisions domestic service employees employed on “a casual basis to provide babysitting services”[[240]](#footnote-241) or “employed in domestic service employment to provide companionship services” to elderly persons or persons with illnesses, injuries, or disabilities who require assistance in caring for themselves.[[241]](#footnote-242) The enactment also exempted from the FLSA’s overtime provision domestic service employees residing in the household where they provide services.[[242]](#footnote-243)

Following these enactments, the DOL promulgated regulations implementing the Section 213(a)(15) and 213(b)(21) exemptions.[[243]](#footnote-244) As applied to “casual babysitters,” those regulations have remained substantially unchanged.[[244]](#footnote-245) However, in 2013, the DOL issued new regulations concerning “companionship services.”[[245]](#footnote-246)

***1. Casual Babysitters***

*a. “Babysitting Services”*

According to DOL regulations, the term “babysitting services” means the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside,[[246]](#footnote-247) but does not include services relating to the care and protection of infants or children performed by trained personnel, such as registered, vocational, or practical nurses.[[247]](#footnote-248)

*b. “Casual Basis”*

The regulations also provide that the term “casual basis,” when applied to babysitting services, shall mean “employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting.”[[248]](#footnote-249) Individuals who engage in babysitting as a full-time occupation are not employed on a “casual basis.”[[249]](#footnote-250) Moreover, employees are not employed on a “casual basis” for purposes of the Section 213(a)(15) exemption if they are engaged by an employer or agency other than the family or household using their services.[[250]](#footnote-251) According to DOL regulations, such employees are engaged in this occupation as a vocation.[[251]](#footnote-252)

*c. Casual Babysitting Services*

Babysitting services may include the performance of some household work not related to caring for the children, “[p]rovided, however, that such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.”[[252]](#footnote-253) If the individual performing babysitting services on a “casual basis” devotes more than 20 percent of his or her time to household work during a babysitting assignment, the exemption for “babysitting services on a casual basis” does not apply during that assignment and the individual must be paid in accordance with the FLSA’s minimum wage and overtime requirements.[[253]](#footnote-254) This does not affect application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.[[254]](#footnote-255)

Usually, babysitting services are on a “casual basis,” whether performed for one or more employers, if such work does not exceed 20 hours per week in the aggregate.[[255]](#footnote-256) Employment in excess of these hours may still be on a “casual basis” if the excessive hours are without regularity or are for irregular or intermittent periods.[[256]](#footnote-257) Babysitting also is deemed to be on a “casual basis” (regardless of the number of weekly hours worked by the babysitter) in the case of individuals not employed in domestic service as a vocation who accompany families for a vacation period to take care of the children, if the duration of such employment does not exceed six weeks.[[257]](#footnote-258)

***2. Companionship Services***

By way of a 2013 final rule,[[258]](#footnote-259) the DOL modified several sections of 29 C.F.R. Part 552 to

• revise the definition of “domestic service employment” in Section 552.3 to clarify the language and modernize the list of examples of professions falling within this category;

• revise the definition of “companionship services” in Section 552.6 to restrict the term to encompass only workers providing limited, nonprofessional services;

• require the keeping of actual records of hours worked by live-in domestic service employees as set forth in Section 552.102 and .110; and

• provide that neither the Section 213(a)(15) nor the Section 213(b)(21) exemption applies to “third party employers,” that is, employers other than the individual receiving services or his or her family or household.

The final rule’s revised third-party regulation and revised definition of “companionship services” were the subject of an unsuccessful court challenge.[[259]](#footnote-260) The D.C. Circuit concluded that “the department’s decision to extend the FLSA’s protections to [domestic services] employees is grounded in a reasonable interpretation of the statute and is neither arbitrary nor capricious,”[[260]](#footnote-261) agreeing with the DOL that the Supreme Court decision in *Long Island Care at Home Ltd. v. Coke*[[261]](#footnote-262) foreclosed any contention that the DOL lacked authority to issue its amended third-party employment regulation: “[*Coke*] confirms that the act vests the department with discretion to apply … or not to apply … the companionship services and live-in exemptions to employees of third-party agencies.”[[262]](#footnote-263)

*a. Historical Background*

In 1974, Congress extended FLSA coverage to all “domestic service” workers, including those employed in private households or companies too small to be covered by the Act.[[263]](#footnote-264) Section 206(f) extended the minimum wage requirements to domestic service employees in either of the following instances:

(1) If the employee’s compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than $1,000 in 1995, or the amount designated for subsequent years pursuant to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or

(2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.[[264]](#footnote-265)

Section 207(l) extended the overtime provisions of Section 207(a) to domestic service employees, defined in Section 206(f).[[265]](#footnote-266)

At the same time the FLSA was amended to include within its coverage domestic service employees, Congress also created an exemption from the minimum wage and overtime requirements for employees “employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”[[266]](#footnote-267) Congress also created an exemption from overtime for domestic service employees residing in the household in which they are employed.[[267]](#footnote-268) According to the legislative history of the 1974 amendments:

It is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service. However, the exemption reflects the intent of the committee to exclude from coverage … companions for individuals who are unable because of age and infirmity to care for themselves. But it is not intended that trained personnel such as nurses, whether registered or practical, shall be excluded. People who will be employed in the excluded categories are not regular bread-winners or responsible for their families’ support. The fact that persons performing … services as companions do some incidental household work does not keep them from being … companions for purposes of this exclusion.[[268]](#footnote-269)

Per the statutory grant of authority to “define and delimit by regulations” the terms “domestic service employment” and “companionship services,”[[269]](#footnote-270) the Secretary promulgated regulations implementing the Section 213(a)(15) and Section 213(b)(21) exemptions.[[270]](#footnote-271) The regulations were divided into two parts: Subpart A of 29 C.F.R. Part 552 defined and delimited the terms “domestic service employment” at 29 C.F.R. §552.3 and “companionship services” at 29 C.F.R. §552.6. Subpart B of the regulations “set forth statements of general policy and interpretation concerning the application of the FLSA to domestic service employees.”[[271]](#footnote-272) Additionally, the Subpart B interpretations permitted third-party employers, or employers of home care workers other than the individuals receiving care or their families, to claim both the companionship services and live-in domestic service exemptions.[[272]](#footnote-273) These regulations remained substantially unchanged from the time they were promulgated in 1975, until 2013.[[273]](#footnote-274)

A final rule issued on October 1, 2013, made significant changes to the regulations for employees performing companionship services and live-in domestic service.[[274]](#footnote-275)

*b. The 2013 Final Rule*

The DOL’s 2013 final rule explains that,

[b]ecause the 1975 regulations define companionship services and address third-party employment in a manner that, given the changes to the home care services industry, the home care services workforce, and the scope of home care services provided, no longer aligns with Congress’s intent when it extended FLSA protections to domestic service employees, the Department is modifying the relevant regulatory provisions in 29 C.F.R. part 552. These changes are intended to clarify and narrow the scope of duties that fall within the definition of companionship services in order to limit the application of the exemption. The Department intends for the exemption to apply to those direct care workers who are performing “elder sitting” rather than the professionalized workforce for whom home care is a vocation.[[275]](#footnote-276)

The final rule made changes to the following sections of 29 C.F.R. Part 552:

• Section 552.3 (Domestic Service Employment);

• Section 552.6 (Companionship Services);

• Section 552.102 (Live-In Domestic Service Employees);[[276]](#footnote-277)

• Section 552.109 (Third Party Employment); and

• Section 552.110 (Recordkeeping Requirements).[[277]](#footnote-278)

The following sections discuss each of these changes that are not covered elsewhere in this treatise.

*c. “Domestic Service Employment”*

The 2013 final rule made slight changes to the definition of “domestic service employment” found in 29 C.F.R. §552.3. Specifically, the DOL

• removed the qualifying introductory phrase “as used in section [2]13(a)(15) of the Act” because the definition of domestic service employment has a broader context than just the exemption found in 213(a)(15);[[278]](#footnote-279)

• removed the phrase “of the person by whom he or she is employed” because the DOL believes the phrase may be confusing and misread as narrowing the coverage of domestic service employees under the FLSA;[[279]](#footnote-280)

• deleted outdated occupations such as “governesses,” “footmen,” and “grooms,” and included more modern occupations, such as “nannies,” “home health aides,” and “personal care aides;”[[280]](#footnote-281) and

• included the terms “babysitters” and “companions” on the list of domestic service workers.[[281]](#footnote-282)

As modified, the definition of “domestic service employment”

means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.[[282]](#footnote-283)

*d. What Constitutes a “Private Home”*

To qualify as a domestic service employee, an employee’s work must be performed in or about a “private home.”[[283]](#footnote-284) The 1975 regulations provided that a “home” can be “a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation.”[[284]](#footnote-285) “[A] separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel could constitute a private home.”[[285]](#footnote-286) However, if an employee is employed in “dwelling places which is primarily a rooming or boarding house,” he or she will not be considered a domestic service employee because these places of work “are not private homes but commercial or business establishments.”[[286]](#footnote-287) Similarly, employees employed in connection with a business or professional service conducted out of a home (such as a real estate, doctor’s, dentist’s or lawyer’s office) are not domestic service employees.[[287]](#footnote-288) Companionship services must be performed “inside” or “around the outside” of a private home and do not include services performed at a facility where clients participate in social and recreational activities.[[288]](#footnote-289)

In its 2013 final rule, the DOL retained the definition of “private home” as found in 29 C.F.R. §§552.3 and 552.101, and noted that “nothing in this final rule is altering the determination of whether work is being performed in or about a private home.”[[289]](#footnote-290) Elaborating on the point, the final rule, citing several opinion letters,[[290]](#footnote-291) explains that

the analysis to determine whether an employee is working in a “private home” remains unchanged. Thus, employees who are working in a location that is not a private home were never properly classified as domestic service employees under the current regulations, and employers were not and are not entitled to claim the companionship services or live-in worker exemptions for such employees.[[291]](#footnote-292)

Among several cases the DOL cited with approval is the Tenth Circuit decision in *Welding v. Bios Corp.*,[[292]](#footnote-293)where the court observed that “the definition of ‘private home’ exists along a continuum”; at one end is “[a] traditional family home in which a single family resides,” and at the other end is “an institution primarily engaged in the care of the sick, the aged, the mentally ill or a boarding house used for business or commercial purposes.”[[293]](#footnote-294) According to the Tenth Circuit, “in evaluating where each living unit lies on the continuum … the key inquiries are who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services.”[[294]](#footnote-295) This inquiry, the court explained, turned on six factors gleaned from the decisional law:[[295]](#footnote-296)

(1) whether the client lived in the unit as his or her private home before beginning to receive services,[[296]](#footnote-297)

(2) who owned the unit,[[297]](#footnote-298)

(3) who managed and maintained the unit,[[298]](#footnote-299)

(4) whether the client would be allowed to live in the unit if the client were not contracting with the provider for services,[[299]](#footnote-300)

(5) the relative difference in the cost/value of the services provided and the cost of maintaining the unit, and

(6) whether the service provider used any part of the residence for the provider’s own business purposes.[[300]](#footnote-301)

The final rule also considered whether significant public funding was involved; who determined who lived together in the home; whether residents lived together for treatment purposes as part of an overall care program; the number of residents; whether the clients could come and go freely; whether the employer or the client acquired the furniture; who had access to the home; and whether the provider was a for-profit or not-for-profit entity.[[301]](#footnote-302)

Applying the six factors articulated in *Welding*, a federal district court held that “independent supportive living locations” providing services to disabled individuals did not qualify as private homes.[[302]](#footnote-303) By contrast, the Eighth Circuit held in *Fezard v*. *United Cerebral Palsy of Central Arkansas*[[303]](#footnote-304) that dwelling units were “private homes” where employees lived with clients and provided companionship services, reasoning that

if the client chooses to live in a dwelling controlled primarily by the employer, the dwelling probably is not the client’s private home. If the client maintains control—or has delegated control to a third party—it probably is a private home. All of the clients in this case chose a living arrangement subject to some measure of control by a third-party who also happens to work for [United Cerebral Palsy of Central Arkansas]. From an employer’s perspective—the relevant perspective for purposes of the FLSA—it is irrelevant whether a client maintains a dwelling unit or pays a landlord to do so. In either case, the employer is providing companionship services for the client in a private home.[[304]](#footnote-305)

Applying this standard, the Eighth Circuit concluded that the dwelling units in which the employees provided services were private homes.[[305]](#footnote-306)

The final rule summarized the case law by noting that whether a living arrangement qualifies as a private home is a fact-specific inquiry, using the factors set out in the case law. It then cited several DOL opinion letters that have been issued on whether certain types of “living units” were “private homes.”[[306]](#footnote-307)

*e. What Constitutes “Companionship Services”*

“Companionship services” were defined in the 1975 regulation as “those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.”[[307]](#footnote-308) In revising the language of the “companionship service” regulation in the 2013 final rule, the DOL stated its intention to “modernize and clarify” the definition of “fellowship, care, and protection.”[[308]](#footnote-309) The final rule also deleted the terms “aged,” “advanced age,” “infirm,” “infirmity,” and “physical or mental infirmity” in the regulatory text of this section.[[309]](#footnote-310) Where a “descriptor” was needed, the DOL substituted “elderly person or person with an illness, injury, or disability.”[[310]](#footnote-311) In addition, the DOL replaced the phrase “unable to care for themselves” with “requires assistance in caring for himself or herself.” According to the final rule: “Although the language being replaced is derived from FLSA section [2]13(a)(15) and the existing regulations at § 552.6, the Department recognizes that such language is outdated and does not reflect contemporary views regarding the elderly and people with disabilities.”[[311]](#footnote-312)

The new Section 552.6 is divided into four separate paragraphs defining each of the key terms.

Section 552.6(a) defines “companionship services” as “the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself.”[[312]](#footnote-313) “Fellowship” means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events.[[313]](#footnote-314) “Protection” means “to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person’s safety and well-being.”[[314]](#footnote-315) According to the preamble to the 2013 final rule, revisions to this definition reflect Congress’s intent that the companionship exemption “be akin to ‘elder sitting.’”[[315]](#footnote-316) The DOL discerned from the legislative history of the 1974 amendments that a companion is someone who “sits with [an elder person]” provides “constant attendance,” and renders services similar to a babysitter, that is, “someone to be there and watch an older person,” or an “elder sitter.”[[316]](#footnote-317)

Section 552.6(b) provides that “companionship services” could also include “the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection, and if it does not exceed 20 percent of the total hours worked per person and per workweek.”[[317]](#footnote-318) The provision of care means

to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).[[318]](#footnote-319)

With regard to the 20 percent limitation on the provision of care, it was “[t]he Department’s view … that failing to provide such a limitation would ignore Congressional intent that making meals and doing laundry would be incidental to the exempt companion’s primary purpose of watching over the consumer”[[319]](#footnote-320) and noted that “a 20 percent limitation for providing this care, coupled with a primary focus on the provision of fellowship and protection, was appropriate for a worker who is not entitled to minimum wage and overtime protections.”[[320]](#footnote-321)

In*Cummings v*. *Bost, Inc*.,[[321]](#footnote-322) the court adopted a burden-shifting approach in assessing whether the 20 percent limit had been exceeded, holding that

[the] Plaintiffs do have a burden, albeit a low one, to show that they qualify under the general household work exception to the companionship services exemption. … Before shifting the burden to [the employer], Plaintiffs must first provide some evidence to meet their burden of showing that they spent more than 20-percent of a work week on general household work.[[322]](#footnote-323)

However, in *Romero v. Diaz-Fox*,[[323]](#footnote-324) the uncontested facts established that the plaintiff spent well over the 20-percent threshold per week providing care service, and therefore the plaintiff was not exempt under the companionship services exemption. Section 552.6(c) excludes from “companionship services” domestic services “performed primarily for the benefit of other members of the household.”[[324]](#footnote-325) This definition of “companionship services” contrasts with the 1975 regulations, which extended the companionship services exemption to a worker who spent up to 20 percent of his or her time performing general household work unrelated to the care of the person receiving the services.[[325]](#footnote-326) Through its 2013 final rule, the DOL stated that it “intended to exclude”from companionship services any general domestic services unrelated to the care of the consumer as defined in paragraph (b).[[326]](#footnote-327) “The determination of whether a particular task constitutes the provision of care or is instead a service performed primarily for the benefit of others in the household is based on a common sense assessment of the facts at issue.”[[327]](#footnote-328)

For example, an exempt companion may vacuum up food the consumer drops or wash a soiled blouse for the consumer as part of his or her “care activities.” Additionally, light housework such as dusting a bedroom the consumer shares with another, that only tangentially benefits others living in the household, may constitute “care” if performed attendant to and in conjunction with the provision of fellowship and protection of the consumer and within the 20 percent limitation on care.[[328]](#footnote-329)

Section 552.6(d) provides that “companionship services” do not include the performance of medically related services. Services are medically related if they “typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants.”[[329]](#footnote-330) The determination is not based on the actual training or occupational title of the individual performing the services.[[330]](#footnote-331)

The 2013 final rule makes two substantive changes to the 1975 regulations’ treatment of the term “trained personnel.” First, the final rule adds “certified nursing assistants” as an example of “trained personnel” who perform medically related services. Second, the final rule clarifies that whether the individual who performs medical tasks received training is irrelevant to the determination of whether the tasks are medically related.[[331]](#footnote-332)

The DOL specifically decided not to include home health aides or personal care aides in its illustrative list of trained personnel because “[t]he work of practitioners of those occupations does not necessarily include medically related services.”[[332]](#footnote-333)

*f. Third-Party Employment*

The 2013 final rule revised 29 C.F.R. §552.109 to prohibit third-party employers from claiming the Section 213(a)(15) exemption; now, rather, “only an individual, family, or household would be permitted to claim the exemptions in §§ [2]13(a)(15) and [2]13(b)(21) of the FLSA.”[[333]](#footnote-334) By way of explanation for the change, the DOL pointed to congressional intent as well as legislative history of the 1974 amendments.[[334]](#footnote-335)

The final rule also explained the DOL’s reversal of the position advocated before the Supreme Court in *Long Island Care at Home, Ltd. v. Coke:*[[335]](#footnote-336)

Although the commenters who noted that the Department is changing its position as to the proper treatment of third party employers in § 552.109 are correct, such a change is not only permissible, but also reasonable. The Department did argue in *Coke*, as well as in Wage and Hour Advisory Memorandum (“WHAM”) 2005–1 … that the third party regulation as written in 1975 was the Department’s best reading of these statutory exemptions. In the past, however, the Department erroneously focused on the phrase “any employee,” instead of focusing on the purpose and objective behind the 1974 amendments, which was to expand minimum wage and overtime protections to workers employed in private households that did not otherwise meet the FLSA coverage requirements. … Moreover, the WHAM failed to consider the industry changes that have taken place over the decades since the statutory amendment was enacted.[[336]](#footnote-337)

To assist the public in complying with the new regulations, the DOL issued the following fact sheets:

• Fact Sheet #79: Private Homes and Domestic Service Employment Under the Fair Labor Standards Act (FLSA);[[337]](#footnote-338)

• Fact Sheet #79A: Companionship Services Under the Fair Labor Standards Act (FLSA);[[338]](#footnote-339)

• Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA);[[339]](#footnote-340)

• Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA);[[340]](#footnote-341)

• Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA);[[341]](#footnote-342)

• Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA);[[342]](#footnote-343)

• Fact Sheet #79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA);[[343]](#footnote-344) and

• Fact Sheet #79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations.[[344]](#footnote-345)

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

In the 1938 version of the FLSA, there were only two Section 213(b) exemptions from the overtime requirements of the FLSA: for employees covered under the Motor Carrier Act (MCA), and for railroad employees.[[345]](#footnote-346) As the FLSA was amended over the years, more employees came within its coverage. As part of the amendment process, a Section 213(a) exemption (from both minimum wage and overtime provisions) sometimes became a Section 213(b) exemption (from overtime provisions only), and thereafter was phased out of existence or was limited in duration. Today, Section 213(b) sets forth a series of industry-specific exemptions from the overtime requirements,[[346]](#footnote-347) including

• employees of a motor carrier;[[347]](#footnote-348)

• railroad employees;[[348]](#footnote-349)

• air transportation employees;[[349]](#footnote-350)

• seaman;[[350]](#footnote-351)

• announcers, news editors, or chief engineers for radio or television stations;[[351]](#footnote-352)

• employees who sell or service automobiles, trucks, or farm implements;[[352]](#footnote-353)

• salespersons of trailers, boats, and aircraft;[[353]](#footnote-354)

• local delivery drivers;[[354]](#footnote-355)

• taxicab drivers;[[355]](#footnote-356)

• domestic servants;[[356]](#footnote-357)

• house parents;[[357]](#footnote-358)

• motion picture theater employees;[[358]](#footnote-359) and

• employees of recreational establishments in national parks or forests.[[359]](#footnote-360)

Each specific exemption from the FLSA’s overtime provisions is subject to unique requirements, and entities covered by any one of the exemptions are still required to pay their employees no less than the applicable minimum wage.[[360]](#footnote-361)

**A. Employees Covered Under the Motor Carrier Act**

Section 213(b)(1) of the FLSA provides an overtime exemption for any employee for whom the Secretary of Transportation has the authority to establish qualifications and maximum hours of service pursuant to Section 204 of the MCA of 1935.[[361]](#footnote-362) The Section 213(b)(1) overtime exemption applies to employees who are

(1) Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102;

(2) Drivers, driver’s helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and

(3) *Not* covered by the small vehicle exception.[[362]](#footnote-363)

The application and effect of the Section 213(b)(1) exemption changed significantly in 2005 and 2008 by statutory amendments to the MCA, including technical correction of its interaction with the FLSA. An overview of the MCA and these amendments precede a discussion of the Section 213(b)(1) exemption as applied today,[[363]](#footnote-364) which turns on the weight and capacity of the vehicles at issue.

***1. Overview of the Motor Carrier Act***

Congress enacted the MCA in 1935 “to promote efficiency, economy, and safety in the motor transportation industry. Under the MCA, the Interstate Commerce Commission (‘ICC’) was granted regulatory power over the employees of motor carriers, and motor private carriers. In 1966, Congress transferred this regulatory power to the Department of Transportation (‘DOT’).”[[364]](#footnote-365)

From 1938 until 2005, Section 213(b)(1) applied to *any* employee with respect to whom the Secretary of Transportation had the power to establish qualifications and maximum hours of service rules pursuant to certain provisions of the MCA. The language of the exemption was carefully drafted to avoid conflicts between the DOL, which is responsible for enforcement of the FLSA, and the Secretary of Transportation, whose concerns include safety of the roads and who enforces the MCA.[[365]](#footnote-366)

Employees who qualified for the exemption included employees of a “motor carrier” and, under some circumstances, a “motor private carrier,” terms defined in 49 U.S.C. §13102 as follows:

(14) Motor carrier.—The term “motor carrier” means a person providing motor vehicle transportation for compensation.

(15) Motor private carrier.—The term “motor private carrier” means a person, other than a motor carrier, transporting property by motor vehicle when—

(A) the transportation is as provided in section 13501 of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.[[366]](#footnote-367)

Thus, persons who served as drivers, driver’s helpers, loaders and mechanics employed by motor carriers or motor private carriers were subject to the Secretary of Transportation’s regulation, and thereby exempt from the overtime requirements of the FLSA.

*a. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)*

On August 10, 2005, Congress enacted transportation reauthorization legislation titled the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[[367]](#footnote-368) Section 4142 of SAFETEA-LU aimed to streamline the process for vehicle inspection at U.S. borders by allowing vehicles not subject to safety regulations to forgo safety inspections when passing in and out of the country. To this end, Section 4142 amended the MCA’s definitions of a “motor carrier” and a “motor private carrier” to cover *only* commercial motor vehicle transportation rather than motor vehicle transportation in general.[[368]](#footnote-369)

Amending the definitions of “motor carrier” and “motor private carrier” to include only commercial motor vehicle transportation had a significant effect on the classification of employees as exempt under the FLSA’s motor carrier exemption. Commercial motor vehicles are defined as follows:

(1) “commercial motor vehicle” means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.[[369]](#footnote-370)

As a result of SAFETEA-LU, if a vehicle driven by a “motor carrier” or a “motor private carrier” did not meet the definition of a “commercial motor vehicle,” then the Secretary of Transportation lacked jurisdiction to prescribe qualifications or maximum hours of service for their drivers. A May 2007 DOL field assistance bulletin discussed the effect:

As a result of SAFETEA-LU, employees engaged in transportation via vehicles such as most light pick-up trucks and automobiles, who historically had been covered by the FLSA § 13(b)(1) ­exemption from overtime, are no longer exempt. Effective August 10, 2005, the FLSA § 13(b)(1) exemption applies only to employees engaged in otherwise exempt transportation using vehicles that meet the above definition of a “commercial motor vehicle.”[[370]](#footnote-371)

Thus, the passage of SAFETEA-LU markedly decreased the scope of the Section 213(b)(1) exemption, which was addressed in part by the Technical Corrections Act three years later.

*b. SAFETEA-LU Technical Corrections Act*

Upon passage of SAFETEA-LU and the industry’s realization of its impact on the scope of the Section 213(b)(1) exemption, many transportation industry employers objected to the imposition of an increased overtime obligation. They argued that insertion of the word “commercial” in the definitions section of the MCA brought about an “unintended result” or was a “drafting error that was never negotiated or discussed.”[[371]](#footnote-372) But worker advocates sought to preserve the overtime protections workers gained under SAFETEA-LU.[[372]](#footnote-373) As a compromise, Congress enacted the SAFETEA-LU Technical Corrections Act (TCA), which went into effect on June 8, 2008.[[373]](#footnote-374) The TCA established that

(1) regardless of the language in Section 213(b)(1) of the FLSA, Section 207 requirements would apply to a “covered employee” as defined in Section 306(c) of the TCA;

(2) employers would not be liable for a violation of Section 207 of the FLSA with respect to a “covered employee” if the violation occurred in the one-year period beginning August 10, 2005, and the employer did not have actual knowledge of the impact of SAFETEA-LU; and

(3) the Secretary of Transportation’s jurisdiction over vehicles weighing 10,000 pounds or less was restored.[[374]](#footnote-375)

Section 306(c) provided

(c) COVERED EMPLOYEE DEFINED.—In this section, the term “covered employee” means an individual—

(1) who is employed by a motor carrier or motor private carrier (as such terms are defined by section 13102 of title 49, United States Code, as amended by section 305);

(2) whose work, in whole or in part, is defined—

(A) as that of a driver, driver’s helper, loader, or mechanic; and

(B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles—

(i) designed or used to transport more than 8 passengers (including the driver) for compensation;

(ii) designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or

(iii) used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of title 49, United States Code, and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103 of title 49, United States Code; and

(3) who performs duties on motor vehicles weighing 10,000 pounds or less.[[375]](#footnote-376)

Thus, the TCA restored jurisdiction to the Secretary of Transportation over *vehicles* weighing 10,000 pounds or less, but it did not restore the overtime exemption for drivers, drivers’ helpers, loaders, or mechanics of vehicles weighing 10,000 pounds or less, except that vehicles used to transport more than 8 passengers for compensation (or 15 passengers without compensation), and vehicles transporting hazardous materials are still subject to Section 213(b)(1).[[376]](#footnote-377)

To illustrate, in *Westberry v. William Joule Marine Transport, Inc.*,[[377]](#footnote-378)escort drivers who drove vehicles weighing less than 10,000 pounds followed and assisted oversized load trucks weighing more than 10,000 pounds. Although the Section 213(b)(1) exemption covered the drivers of the oversized load trucks, the court found that the escort drivers were not exempt from overtime under the TCA because they drove vehicles weighing less than 10,000 pounds.

Given the centrality of a vehicle’s weight, capacity, and payload composition after the TCA, we turn to application of the exemption (1) to vehicles in excess of 10,000 pounds; (2) to small vehicles weighing 10,000 pounds or less; and (3) to motor carriers with mixed fleets of vehicles weighing both less than and more than 10,000 pounds.

***2. Application of the Exemption (for Vehicles in Excess of 10,000 Pounds)***

For vehicles in excess of 10,000 pounds,[[378]](#footnote-379) the MCA exemption turns on a three-step analysis:

(1) Is the employee in question employed by a carrier that is *subject to the power of the Secretary of Transportation* to establish qualifications and maximum hours of service for such employees under the MCA?[[379]](#footnote-380)

(2) If the answer to (1) is yes, is the employee engaged in *activities that directly affect the operational safety of commercial vehicles?*[[380]](#footnote-381)

(3) If the answer to (2) is yes, do those vehicles transport passengers or property on public highways in *interstate or foreign commerce?*[[381]](#footnote-382)

*a. Carriers Subject to the Power of the Secretary of Transportation*

The first step of the MCA exemption analysis begins with Section 13501 of the MCA, which authorizes the Secretary of Transportation to regulate transportation by motor carrier “between places in different states, between places in the same state if the transport passes through another state and between the United States and a foreign country to the extent that the transportation occurs in the United States.”[[382]](#footnote-383) Pursuant to 49 U.S.C. §31502(b), the Secretary may prescribe requirements for qualifications and maximum hours of service of employees of a motor carrier or a motor private carrier when needed to promote safety of operation.[[383]](#footnote-384)

Generally speaking, the Section 213(b)(1) exemption is limited to employees of motor carriers.[[384]](#footnote-385) However, the MCA gives the DOT “power to establish qualifications and maximum hours of service for drivers employed by non-carriers in situations where the non-carrier leases or rents motor vehicles with such drivers to motor carriers.”[[385]](#footnote-386) Provided that all other requirements for the exemption are satisfied, Section 213(b)(1) is applicable to these drivers while they are driving the motor vehicle leased or rented to motor carriers on the same basis as if they were actually employed by the carriers.[[386]](#footnote-387) But Section 213(b)(1) “does not extend to other safety-affecting employees of the leasing or renting establishment, such as mechanics,” unless the employer itself is a motor carrier.[[387]](#footnote-388)

Where an employer’s business is subject to DOT regulation, compliance with the regulations supports a conclusion that the employer falls under the Secretary of Transportation’s jurisdiction for purposes of the MCA. For example, a company could be licensed by the DOT, have the Federal Motor Carrier Safety Administration authorizations necessary to be an interstate motor carrier, or have been the subject of past DOT audits.[[388]](#footnote-389) Drivers could be required to pass an initial DOT drug test and be subject to random and reasonable cause DOT-required drug testing thereafter, pay a DOT-required medical examination every two years, pass a DOT-required road test, pass a DOT written examination, or maintain DOT-required logs.[[389]](#footnote-390)

However, the applicability of the exemption is determined by the *existence* of the regulatory power of the Secretary of Transportation to establish qualifications and maximum hours of service.[[390]](#footnote-391) Whether the Secretary actually exerts authority is not determinative—instead, the key question is whether the Secretary has the authority to establish qualifications and maximum hours of service for the particular employees.[[391]](#footnote-392) Therefore, a decision of the Secretary of Transportation to refrain from exercising regulatory authority over a category of carriers alone does not exempt them from the Secretary’s authority.[[392]](#footnote-393) Similarly, an employer’s failure to adhere to DOT regulations will not invalidate application of the exemption.[[393]](#footnote-394)

The MCA has specifically exempted certain transportation from its jurisdiction.[[394]](#footnote-395) Some of these include motor vehicles providing taxicab service[[395]](#footnote-396) and school bus drivers.[[396]](#footnote-397) By regulation, the Secretary of Transportation has also disclaimed jurisdiction over specific categories of transportation including the transportation of human corpses, sick or injured persons, and fire trucks and rescue vehicles involved in emergency-related operations.[[397]](#footnote-398)

A company’s primary business need not be transportation for the exemption to apply. In *McGuiggan v. CPC International, Inc*.,[[398]](#footnote-399) a federal district court found the exemption for private motor carriers applicable where the employer’s primary business was baking and selling baked goods. Relying on cases from the Third and Ninth Circuits,[[399]](#footnote-400) the court applied the exemption to drivers of baked goods across state lines, noting that although coverage by the DOT is limited regarding non-transportation business, coverage continues with relation to working hours and safety of certain drivers.[[400]](#footnote-401)

With respect to carriers of passengers, practical considerations are given to the Secretary’s authority over the operation of vehicles designed or used to transport more than 8 or 15 passengers (regardless of the vehicle’s weight).[[401]](#footnote-402) The Third Circuit distinguished the transportation of passengers from the transportation of goods in *Packard v. Pittsburgh Transportation Co.*,[[402]](#footnote-403) determining that the former did not fall within the Secretary of Transportation’s jurisdiction because it was not “in practical continuity with a larger interstate journey.”[[403]](#footnote-404) In assessing transportation provided to the elderly and disabled, including trips to train and bus stations and to the airport,[[404]](#footnote-405) the Third Circuit looked at cases that defined the interstate transportation of passengers in other contexts, including *United States v. Yellow Cab Co*,[[405]](#footnote-406) which similarly noted the distinction between property and passengers:

[W]hat may fairly be said to be the limits of an interstate shipment of goods and chattel may not necessarily be the commonly accepted limits of an individual’s interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.[[406]](#footnote-407)

Some courts evaluate the import of intrastate travel under the third prong of the MCA exemption analysis, which addresses the employee’s activity of transporting passengers or property on public highways in interstate or foreign commerce.[[407]](#footnote-408) Regardless of where the analysis occurs, purely intrastate travel requires some common arrangement with an interstate carrier—such as a joint fare, through-ticket, station-to-station travel, or prepackaged tour—for purposes of the MCA.[[408]](#footnote-409)

*b. Employees Engaged in Activities That Directly Affect Safety*

The second step of the MCA exemption analysis is that the employee’s duties must include the regular or periodic performance of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce.[[409]](#footnote-410) Employees must perform such duties as a driver, driver’s helper, loader, or mechanic.[[410]](#footnote-411) The Supreme Court has upheld as reasonable the Secretary of Transportation’s determination that these are the only categories of workers that potentially directly affect the safety of vehicles operating in interstate commerce.[[411]](#footnote-412)

Employees performing such duties meet the duties requirement of the exemption regardless of the proportion of “safety affecting activities” performed,[[412]](#footnote-413) except where the continuing duties have no substantial direct effect on “safety of operation,” or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis (so long as there is no change in the duties).[[413]](#footnote-414)

*(i.) Drivers*

A “driver” is defined for MCA purposes as an individual who drives a motor vehicle in transportation in interstate or foreign commerce.[[414]](#footnote-415) DOL regulations recognize that the definition does not require that the individual be engaged in such work at all times[[415]](#footnote-416)—even full-duty drivers devote some of their working time to activities other than driving.[[416]](#footnote-417) Thus, “drivers” includes partial-duty drivers who drive in interstate or foreign commerce as part of a job in which they also engage in other types of driving or non-driving work, such as, for example, the following:

• individuals whose driving duties concern transportation, partially in intrastate commerce and partially in interstate or foreign commerce;

• individuals who ride along and act as an assistant or relief driver of motor vehicles engaged in transportation in interstate or foreign commerce (in addition to helping with loading, unloading, and similar work);

• drivers of chartered buses or farm trucks who have many duties unrelated to driving or safety of operation of the vehicles in interstate transportation on the highways; and

• driver-salesmen who devote much of their time to selling goods rather than to activities affecting such safety of operation.[[417]](#footnote-418)

In contrast, “yard drivers” who move vehicles within a jobsite and on public roads intrastate may not be regarded as “drivers” under the MCA.[[418]](#footnote-419)

Whether full- or partial-duty, a driver directly affects “safety of operation” whenever he or she drives a motor vehicle in interstate or foreign commerce within the meaning of the MCA. Additional activities of a character affecting safety may include requirements that drivers complete DOT logs regarding the time spent driving, pass DOT written and driving tests, complete various DOT forms, and pass a DOT physical and drug test.[[419]](#footnote-420)

*(ii.) Drivers’ Helpers*

A “driver’s helper” is defined for MCA purposes as an employee, other than a driver, required to ride on a motor vehicle when it is being operated in interstate or foreign commerce and whose job duties include work that directly relates to the safety of operations.[[420]](#footnote-421) Included within the helper category are armed guards on armored trucks, conductors on buses, and individuals who flag trucks across railroad tracks.[[421]](#footnote-422) The category does not include employees who ride on the vehicle and act as assistants or relief drivers.[[422]](#footnote-423)

Employees engaged in the work of drivers’ helpers are considered to be performing safety-related tasks if doing so for only a part of the time during their workweek.[[423]](#footnote-424) But a helper must be “required” to ride along with the driver as part of his or her job duties in order to be exempt.[[424]](#footnote-425) For example, “hostesses” on interstate buses responsible for “looking after the comfort of the passengers, keeping the aisles clean and clear, and assisting the driver and passengers in case of [an] accident” are considered “helpers” because “their duties are considered to affect the safety of operation of the vehicle.”[[425]](#footnote-426) However, an employee whose responsibilities are unrelated to safety is not considered a helper for purposes of the exemption, even if he or she rides in the vehicle with the driver.[[426]](#footnote-427) Also, if the employee rides with the driver only as a matter of convenience, he or she cannot be considered a helper subject to exemption.[[427]](#footnote-428)

*(iii.) Loaders*

A “loader” is defined for MCA purposes as an employee (other than a driver or driver’s helper) whose duties include the proper loading of the employer’s motor vehicles so they may be safely operated on the highways of the country.[[428]](#footnote-429) A loader may be called a “dockman,” “stacker,” or “helper,” and his or her duties will usually include unloading and the transfer of freight between the vehicles and the warehouse.[[429]](#footnote-430)

A loader engages in work directly affecting “safety of operation” so long as he or she has responsibility, when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized.[[430]](#footnote-431) Individuals who supervise the loading of vehicles that operate in interstate commerce may also be exempt if their activities likewise affect vehicle safety.[[431]](#footnote-432)

Employees who do not perform actual loading or have no discretion with respect to the method and means of loading a vehicle are not covered by the exemption.[[432]](#footnote-433) Unloading freight, moving freight around in a warehouse, and checking bills of lading also do not constitute activities that affect the safety of vehicles operating in interstate commerce.[[433]](#footnote-434) Furthermore, the exemption does not apply where the activities affecting highway safety are trivial, casual, occasional, and insubstantial,[[434]](#footnote-435) or where the employee merely furnishes physical assistance when necessary.[[435]](#footnote-436)

The DOL addressed the applicability of Section 213(b)(1) to “team loaders” in an opinion letter considering the exempt treatment of workers who loaded a racing automobile and parts onto a trailer for transportation.[[436]](#footnote-437) There, the WHD Administrator pointed out that an employee “is not a loader ‘merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure in place.’”[[437]](#footnote-438) It concluded that “only those of the ‘team loaders’ who exercise the judgment and discretion necessary to determine that the automobile and parts have been loaded safely on the trailer would qualify for the exemption.”[[438]](#footnote-439)

*(iv.) Mechanics*

A “mechanic” is defined for MCA purposes as an employee whose duty is to keep motor vehicles operated in interstate or foreign commerce by his or her employer in a good and safe working condition.[[439]](#footnote-440) Courts have held that the definition encompasses employees who do inspection, adjustment, repair, or maintenance work on the motor vehicles themselves (including trucks, tractors and trailers, and buses) and are, when so engaged, directly responsible for creating or maintaining physical conditions essential to the safety of the vehicles on the highways through the correction or prevention of defects that have a direct causal connection with the safe operation of the unit as a whole.[[440]](#footnote-441)

Activities that fall within this category include the maintenance and repair of brakes, lights, horns, windshield wipers, wheels and axles, bushings, transmissions, differentials, motors, starters and ignitions, carburetors, fifth wheels, springs and spring hangers, frames, gasoline tanks, and tires.[[441]](#footnote-442) Hooking up tractors and trailers, including light and brake connections, are also included.[[442]](#footnote-443) Similarly, the “installation, inspection, repair, and maintenance of refrigeration equipment on motor vehicles operated in interstate commerce constitute safety-affecting activities.”[[443]](#footnote-444)

Supervisory employees who direct such work are also covered by the exemption.[[444]](#footnote-445) The supervision or approval by a foreman does not withdraw the otherwise available exemption from the mechanic if the mechanic maintains discretion or responsibility over the proper mechanical repair.[[445]](#footnote-446)

An employee is not an exempt mechanic where the activities performed do not directly affect the safe operation of a motor vehicle in interstate commerce. For example, vehicle painters and service technicians who only change oil, gas, or grease, or wash motor vehicles are not considered to be “mechanics” under the FLSA.[[446]](#footnote-447) Such tasks are considered unrelated to safety and therefore are outside the scope of the exemption. Also beyond the reach of the exemption are individuals whose mechanical work is performed exclusively away from the vehicle, such as those who rebuild parts or repair tires but do not install them on vehicles.[[447]](#footnote-448)

The DOL has taken the position that dispatchers do not perform safety-sensitive functions.[[448]](#footnote-449) However, in *McIntyre v. FLX of Miami, Inc*.,[[449]](#footnote-450) a Florida district court held that a truck dispatcher whose duties included calling mechanics for stranded truckers and verifying that vehicles were in safe operating condition affected the safety and operation of motor vehicles so as to come within the scope of the MCA exemption.

*c. Transportation in Interstate Commerce*

*(i.) Definition of “Interstate Commerce” Under the Motor Carrier Act*

In the third step of the MCA exemption analysis, the activities of a driver, driver’s helper, loader, or mechanic must directly affect the safe operation of commercial motor vehicles in transportation in interstate or foreign commerce, within the meaning of the MCA.[[450]](#footnote-451) What constitutes transportation sufficient to bring employees within the regulatory power of the Secretary of Transportation under Section 204 of the MCA is determined by *definitions* contained in the MCA.[[451]](#footnote-452) However, these definitions are not identical to the definitions in the FLSA that determine whether an employee is “engaged in (interstate or foreign) commerce.”[[452]](#footnote-453) For this reason, the interstate commerce requirements of the Section 213(b)(1) exemption are not necessarily met by establishing that an employee is “engaged in commerce” within the meaning of the FLSA when performing activities as a driver, driver’s helper, loader, or mechanic.[[453]](#footnote-454) For example,

employees of construction contractors are, within the meaning of the Fair Labor Standards Act, engaged in commerce where they operate or repair motor vehicles used in the maintenance, repair, or reconstruction of instrumentalities of interstate commerce (for example, highways over which goods and persons regularly move in interstate commerce). Employees so engaged are not, however, brought within the [Section 13(b)(1)] exemption merely by reason of that fact. In order for the exemption to apply, their activities, so far as interstate commerce [under the MCA] is concerned, must relate directly to the transportation of materials moving in interstate or foreign commerce within the meaning of the Motor Carrier Act.[[454]](#footnote-455)

Consequently, transportation by motor vehicle that is in “interstate commerce” under the FLSA may not constitute transportation over which the DOT has the power to exercise control and upon which the Section 213(b)(1) exemption is based.[[455]](#footnote-456) However, as an enforcement policy, the DOL takes the position that a movement in interstate commerce under the FLSA shall also be considered interstate commerce under the MCA, except in those situations where the ICC has held, or the Secretary of Transportation or the courts hold, otherwise.[[456]](#footnote-457)

*(ii.) Highway Transportation From One State to Another*

Generally, highway transportation by commercial vehicle from one state to another, in the course of which the vehicle crosses the state line, constitutes interstate commerce under both the FLSA and the MCA.[[457]](#footnote-458) Even employees who drive commercial vehicles in interstate commerce on an “as needed” basis may be exempt under the MCA, provided they do not drive non-commercial vehicles during the same workweek.[[458]](#footnote-459)

The exemption applies in all weeks in which an employee may be called on to drive commercial vehicles in interstate commerce under the authority of the Secretary of Transportation.[[459]](#footnote-460) In determining whether interstate transportation exists, courts have held that it is not the proportion of time devoted to the covered activity but the character of the activity that governs.[[460]](#footnote-461)

*(iii.) Intrastate Transportation*

Transportation within a single state from a storage terminal of commodities that have had a prior movement by rail, pipeline, motor, or water from an origin in a different state is not in interstate or foreign commerce if the shipper has no “fixed and persisting transportation intent” beyond the terminal storage point at the time of shipment.[[461]](#footnote-462) In 1992, the DOT issued a Policy Statement regarding the term “fixed and persisting intent,”[[462]](#footnote-463) and it laid out the following indicators to determine if a trip from a warehouse to an end user constitutes the final leg of an interstate journey:

1. Even if a shipper does not know the ultimate destination of specific shipments, it bases its determination on the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. This may include, but is not limited to, historical sales in the State, actual present orders, and relevant market surveys of need.

2. No processing or substantial product modification of substance occurs at the warehouse or distribution center. However, repackaging or reconfiguring (secondary packaging) may be performed.

3. While in the warehouse, the merchandise is subject to the shipper’s control and direction to the subsequent transportation.

4. Modern tracking systems allow tracking and documentation of most, if not all, of the shipments coming in and going out of the warehouse or distribution center.

5. The shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier.

6. The warehouse utilized is owned by the shipper.

7. The shipments move through the warehouse pursuant to a storage in transit provision.[[463]](#footnote-464)

According to the DOT, the presence of one or more of the following factors is not sufficient to establish a break in the continuity that would change the interstate character of the subsequent transportation:

(1) the shipper’s lack of knowledge of the specific, ultimate destination or consignee at the time the shipment leaves its out-of-state origin;

(2) separate bills of lading for the inbound and outbound movements instead of through bills of lading;

(3) storage-in-transit tariff provisions;

(4) storage receipts issued by the warehouse distribution center;

(5) time limitations on storage;

(6) payment of transportation charges by the warehouse or distribution center, when the shipper or consignee is ultimately billed for these charges;

(7) routing of the outbound shipments by the warehouse or distribution center;

(8) a change in carriers or transportation modes at a distribution facility;

(9) use of brokers retained by the shipper; and

(10) use of a warehouse not owned by the shipper.[[464]](#footnote-465)

In a 2005 opinion letter,[[465]](#footnote-466) the DOL acknowledged the DOT’s administrative authority for the MCA, stating “its interpretation of its jurisdiction is controlling”[[466]](#footnote-467) and noting that

[t]he determination of interstate commerce for the final leg of shipments not sent to a named recipient, but held in storage between legs of the trip, has traditionally been governed by a more specific provision at 29 C.F.R. 782.7(b)(2). This regulation is based on rulings of the Interstate Commerce Commission as to its jurisdiction in this particular situation, and is one of the exceptions from the application of the general FLSA definition of interstate commerce described in section 782.7(b)(1).[[467]](#footnote-468)

Courts have used a “totality of the circumstances” test that generally encapsulates the factors in the 1992 DOT Policy Statement to address the “fixed and persisting” intent of the shipper and determine whether goods traveling intrastate are considered to be in “interstate commerce.”[[468]](#footnote-469) Although use of the factors has not been without criticism,[[469]](#footnote-470) most courts have held that the factors set out by the DOT should be used in determining whether a shipper has a “fixed and persisting intent” to engage in interstate commerce.[[470]](#footnote-471)

Additionally, “[t]ransportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a ‘practical continuity of movement’ across State lines from the point of origin to the point of destination.”[[471]](#footnote-472) For example, several courts have held that the regular pickup of empty containers, destined for out of state, places employees in interstate commerce and within the scope of the Section 213(b)(1) exemption, provided the other requirements are met.[[472]](#footnote-473)

Also, the transportation of passengers within a single State will constitute interstate commerce if there is “a practical continuity of movement between the intrastate segment and the overall interstate … flow” such that it is part of a “continuous stream of interstate travel.”[[473]](#footnote-474) In *Walters v. American Coach Lines*,[[474]](#footnote-475)the Eleventh Circuit held that employees providing ground transportation within the state of Florida for cruise passengers shuttling between the Miami and Fort Lauderdale airports and the cruise ship ports constituted a continuous stream of interstate travel as part of their cruise vacation.[[475]](#footnote-476) The fee for the shuttle service was either bundled as part of the vacation package or included on the bill for the shipboard account.[[476]](#footnote-477)

***3. Small Vehicle Exception (for Vehicles of 10,000 Pounds or Less)***

The TCA established that, notwithstanding Section 213(b)(1) of the FLSA, Section 207 of the FLSA would apply to a “covered employee” as defined in Section 306(c) of the TCA. Section 306(c) of the TCA defines a covered employee as an individual—

(1) who is employed by a motor carrier or motor private carrier (as such terms are defined by section 13102 of title 49, United States Code, as amended by section 305);

(2) whose work, in whole or in part, is defined—

(A) as that of a driver, driver’s helper, loader, or mechanic; and

(B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles—

(i) designed or used to transport more than 8 passengers (including the driver) for compensation;

(ii) designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or

(iii) used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of title 49, United States Code, and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103 of title 49, United States Code; and

(3) who performs duties on motor vehicles weighing 10,000 pounds or less.[[477]](#footnote-478)

By maintaining the availability of overtime pay under the FLSA for covered employees affecting the safe operation of certain vehicles depending on their weight or capacity, the exception created for small vehicles by the TCA has the effect of continuing the exemption for employees driving vehicles weighing at least 10,001 pounds and those that can transport more than 8 passengers for compensation (or 15 without compensation) regardless of weight. But the MCA exemption *does not* apply to employees of smaller vehicles weighing 10,000 pounds or less.[[478]](#footnote-479) Thus, as some courts have noted, if an employee drives vehicles carrying at least eight passengers, regardless of gross weight, the driver is exempt from overtime pay.[[479]](#footnote-480)

*a. Determining Vehicle Weight*

Two recurring questions under the TCA concern (1) the burden of proof regarding the weight of the motor vehicles at issue, and (2) whether “weight” refers to the gross vehicle weight rating (GVWR) or some other measure. The Fifth Circuit, in *Carley v*. *Crest Pumping Technologies, LLC*,[[480]](#footnote-481) held that the burden of proving the weight of the vehicles rested with the plaintiffs, because the TCA was not codified as an exemption from Section 207(a) but rather sets forth eligibility conditions for overtime compensation notwithstanding the MCA.[[481]](#footnote-482) With respect to vehicle weight, the Fifth Circuit held that the GVWR is the proper measure of weight,[[482]](#footnote-483) agreeing with the Eighth Circuit on this point,[[483]](#footnote-484) and applying *Skidmore*[[484]](#footnote-485) deference to a 2010 DOL field assistance bulletin, which provides:

“Weighing 10,000 pounds”—WHD will continue to use the gross vehicle weight rating (GVWR) or gross combined vehicle weight rating in the event that the vehicle is pulling a trailer. The GVWR is found on the vehicle, usually on a plate on the door jamb.[[485]](#footnote-486)

In *Albanil v. Coast 2 Coast, Inc.,*[[486]](#footnote-487)the Fifth Circuit also held that, in determining whether a motor vehicle’s weight is greater than 10,000 pounds, the weight of the truck includes the weight of a towed unit such as a trailer.[[487]](#footnote-488)

*b. Vehicle Modifications*

Another issue that has arisen under the TCA concerns the effective result of vehicle modifications in weight and/or capacity implicating TCA coverage. With regard to modifications affecting passenger capacity, the 2010 DOL field assistance bulletin provides:

“Designed or used to transport more than 8” (or more than 15)—WHD will determine this information based on the vehicle’s current design and the vehicle capacity as found on the door jamb plate. Where a vehicle’s seating capacity has been reduced, for example by removing seats to accommodate a wheelchair, we will count the resulting seating capacity plus add 1 for each wheelchair placement. Where a vehicle’s capacity has been increased, for example by bolting a bench seat into a cargo area, we will not count the added capacity unless the vehicle has been recertified by DOT for that purpose.[[488]](#footnote-489)

In *Lacurtis v*. *Express Medical Transporters, Inc*.,[[489]](#footnote-490) the Eighth Circuit held that the exemption did not apply to drivers of vans with a gross vehicle weight of less than 10,000 pounds originally designed and manufactured to carry up to 12 and 15 passengers, respectively, but converted into paralift vans by permanently removing some seats to allow for access by two wheelchairs, resulting in a maximum seating capacity of 5 and 6 passengers plus up to 2 passengers in wheelchairs. Given the “comprehensive redesign and conversion process” the paralift vans underwent before being placed into service, the court concluded that they were not “designed” to transport more than 8 passengers.[[490]](#footnote-491)

***4. Mixed Fleets***

Neither the language of the FLSA nor the MCA indicates how to categorize carriers that operate both commercial motor vehicles and noncommercial motor vehiclesin a fleet.[[491]](#footnote-492) As a result, courts have struggled with the question of whether employees of a “hybrid” employer—a motor carrier that has a mixed fleet of vehicles weighing both less than and more than 10,000 pounds—are covered by the Section 213(b)(1) exemption.

As noted earlier, Section 306(c) of the TCA defines a covered employee as an individual

(2) whose work, in whole or in part, is defined—

(A) as that of a driver, driver’s helper, loader, or mechanic; and

(B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, [exceptions not included].[[492]](#footnote-493)

Shortly after the passage of the TCA, a 2010 DOL field assistance bulletin defined the term “in whole or in part” as follows:

The phrase “in whole or in part” included in the statute means an employee who performs such duties involving small vehicles for the entire week or part of the week must receive overtime pay for hours worked over 40 in that workweek. The changes made by TCA thus extend FLSA overtime protection to some employees even when such employees are also subject to the authority of the Secretary of Transportation to set maximum hours of service.[[493]](#footnote-494)

Based on the “in whole or in part” language contained in Section 306(c), many courts have held that if an employee’s work on noncommercial vehicles is more than de minimis, then the employee is considered a covered employee under the TCA.[[494]](#footnote-495) In *McMaster v*. *Eastern Armored Services, Inc*.,[[495]](#footnote-496) the plaintiff was a driver and guard of a commercial armored vehicle, and approximately half her trips were in vehicles lighter than 10,000 pounds. Her daily routes included interstate trips on public roadways, and the employer was admittedly a motor carrier. The Third Circuit focused on the TCA’s pronouncement that “Section 7 of the Fair Labor Standards Act of 1938 … shall apply to a covered employee notwithstanding section 13(b)(1) of that Act,”[[496]](#footnote-497) and concluded that the plaintiff in whole or in part met the TCA’s definition of a “covered employee.”[[497]](#footnote-498)

As support for this conclusion, the Third Circuit pointed to decisions of the Fifth and Eighth Circuits (albeit in different contexts).[[498]](#footnote-499) Rejecting criticism by the Seventh Circuit in*Collins v*. *Heritage Wine Cellars, Ltd*.[[499]](#footnote-500) that “[d]ividing jurisdiction over the same drivers, with the result that their employer would be regulated under the Motor Carrier Act when they were driving the big trucks and under the Fair Labor Standards Act when they were driving trucks that might weigh only a pound less, would require burdensome record-keeping, create confusion, and give rise to mistakes and disputes,”[[500]](#footnote-501) the Third Circuit observed that “[n]either history nor policy … can overcome an express change to the statutory scheme.”[[501]](#footnote-502)

Despite *McMaster*, some courts have suggested that there is a minimum threshold of the type or amount of work employees must perform on vehicles weighing 10,000 pounds or less before the TCA affords them FLSA overtime coverage.In *Allen v*. *Coil Tubing Services, LLC*,[[502]](#footnote-503) the Fifth Circuit held that to be covered by the TCA, the employee “must perform *some meaningful work for more than an insubstantial time* with the vehicles weighing 10,000 pounds or less.”[[503]](#footnote-504) In *Oddo v. Bimbo Bakeries U.S.A., Inc.*,[[504]](#footnote-505) a district court held that drivers of small vehicles satisfied the threshold under the TCA when they drove 1 percent or more of the total trips completed by each during the statutory period.[[505]](#footnote-506) Other courts have rejected or cabined a “meaningful work” requirement in the TCA.[[506]](#footnote-507)

**B. Railroad Employees**

Section 213(b)(2) exempts from the overtime requirements of the FLSA “any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49.”[[507]](#footnote-508) When the FLSA was enacted in 1938, Section 213(b)(2) (the rail carrier exemption) applied to employees of an employer subjected to the provisions of Part I of the Interstate Commerce Act (ICA), which, at that time, regulated railroad operations.[[508]](#footnote-509)

Early cases addressing the scope of the rail carrier exemption “adhered to the intent of Congress that the exemption be limited to employees of employers subject to regulation by the Interstate Commerce Commission [ICC].”[[509]](#footnote-510) As noted in *Walling v. Rockton & Rion Railroad,*[[510]](#footnote-511)“[t]he language of Section 13(b)(2), as well as its legislative history, shows that the exemption was inserted into the FLSA to avoid duplication of Federal regulatory authority over the hours of employment of railroad workers.”[[511]](#footnote-512)

The provisions of Part I of the ICA applied only to common carriers engaged in interstate commerce transporting passengers or property either (1) exclusively by rail; or (2) partly by rail and partly by water when both were under common control, management, or arrangement[[512]](#footnote-513) for a continuous carriage or shipment.[[513]](#footnote-514) Employers in this category included railroad carriers, express companies, sleeping car companies, and refrigerator car companies.[[514]](#footnote-515)

The exemption continues to apply only to those employees who perform activities subjecting their employer to Part I of the ICA.[[515]](#footnote-516) The term “employer” as used in the exemption refers to the person or persons who would be legally obligated to pay overtime in the absence of this exemption.[[516]](#footnote-517) For example, employees of an employer who leases refrigerator and tank cars to railroads and shippers for the interstate transportation of goods are exempt from overtime under Section 213(b)(2).[[517]](#footnote-518) However, employees of a railroad contractor engaged in maintaining and servicing air-conditioned and car-lighting equipment sold to railroads are not within the purview of Section 213(b)(2) because the contractor is neither a common carrier nor engaged in transportation in interstate commerce.[[518]](#footnote-519)

The *Field Operations Handbook* delineates several operations encompassed by the Section 213(b)(2) exemption, including

• manufacturing ice (where ice is used solely for the railroad);[[519]](#footnote-520) and

• loading and unloading livestock by employees of a public stockyard onto and from railroad cars (but not other stockyard activities such as yarding, feeding, watering, and handling livestock before or after loading and unloading).[[520]](#footnote-521)

The *Field Operations Handbook* further provides that the Section 213(b)(2) exemption does not apply to the following:

• employees of a warehouse if the warehouse stores goods that have not been carried over the lines of the railroad that owns the warehouse and the storage of such goods constitutes a substantial portion of the warehouse’s business;[[521]](#footnote-522)

• employees of an employer exclusively engaged in a pick-up and delivery service under contract with a railroad express agency;[[522]](#footnote-523)

• employees of a trucking company, even if the trucking company is wholly owned and controlled by a railroad company;[[523]](#footnote-524) and

• employees of an establishment that ships livestock only for itself.[[524]](#footnote-525)

In sum, the Section 213(b)(2) exemption does not apply to employees who do not perform activities subjecting their employer to Part I of the ICA[[525]](#footnote-526) and those engaged in nonexempt work for more than 20 percent of the total hours worked in a given week.[[526]](#footnote-527)

In 1995, as part of the Interstate Commerce Commission Termination Act, the ICC was abolished and its remaining functions were transferred to the Surface Transportation Board (STB).[[527]](#footnote-528) For the sake of conformity, the language of Section 213(b)(2) was modified to its current form, using the phrase “rail carrier” and inserting the words “subject to part A of subtitle IV of Title 49” to track the reorganization of the law referenced within the exemption.[[528]](#footnote-529)

A company is subject to part A of subtitle IV of Title 49 in one of two ways: (1) if its activities constitute “transportation by rail carrier”;[[529]](#footnote-530) or (2) if its activities fall within the “terminal area” exception to jurisdiction under the MCA.[[530]](#footnote-531)

***1. Transportation by Rail Carrier***

To establish that a company is subject to the STB’s jurisdiction, it “must show that both the activities at issue constitute ‘transportation’ and that such transportation is performed by, or under the auspices of a ‘rail carrier.’”[[531]](#footnote-532) “Transportation” is defined as

(A) a locomotive, car, vehicle … or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers or property.[[532]](#footnote-533)

The phrase “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.”[[533]](#footnote-534)

As defined, the STB’s jurisdiction over “rail carriers” is limited to common carriers.[[534]](#footnote-535) “To be considered a rail carrier under the statute, there must be a holding out to the public to provide common carrier service.”[[535]](#footnote-536) As the court noted in *Tews v. Renzenberger, Inc*.,[[536]](#footnote-537) “whatever service the non-carrier is providing—no matter how ‘integral’ to the rail carrier or whether the rail carrier exerts control over the non-carrier’s operations—must be publicly available.”[[537]](#footnote-538) Also, as *Tews* stated,

it is not necessary that the entity directly offer its services to the public as long as “the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad, whether through common ownership or contract is deemed to hold itself out to the public.”[[538]](#footnote-539)

In *Tews*, the defendant provided rail crew transportation services (by motor vehicle) exclusively to railroad industry clients, not the general public, and therefore was not a “rail carrier” for purposes of STB jurisdiction.[[539]](#footnote-540)

***2. Terminal Area Exception***

In 1940, the MCA was amended to provide that transportation by motor vehicle for a common carrier by railroad “in the performance within terminal areas of transfer, collection, or delivery service” was to be considered and regulated as “transportation by railroad … to which such services are incidental.”[[540]](#footnote-541) These services, known as “collection and delivery services,” were often performed by independent contractors who transported, via buses and trucks, railroad passengers and their baggage from depot to depot under contracts with the railroads. In *Cederblade v. Parmelee Transportation Co.*,[[541]](#footnote-542) the Seventh Circuit held that such “collection and delivery services” are exempt from overtime under Section 213(b)(2):

When a [railway] carrier uses terminal facilities such as motor vehicles to carry passengers and property within the terminal area, … said motor vehicles formed part of a railroad engaged in commerce, although the motor vehicles used are not owned by the rail carrier but are contracted for with independent contractors.[[542]](#footnote-543)

In *Williams v. Alex’s Transportation, Inc*.,[[543]](#footnote-544) the court accepted the reasoning of *Cederblade* and suggested that “collection and delivery service” is incidental to a rail carrier and therefore within the rail carrier exemption, despite the drivers transporting railroad crews from hotels and rail yards to trains at various points along the rail lines outside of terminal areas.[[544]](#footnote-545) This prompted criticism in *Tews v. Renzenberger, Inc.*,[[545]](#footnote-546) where a district court held that “road drivers” responsible for transporting rail crews—primarily engineers and conductors—by motor vehicle to and from various destinations to “relieve” rail crews who had exhausted their federally mandated maximum hours of service and to replace those crews with “fresh” crews were not covered by the terminal area exception because they “are not confined to terminal areas in the performance of their jobs.”[[546]](#footnote-547) The court observed that

the rail carrier exemption does not limit its application to services performed within terminal areas—it is limited to employees of employers who are regulated as rail carriers or who perform services (including transfer, collection and delivery services provided by motor vehicle within a terminal area) that fall under the jurisdiction of the Surface Transportation Board.[[547]](#footnote-548)

The *Tews* court concluded that, on this basis, *Alex’s Transportation* was unpersuasive because the district court did not consider *Cederblade*’s express reliance on the “terminal area” exception in determining that the plaintiffs fell within the rail carrier exemption.[[548]](#footnote-549)

***3. The Effect of Deregulation of the Railroad Industry on Section 213(b)(2)***

For about 10 years prior to 1975, the capital shortfall in the railroad industry “culminated with a rash of bankruptcies.”[[549]](#footnote-550) When Congress first addressed this fiscal situation in 1975, eight major carriers in the Northeast and Midwest were in financial ruin.[[550]](#footnote-551) The first act that Congress passed seeking to deregulate the railroad industry was the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).[[551]](#footnote-552) However, because railroad reinvigoration was slow, Congress enacted the Staggers Rail Act of 1980. Getting an exemption from the ICA was “central to the implementation of both these initiatives.”[[552]](#footnote-553) It allowed the ICC to exempt railroads from ICA regulations so long as they were “not necessary to carry out the [national] transportation policy.”[[553]](#footnote-554) The exemption’s purpose was to facilitate competition by substituting market-based decisions for regulatory structures.[[554]](#footnote-555)

In 1982, Metro-North, a railroad operating commuter lines, sought an exemption from the ICA to avoid “duplicative regulatory control” as “Metro-North … [is] subject to extensive regulation by the Urban Mass Transportation Administration, as well as local governmental bodies, regarding fare and service changes, [as well as] operations and accounting procedures … .”[[555]](#footnote-556) At the time it sought the exemption, Metro-North was an employer engaged in the operation of a common carrier by rail, and subject to the provisions of Part I of the ICA.[[556]](#footnote-557) As a result, its employees were considered exempt from overtime under Section 213(b)(2) of the FLSA.

At issue in *Farley v. Metro-North Commuter Railroad*[[557]](#footnote-558) was whether the exemption was lost when ICC granted Metro-North an exemption from the ICA regulations. The Second Circuit held that the exemption remained intact, as there was not “even a single passage of legislative history indicating that Congress considered subjecting an exempted railroad to the FLSA,” concluding that to hold otherwise would “alter 100 years of established Congressional policy without so much as a whisper from the nation’s law-makers. It is inconceivable that a statute designed to deregulate must be read to re-regulate a distressed industry in this fashion.”[[558]](#footnote-559) Moreover, the court noted, “the ICC is empowered to cancel the ICA exemption if it adversely impinges upon Metro-North employees.”[[559]](#footnote-560)

**C. Air Transportation Employees**

Under Section 213(b)(3), the overtime requirements of the FLSA do not apply to “any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [RLA] [45 U.S.C.A. §§181, *et seq.*]”[[560]](#footnote-561) Like the Section 213(b)(2) exemption, with the exception of an enforcement regulation found in 29 C.F.R. §786.150, there is no DOL regulatory guidance on this exemption. However, *Field Operations Handbook* Section 24j addresses certain issues related to this exemption.

The *Field Operations Handbook* notes that the Section 213(b)(3) exemption is not for the benefit of an industry or establishment but rather

applies to individual employees of an air carrier when their activities bear a reasonably close relationship to the exempt type of transportation activities which bring the employer’s operation under Title II of the Railway Labor Act. Title II applies to “every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.”[[561]](#footnote-562)

Commuter airline pilots and air taxi pilots employed by a carrier that has been issued an air taxi and commercial operations (ATCO) certificate or an ATCO letter of registration by the Federal Aviation Administration and is engaged in interstate operations may be subject to the Section 213(b)(3) exemption.[[562]](#footnote-563) The exemption also extends to air freight forwarders owned or controlled by, or under common control with, a company actually engaged in air transportation where the air forwarder is performing services connected with property transported by such other company.[[563]](#footnote-564) Employees of an air carrier supplying food and meal service equipment to airlines for use on the airplane are also exempt under Section 213(b)(3) because such employees are engaged in operating equipment and facilities and performing services in connection with transportation and handling of property transported by airlines.[[564]](#footnote-565)

In *Valdivieso v. Atlas Air, Inc*.,[[565]](#footnote-566) the Eleventh Circuit held that a commercial air carrier that owned, operated, and maintained a fleet of freighter aircraft used to transport cargo was a “common carrier,” although it specialized in long-term outsourcing of its aircraft under “Aircraft, Crew, Maintenance, and Insurance” contracts,[[566]](#footnote-567) where the company offered its services to anyone willing to accept its terms and prices and was licensed by the DOT as a common carrier.[[567]](#footnote-568) Similarly, in *Thibodeaux v. Executive Jet International, Inc*.,[[568]](#footnote-569) the Fifth Circuit deemed the Section 213(b)(3) exemption applicable to a flight attendant employed by a company that operated aircraft in fractional ownership programs.

In *Slavens v. Scenic Aviation, Inc.*,[[569]](#footnote-570) the Tenth Circuit held that the Section 213(b)(3) exemption applied to an employee of an air ambulance and charter service where the employee’s activities—evaluating the medical background of potential medical staff, establishing medical protocols, establishing company policies and procedures, informing hospitals of the services available, and resolving personnel disputes—were “integral” to the employer’s air ambulance services.[[570]](#footnote-571)

To determine whether an employer and its employees are subject to the RLA when the employer itself is not engaged in the common carriage of passengers by air, the National Mediation Board (NMB)[[571]](#footnote-572) applies a two-part test:

First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers—*the function test*. Second, the NMB determines whether the employer is directly or indirectly controlled by or under common control with, a carrier or carriers—*the control test*.[[572]](#footnote-573)

“Both prongs must be satisfied in order for the RLA exemption to apply.”[[573]](#footnote-574)

Under the function test, “the controlling inquiry is ‘whether the nature of the work is that traditionally performed by employees of rail or air carriers.’”[[574]](#footnote-575) The analysis examines “whether the carrier affiliate’s services are sufficiently connected to the carrier’s commercial transportation operations [such] that a work stoppage at the carrier affiliate would impede those operations.”[[575]](#footnote-576) The function test also reviews whether the work is essential to a carrier’s air transportation services.[[576]](#footnote-577)

The NMB has found the following types of work to be traditionally performed by employees of air carriers: maintenance and janitorial work at an air carrier’s buildings;[[577]](#footnote-578) transportation services for aircraft crew members between airport and hotels;[[578]](#footnote-579) repair, servicing, and overhauling aircraft;[[579]](#footnote-580) and security services.[[580]](#footnote-581) Types of work performed by an affiliate carrier deemed essential to an air carrier’s transportation services include monitoring of computer operations critical to scheduling and related activities,[[581]](#footnote-582) and information technology services.[[582]](#footnote-583) The district court in *Venegas v. Global Aircraft Service, Inc.*,[[583]](#footnote-584) left it for a jury to decide whether metal workers engaged in a long-term restoration project to return an aircraft to airworthy condition were essential to the air carrier’s transportation services, where the aircraft had not flown for at least 10 years and the restoration project had been going on for 7 years. The court concluded that “a jury could reasonably find that the work at issue here is too far removed from regular transportation activities to be covered by the RLA.”[[584]](#footnote-585)

The NMB’s control test looks at whether an affiliate carrier is directly or indirectly *controlled by* or under common control with a carrier or carriers.[[585]](#footnote-586) In determining whether an entity is controlled by an air carrier, the NMB considers the following factors:

• the extent of the carrier’s control over the manner in which the company conducts its business;

• the carrier’s access to the company’s operations and records;

• the carrier’s role in personnel decisions;

• the carrier’s degree of supervision over the company’s employees;

• the carrier’s control over employee training;

• whether company employees are held out to the public as employees of the carrier; and

• the carrier’s role in the company’s daily operations, the company’s employees’ performance of services for the carrier, and the degree to which the carrier affects other conditions of employment.[[586]](#footnote-587)

In *Cunningham II*, the district court observed that “though all of the NMB’s factors remain relevant to the analysis, day-to-day operational control and influence over personnel decisions do much to determine outcomes under the control prong.”[[587]](#footnote-588)

The DOL’s enforcement regulation[[588]](#footnote-589) requires that eligible employees perform exempt work during a substantial part of their workweek. If an employee performs nonexempt work for more than 20 percent of the workweek, the employee will not qualify for the exemption.[[589]](#footnote-590) The exemption applies only when the employee’s activities bear a reasonably close relationship to the exempt type of transportation activities that bring the employer’s operation under Title II of the RLA.[[590]](#footnote-591)

**D. Employees Employed as Seamen**

Under Section 213(b)(6) the overtime requirements of the FLSA do not apply to “any employee employed as a seaman.”[[591]](#footnote-592)

In 1973, the *Field Operations Handbook* issued guidelines on the Section 213(b)(6) and Section 213(a)(12) exemptions.[[592]](#footnote-593) In addition, the DOL issued regulations covering both exemptions.[[593]](#footnote-594) According to the regulations, the key words to understanding the meaning of both of these exemptions are “employed as a seaman” and “vessel.”[[594]](#footnote-595) The terms “seaman” and “vessel” have the same meaning for purposes of both Section 213(b)(6) and Section 213(a)(12).[[595]](#footnote-596)

***1. “Seaman”***

The FLSA does not define the phrase “employed as a seaman.” However, the regulations set forth the following criteria for the exemption:

An employee will ordinarily be regarded as “employed as a seaman” if he performs, as master or subject to authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean going and coastal vessels.[[596]](#footnote-597)

The regulations further provide:

The term “seaman” includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in §783.31. … However, an employee does not lose his status as a seaman simply because, as incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.[[597]](#footnote-598)

An employee does not qualify as a seaman merely by working on a vessel,[[598]](#footnote-599) performing a job titled “seaman,”[[599]](#footnote-600) being licensed as a “seaman,”[[600]](#footnote-601) or performing limited maritime duties.[[601]](#footnote-602) Rather, it is an employee’s primary duties that determine exempt status.[[602]](#footnote-603) Courts have been accustomed to applying the Jones Act’s[[603]](#footnote-604) expansive definition of the term “seaman” as applicable to claims brought by an injured seaman.[[604]](#footnote-605) “The definition of seaman under the Jones Act is limited to that Act and its remedial goals. In contrast, the remedial goals of the Fair Labor Standards Act lead us to read narrowly its exemptions, including the definition of ‘seaman.’”[[605]](#footnote-606) For FLSA purposes, courts include under the definition of “seaman” only those workers employed primarily to assist in the operation of a vessel for transportation.[[606]](#footnote-607)

The character of the work an employee actually performs, not the employee’s job title, classification, or the place where the work is performed is key to the determination of exempt status.[[607]](#footnote-608) For example, an exempt seaman could be a pilot, navigator, sailor, captain, engineer, radio operator, firefighter, purser, surgeon, cook, steward, apprentice pilot, or deck hand, as long as the employee’s primary duties are to aid in vessel transportation operations.[[608]](#footnote-609) The term “seaman” also encompasses relief officers or engineers who exercise an absent master’s authority to maintain the ship in port in safe and operational condition or to maintain the vessel’s auxiliary machinery in operation and repair.[[609]](#footnote-610) Likewise, barge tenders and deck scow captains who attend to the lines and anchors, put out fenders, display running and mooring lights, supervise cargo placement for vessel stability, pump out bilge water, and perform other similar activities that are necessary and usual to barge and scow navigation qualify as seamen.[[610]](#footnote-611) However, the seaman exemption generally does not apply to employees performing predominantly industrial work, such as dredging or mining, as opposed to work rendered primarily in aid of the operation of the vessel as a means of transportation.[[611]](#footnote-612)

The exemption does not apply where “a person employed on a ship was engaged in activities that had no maritime tincture whatever; an example would be a waiter employed on a cruise ship to serve meals to the passengers at regular hours.”[[612]](#footnote-613) In *Priyanto v. M/S Amsterdam*,[[613]](#footnote-614) the court found that state room cleaners on a cruise ship were “like waiters, in that they do not perform a ‘service which is rendered primarily as an aid in the operation of the vessels upon which they work. Rather, they perform the same tasks that hotel housekeeping staff would perform in a land-based hotel.’”[[614]](#footnote-615) As such, they do not fall under the “seaman” exemption.

Seamen generally do not become nonexempt merely because they perform some work unconnected with vessel transportation operations, such as pre- or post-voyage freight loading or unloading,[[615]](#footnote-616) watchman-related services during temporary port stays,[[616]](#footnote-617) or fishing duties.[[617]](#footnote-618) However, a worker loses exempt status if he or she performs a “substantial” amount of “nonseaman’s work” during any particular workweek.[[618]](#footnote-619) For the DOL’s enforcement purposes, “substantial” means more than 20 percent of a seaman’s services.[[619]](#footnote-620) Not all courts have applied this 20 percent rule. For example, the Seventh Circuit employs a presumption that a seaman under the Jones Act is a seaman under the FLSA.[[620]](#footnote-621) However, other courts have embraced the 20 percent rule but do not apply the rule in a strict, mechanical fashion.[[621]](#footnote-622)

According to the DOL, the seaman exemption is inapplicable to stevedores, longshoremen, and others employed primarily for loading and unloading, even if they travel on the vessel or barge and perform incidental maritime services.[[622]](#footnote-623) Employees who repair vessels between trips,[[623]](#footnote-624) render watchman services during lengthy port stays,[[624]](#footnote-625) or protect oil platforms from barge damage[[625]](#footnote-626) are also generally deemed not to qualify as seamen while performing such tasks. Likewise, courts have held that employees principally engaged in industrial work such as dredging;[[626]](#footnote-627) forestry or lumbering operations;[[627]](#footnote-628) or construction-related work such as dock, levee, or structure building[[628]](#footnote-629) do not qualify for the exemption. Other employees who perform substantial non-maritime work also do not meet the requirements for the exemption.[[629]](#footnote-630) Included in this category of nonexempt employees are concessionaires, as well as employees selling tickets, collecting payments, and issuing receipts from a structure attached to shore.[[630]](#footnote-631)

In *Halle v*. *Galliano Marine Service, LLC*,[[631]](#footnote-632) the Fifth Circuit observed that the seamen exemption applies where “(1) the employee is subject to the authority, direction, and control of the master; and (2) the employee’s service is primarily offered to aid the vessel as a means of transportation, provided that the employee does not perform a substantial amount of different work.”[[632]](#footnote-633) Applying this standard, the court reversed a district court’s grant of summary judgment because evidence showed that the remotely occupied vehicle (ROV) Technicians did not assist with any part of navigation:

ROV Technicians control ROVs remotely to provide “emergency backup for underwater drilling operations[,] … turn subsea valves, disconnect and realign underwater lines, inspect underwater structures, and place marking beacons on the sea floor.” They are also responsible for maintaining and servicing the ROVs themselves. Even assuming that it takes an ROV Technician several hours every few days to calculate coordinates and then a few additional minutes to communicate that information to the captain of the support vessel, this does not clearly account for 80% of the estimated eighty-four plus hours worked weekly by ROV Technicians.[[633]](#footnote-634)

***2. “Vessel”***

Although the FLSA does not define the term “vessel,” the DOL and the courts have read the term as encompassing “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”[[634]](#footnote-635) The definition excludes “seaplanes” and “aircraft.”[[635]](#footnote-636) A watercraft need not be operated with power or steering gear to qualify as a “vessel” under this exemption.[[636]](#footnote-637) Thus, the Seventh Circuit has held that gambling boats qualify as “vessels” under Section 213(b)(6).[[637]](#footnote-638) However, an employee primarily employed on a barge that is not self-propelled and used as a “stationary” auxiliary facility to off-shore drilling activities, rather than as a means of transportation, is not a seaman within Sections 213(a)(12) and 213(b)(6).[[638]](#footnote-639)

Section 213(a)(12) of the FLSA applies only to seamen who work on non-American vessels,[[639]](#footnote-640) whereas Section 213(b)(6) applies to seamen who work on American vessels—meaning any vessel documented or numbered under the laws of the United States.[[640]](#footnote-641) A *documented* vessel typically has been (1) registered, (2) enrolled and licensed, or (3) licensed by the Bureau of Customs under United States law.[[641]](#footnote-642) A *numbered* vessel has been numbered pursuant to the provisions of federal law in accordance with the Federal Boating Act of 1958.[[642]](#footnote-643) Also included within the term “American vessel” are undocumented and unnumbered vessels plying the purely internal waters of a state that do not reach navigable waters of another state.[[643]](#footnote-644) On the other hand, a non-American vessel has been described as one that navigates outside the states’ purely internal waters and is neither documented nor numbered under U.S. law.[[644]](#footnote-645)

**E. Announcers, News Editors, or Chief Engineers of Certain Radio or Television Stations**

Section 213(b)(9) exempts announcers, news editors, or chief engineers of certain small market radio or television stations from the overtime provisions of the FLSA.[[645]](#footnote-646) The exemption has three requirements:[[646]](#footnote-647)

1. *The employee must be primarily employed as an announcer, news editor, or chief engineer.*[[647]](#footnote-648)According to the regulations, an announcer reads news, introduces programs, presents commercials, and gives station identification and similar routine material.[[648]](#footnote-649) A news editor gathers, edits, and rewrites the news, and may select and prepare news items for broadcast and present the news on the air.[[649]](#footnote-650) A chief engineer primarily supervises the operations, maintenance, and repair of all electronic equipment in the studio and at the transmitter.[[650]](#footnote-651) For the exemption to apply, an employee generally must perform duties that are associated with the named occupations for more than 50 percent of the hours worked in a workweek.[[651]](#footnote-652) An employee is allowed to combine exempt duties within each of these classifications to meet the 50 percent threshold.[[652]](#footnote-653)

2. *The employee must be employed by a radio or television station.*[[653]](#footnote-654)For purposes of the exemption, the DOL has adopted the Federal Communications Commission’s (FCC’s) designation of licensed stations.[[654]](#footnote-655)

3. *The major studio of such a radio or television station must be located in a city or town that meets the prescribed population and locality tests.*[[655]](#footnote-656)It is the location of the “major studio” of the station that controls for purposes of determining whether the small market requirement has been satisfied. To determine the location of the station’s major studio, the DOL relies on the designation of the main studio on the station’s FCC license. The exemption applies only if the location of that studio is in a city or town that is sufficiently small to meet the governing standards.[[656]](#footnote-657)

The exemption does not extend to a station whose major studio is in a city or town with a population of more than 100,000 people.[[657]](#footnote-658) Stations located in cities or towns with 100,000 or fewer people may qualify for the exemption as long as the station is not within a “standard metropolitan statistical area” that has a population of more than 100,000.[[658]](#footnote-659) A station in a city or town with a population of 25,000 or less may qualify for the exemption, even where the major studio is located within a standard metropolitan statistical area that has a population of more than 100,000, if the station is located in a city that is at least 40 airline miles from the principal city in the area.[[659]](#footnote-660) The regulations identify sources of information for determining both the standard metropolitan statistical areas and which cities are considered “principal cities” under the FLSA.[[660]](#footnote-661) The latest decennial census data are relied on for determining whether a city’s population is more than 100,000.[[661]](#footnote-662)

**F. Certain Employees of Automobile, Truck, or Farm Implement Dealers; Salespersons of Trailers, Boats, and Aircraft**

Under Section 213(b)(10), the overtime requirements of the FLSA do not apply to

(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.[[662]](#footnote-663)

Most of the language in Part A of the exemption was added to the statute in 1966.[[663]](#footnote-664) Part B was added in 1974 to provide an exemption for “salesmen only” of trailers, boats, or aircraft.[[664]](#footnote-665) “The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.”[[665]](#footnote-666)

In April 1970, the DOL issued an interpretative bulletin entitled “The Fair Labor Standards Act as Applied to Retailers of Goods and Services.”[[666]](#footnote-667) Subpart D of that bulletin, “Exemptions for Certain Retail or Service Establishments,” exempted employees of “a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements.”[[667]](#footnote-668) The regulations defined the terms “salesman,” “partsman,” “mechanic,” and “primarily engaged” as follows:

• a salesman “is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements [or the trailers, boats, or aircraft] that the establishment is primarily engaged in selling”;[[668]](#footnote-669)

• a partsman “is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts”;[[669]](#footnote-670)

• a mechanic “is any employee primarily engaged in doing mechanical work … in the servicing of an automobile, truck or farm implement for its use and operation as such”;[[670]](#footnote-671) and

• “primarily engaged” means that “the major part or over 50 percent of the salesman’s, partsman’s, or mechanic’s time must be spent in selling or servicing the enumerated vehicles.”[[671]](#footnote-672)

The Section 213(b)(10) exemption does not apply to “employees of automobile parts and accessories wholesalers, retail auto parts stores, automotive repair garages,” or other establishments that do not sell the enumerated vehicles.[[672]](#footnote-673) The 1970 regulations also excluded “service advisors”from the exemption.

Employees variously described as service manager, service writer, service advisor, or service salesman … are not exempt under [the statute]. This is true despite the fact that such an employee’s principal function may be [diagnosing] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.[[673]](#footnote-674)

Three years after the issuance of the 1970 DOL regulations, the Fifth Circuit, and thereafter several district courts, rejected the DOL’s conclusion that service advisors were not covered by Section 213(b)(10).[[674]](#footnote-675)

In 1978, the DOL issued an opinion letter consistent with this developing decisional law,[[675]](#footnote-676) agreeing that service advisors could be exempt under Section 213(b)(10)(A). The letter acknowledged that the Department’s pronouncement “represent[ed] a change from the position set forth in section 29 C.F.R. §779.372(c)(4)” of the 1970 regulation.[[676]](#footnote-677)

In 1987, the DOL amended the *Field Operations Handbook* to clarify that service advisors should be treated as exempt under Section 213(b)(10)(A).[[677]](#footnote-678) The *Field Operations Handbook* entry observed that some courts had interpreted the statutory exemption to cover service advisors, and as a result of those decisions, it would “no longer deny the [overtime] exemption for such employees.”[[678]](#footnote-679) The DOL also made a commitment that its 1970 regulation would “be revised as soon as is practicable.”[[679]](#footnote-680)

However, it was not until 2008 that the DOL issued a notice of proposed rulemaking regarding its intentions to revise its regulations to bring them in line with existing court rulings by interpreting the exemption in Section 213(b)(10)(A) to cover service advisors.[[680]](#footnote-681) But, in 2011, the DOL announced that it was “not proceeding with the proposed rule.”[[681]](#footnote-682) Rather, the DOL issued a final rule that followed the language of the 1970 regulation and interpreted the statutory term “salesman” to mean only an employee who sells automobiles, trucks, or farm implements.[[682]](#footnote-683) In the preamble to final rule, the DOL said the following about why it was changing the practice that had been in effect for decades:

The Department notes that current § 779.372(c)(1) is based on its reading of 13(b)(10)(A) as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. The Department believes that this interpretation is reasonable and disagrees with the Fourth Circuit’s conclusion in Walton v. Greenbrier Ford, Inc., 370 F.3d 446, 452 (4th Cir. 2004), that the regulation impermissibly narrows the statute.[[683]](#footnote-684)

Shortly after the DOL issued its final rule in 2011, five current and former service advisors working for a Mercedes-Benz automobile dealership in Los Angeles filed suit alleging overtime pay violations. In *Encino Motorcars, LLC v*. *Navarro* (*Encino I*),[[684]](#footnote-685) the district court granted the dealership’s motion to dismiss on the ground that service advisors were covered by the Section 213(b)(10)(A) exemption. The Ninth Circuit reversed, siding with the DOL’s 2011 interpretation of the exemption while acknowledging contrary decisions issued by the Fourth Circuit, the Fifth Circuit, and the Montana Supreme Court.[[685]](#footnote-686) As the Ninth Circuit saw it, “[s]ervice advisors may be ‘salesmen’ in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition.”[[686]](#footnote-687) Citing *Chevron*,[[687]](#footnote-688) the Ninth Circuit concluded that while “there are good arguments supporting both interpretations of the exemption, where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice” and therefore held that “Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).”[[688]](#footnote-689)

After granting certiorari, the Supreme Court vacated and remanded the case to the Ninth Circuit,[[689]](#footnote-690) explaining that because the DOL’s 2011 interpretation of Section   
213(b)(10)(A) “was issued without the reasoned explanation that was required in light of the DOL’s change in position and the significant reliance interests involved,” the statutory provision must be construed without placing controlling weight on DOL’s interpretation.[[690]](#footnote-691)

[W]here the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. … But the agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.”[[691]](#footnote-692)

The Court concluded that an “‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,’ … and an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.”[[692]](#footnote-693)

On remand, the Ninth Circuit was asked to interpret the statute in the first instance, without according deference to the DOL’s interpretation. Even so, the Ninth Circuit, employing the distributive canon of statutory construction, matched “salesman” with “selling” and “partsman and mechanic” with servicing and again held that Section 213(b)(10)(A) did not exempt service advisors from the FLSA’s overtime pay requirements.[[693]](#footnote-694)

The Supreme Court again granted certiorari and reversed the Ninth Circuit.[[694]](#footnote-695) The Court began by noting that a service advisor is “obviously” a salesman. “The ordinary meaning of ‘salesman’ is someone who sells goods or services. … Service advisors do precisely that.”[[695]](#footnote-696) From there, the Court noted that service advisors were also “primarily engaged in … servicing automobiles,” citing to the Oxford English Dictionary definition of “servicing” and concluding “service advisors are integral to the servicing process.”[[696]](#footnote-697)

True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. … In other words, the phrase “primarily engaged in … servicing automobiles” must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.[[697]](#footnote-698)

The opinion summarily rejected the Ninth Circuit’s distributive canon analysis, reasoning that “the exemption uses the word ‘or’ to connect all of its nouns and gerunds, and ‘or’ is ‘almost always disjunctive.’ Thus, the use of ‘or’ to join ‘selling’ and ‘servicing’ suggests that the exemption covers a salesman primarily engaged in either activity.”[[698]](#footnote-699) The Court then denounced the Ninth Circuit’s “narrow construction” of the exemption.

We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no “textual indication” that its exemptions should be construed narrowly, “there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.” The narrow-construction principle relies on the flawed premise that the FLSA “pursues” its remedial purpose “at all costs.” But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement.

We thus have no license to give the exemption anything but a fair reading.[[699]](#footnote-700)

**G. Local Delivery Drivers**

Section 213(b)(11) exempts from overtime any driver or driver’s helper who makes local deliveries and is compensated on the basis of trip rates or some other delivery payment plan the Secretary of Labor finds has the general purpose and effect of reducing hours worked by such employees to or below the applicable maximum workweek.[[700]](#footnote-701)

DOL regulations describe the requirements and procedures for the submission of petitions to the WHD Administrator for approval of plans to operate under Section 213(b)(11).[[701]](#footnote-702) Recordkeeping regulations require certain records to be kept by employers operating under an approved plan.[[702]](#footnote-703)

The phrase “making local deliveries” is defined by regulation as follows:

Making local deliveries includes the activities customarily and regularly performed in the physical transfer, to customers of a business establishment situated within the rural or urban community or metropolitan area in which the establishment is located, of goods sold or otherwise disposed of to such local customers by such establishment. Included are activities performed by the driver or driver’s helpers as an incident to or in conjunction with making such deliveries, such as picking up and returning the delivery vehicle at the beginning and end of the workday, cleaning the vehicle, checking it to see that it is in operating condition, loading and unloading or assisting in loading or unloading the goods, and picking up empty containers or other goods from customers for return to the establishment.[[703]](#footnote-704)

The following are excluded from the concept of “making local deliveries:”

the carriage of passengers; the transportation of any load of goods that would normally require a round trip longer than a single workday for delivery and return to the starting point; any movement of goods which does not accomplish a transfer of possession from one person to another; [the] transportation of goods as a part of a process of production; and [the] transportation of goods within a local community or metropolitan area as an integral part of a carriage of such goods from a point outside such community or area to a destination within it, rather than as a part of the activities customarily performed in making local deliveries … in the same manner as deliveries of goods held locally for local disposition.[[704]](#footnote-705)

According to DOL regulations, a “plan of compensation on the basis of trip rates or other delivery payment plan” means

any plan whereby employees employed as drivers or drivers’ helpers making local deliveries are compensated for their employment on a basis such that the amount of payment which they receive is governed in substantial part by a system of wage payments based on units of work measurement such as numbers of trips taken, miles driven, stops made, or units of goods delivered (but not including any plan based solely on the number of hours worked) so that there is a substantial inducement to employees to minimize the number of hours worked.[[705]](#footnote-706)

An employer desiring to establish an exemption from overtime pay under Section 213(b)(11) may petition the WHD Administrator.[[706]](#footnote-707) Upon the filing of a petition,[[707]](#footnote-708) the Administrator will make further inquiry into the facts, and may require that notice of the petition be given to the affected employees so as to afford them an opportunity to submit facts or reasons supporting or opposing the employer’s request.[[708]](#footnote-709) If the Administrator determines that the petition fails to satisfy any of the requirements, then he or she shall deny the request for a finding or advise the petitioners that further consideration will be given to the submission if the deficiencies are remedied.[[709]](#footnote-710) However, if the Administrator determines that the factual situation as described in the petition is not one in which authority to make a finding is provided by Section 213(b)(11), no further consideration will be given.[[710]](#footnote-711)

If the Administrator determines that the petition meets all the requirements and is satisfied after considering all relevant facts and information available that the wage payment plan submitted has the general purpose and effect with respect to drivers or drivers’ helpers making local deliveries, of reducing the hours worked by such employees to, or below, the maximum workweek applicable under Section 207(a) of the FLSA, then the Administrator will make an appropriate finding to this effect, and notify the petitioner.[[711]](#footnote-712)

A finding by the Administrator that a wage payment plan has the purpose and effect required for exemption under Section 213(b)(11) shall be effective in accordance with its terms on notification to the petitioners.[[712]](#footnote-713) A finding may be amended or revoked by the Administrator at any time on his or her own motion or on written request of any interested person setting forth reasonable grounds therefor. Before taking such action, the Administrator shall afford interested persons an opportunity to present their views, and give consideration to any relevant information presented.[[713]](#footnote-714)

**H. Taxicab Drivers**

Section 213(b)(17) of the FLSA provides an overtime exemption for “any driver employed by an employer engaged in the business of operating taxicabs.”[[714]](#footnote-715) According to the *Field Operations Handbook*:

The taxicab business consists normally of common carrier transportation in small motor vehicles of persons and such property as they may carry with them to any requested destination in the community. The business operates without fixed routes or contracts for recurrent transportation. It serves the miscellaneous and predominantly local transportation needs of the community.[[715]](#footnote-716)

The exemption applies only to “drivers” employed by an employer engaged in the business of operating taxicabs.[[716]](#footnote-717)

The *Field Operations Handbook* sets forth the following examples of “nonexempt work”:

• acting as a dispatcher;

• performing general clerical duties;

• performing general mechanical or repair services on vehicles; and

• performing work, including driving, in connection with other business operations of the employer, such as operation of an airport limousine service, a pick-up and delivery service, or a moving and storage service.[[717]](#footnote-718)

Transferring baggage or freight not done in conjunction with transporting persons in the same vehicle is also considered non-exempt work.[[718]](#footnote-719) The exemption remains applicable provided that the amount of nonexempt work does not exceed 20 percent of the time worked by the driver during the workweek.[[719]](#footnote-720)

Courts have held that drivers of ambulette vehicles do not come within the taxicab exemption.[[720]](#footnote-721) Several courts have found that limousine drivers are not exempt under the taxicab exemption where services are furnished under a contract, trips are unmetered, vehicles do not have vacancy signs, and the drivers do not operate freely with initiative.[[721]](#footnote-722) However, in *Munoz-Gonzalez v*. *D.L.C*. *Limousine Service, Inc*.,[[722]](#footnote-723) the Second Circuit found that drivers employed by a suburban car service qualified for the taxicab exemption because (1) the company’s fleet consisted of chauffeured passenger vehicles; (2) the vehicles were available for hire by individual members of the general public; and (3) the vehicles took passengers wherever they wanted to go and did not cover fixed routes or adhere to fixed schedules or fixed termini.[[723]](#footnote-724)

**I. Domestic Servants Who Reside in a Household**

Section 213(b)(21) of the FLSA provides an overtime exemption for “any employee who is employed in domestic service in a household and who resides in such household.”[[724]](#footnote-725) In 2013, the DOL made changes to several regulations concerning domestic service employment, including a change to the language of 29 C.F.R. §552.102(b), titled “Live-in Domestic Service Employees.” That regulation now reads:

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act’s overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations part 785, § 785.23.

(b) If it is found by the parties that there is a significant deviation from the initial agreement, the parties should reach a new agreement that reflects the actual facts of the hours worked by the employee.[[725]](#footnote-726)

To be considered a live-in domestic service employee, the employee must (1) meet the definition of domestic service employment under 29 C.F.R. §552.101 and (2) reside on the employer’s premises on a “permanent basis” or for “extended periods of time.”[[726]](#footnote-727) Employees who work and sleep on the employer’s premises seven days per week and therefore have no home of their own other than the one provided by the employer are considered to “permanently reside” on the employer’s premises.[[727]](#footnote-728) When the Final Rule on the Application of the FLSA to Domestic Service was first published, the DOL wrote:

Further, in accordance with the Department’s existing policy, employees who work and sleep on the employer’s premises for five days a week (120 hours or more) are considered to reside on the employer’s premises for “extended periods of time.” *See* FOH §31b20. If less than 120 hours per week is spent working and sleeping on the employer’s premises, five consecutive days or nights would also qualify as residing on the premises for extended periods of time. … For example, employees who reside on the employer’s premises five consecutive days from 9:00 a.m. Monday until 5:00 p.m. Friday (sleeping four straight nights on the premises) would be considered to reside on the employer’s premises for an extended period of time. Similarly, employees who reside on an employer’s premises five consecutive nights from 9:00 p.m. Monday until 9:00 a.m. Saturday would also be considered to reside on their employer’s premises for an extended period of time.[[728]](#footnote-729)

Employees who work only temporarily, for example, for only a short period of time such as two weeks, for the given household are not considered live-in domestic service workers, because residing on the premises of such household implies more than temporary activity. In addition, employees who work 24-hour shifts but are not residing on the employer’s premises “permanently” or for “extended periods of time” as defined above are not considered live-in domestic service workers and, thus, the employers are not entitled to the overtime exemption.[[729]](#footnote-730) The 2013 amendments to the “Live-in Domestic Service Employees” regulations established recordkeeping requirements for domestic servants who reside in households. Prior to October 1, 2013, there was no requirement to keep track of employees’ hours of work.

***1. Recordkeeping Requirements***

DOL regulations now require an employer to keep a copy of the agreement between the live-in domestic servant and the employer and make, keep, and preserve a record showing the exact number of hours worked by the live-in domestic service employee.[[730]](#footnote-731)

***2. Third-Party Employment***

Third-party employers of employees engaged in live-in domestic service employment within the meaning of the DOL regulations, 29 C.F.R. §552.102, may not avail themselves of the overtime exemption provided by Section 213(b)(21) of the FLSA, even if the employee is jointly employed by the individual or member of the family or household using the services.[[731]](#footnote-732) However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption.[[732]](#footnote-733)

**J. Husbands and Wives Who Serve as House Parents**

Added to the FLSA in 1974, Section 213(b)(24) provides an overtime exemption for

any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000.[[733]](#footnote-734)

According to the *Field Operations Handbook*, any reasonable arrangement between the parties that takes into consideration all the pertinent facts, within the meaning of 29 C.F.R. §785.23, is permissible in determining hours worked by exempt house parents for minimum wage compliance purposes.[[734]](#footnote-735) The WHD has opined that Congress intended the Section 213(b)(4) exemption for house parents to only apply to married couples, not unmarried individuals.[[735]](#footnote-736)

**K. Motion Picture Theater Employees**

Section 213(b)(27) of the FLSA provides an overtime exemption for “any employee employed by an establishment which is a motion picture theater.”[[736]](#footnote-737)

The regulations define “motion picture theater” as a commercially operated theater primarily engaged in the exhibition of motion pictures, with or without vaudeville presentations.[[737]](#footnote-738) The term includes drive-in motion picture theaters, but does not extend to “such incidental exhibition of motion pictures as those offered to passengers on aircraft.”[[738]](#footnote-739) Nor are “legitimate theaters” primarily engaged in exhibiting stage productions covered by the exemption.[[739]](#footnote-740) If an establishment meets the definition of a “motion picture theater,” the exemption will be applicable irrespective of the annual dollar volume of sales of such establishment or of the enterprise of which it is a part.[[740]](#footnote-741)

The DOL has stated that establishments meet the requirements of this exemption when they devote at least 50 percent of their available presentation time to motion pictures.[[741]](#footnote-742) As with other “establishment based” exemptions, it is the “nature of the employer’s business, not the work performed by a particular employee,” that determines whether the exemption applies.[[742]](#footnote-743)

In a 2018 opinion letter, the WHD Administrator addressed whether Section 213(b)(27) applied to the food service operations of a motion picture theater.[[743]](#footnote-744) The employer owned motion picture theaters that provided in-theater dining, including some with a full-service restaurant on-site. Movies were shown at all times during the hours of operation at each location. Restaurant patrons were required to purchase a movie ticket to eat in the on-site restaurant.[[744]](#footnote-745) The food service operations were not separately incorporated and did not operate in any way as separate entities. For example, the restaurants did not have “separate entrances, operate under different names, file separate taxes, maintain separate bank accounts, place orders separately, pay invoices separately, or use separate bank accounts.”[[745]](#footnote-746) The primary revenue source for each of the employer’s establishments was the sale of movie tickets. Based on these facts, the DOL concluded that the employer’s food services operations were functionally integrated with its theater operations such that they operated as a single establishment.[[746]](#footnote-747) The opinion letter went on to note that “even if the theaters and food service operations were not functionally integrated, they would still constitute a single establishment under 29 C.F.R. § 779.305 because of the ‘interchange of employees between the units.’”[[747]](#footnote-748) The opinion letter concluded that   
“[e]ach location shows motion pictures consistently throughout its hours of operation—well in excess of the 50 percent threshold necessary to qualify as a ‘motion picture theater’ under Section 213(b)(27).”[[748]](#footnote-749)

**L. Employees of Amusement or Recreational Establishments Located in a National Park, National Forest, or on Land in the National Wildlife Refuge System**

Section 213(b)(29) provides an exemption from the overtime requirements of the FLSA for

any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.[[749]](#footnote-750)

Both requirements must be met for the exemption to apply.[[750]](#footnote-751) Further, to meet the requirements of the Section 213(b)(29) exemption, the employer must be an “amusement or recreational establishment” as that term is defined under Section 213(a)(3).[[751]](#footnote-752)

Section 213(b)(29) is a limited exemption, in that exempt employees are still entitled to an overtime premium of one and a half times the regular rate for hours worked in excess of 56 in a workweek.[[752]](#footnote-753) The sparse legislative history confirms that Section 213(b)(29) requires “concessioners providing accommodations, food and other consumer goods in ‘national parks’” to “pay employees time-and-one-half their regular rate of pay for all hours over 56 in a week.”[[753]](#footnote-754)

In *Chessin v. Keystone Resort Management*,[[754]](#footnote-755) the Tenth Circuit found the Section 213(b)(29) exemption applicable to an operator of ski resorts on national forest land pursuant to a special use permit issued by the Department of Agriculture authorizing a “four season recreation resort” that included lodging, retail shops, restaurants, and other activities besides skiing, where on an annual basis, ski operations represented the operator’s largest revenue-  
producing function.[[755]](#footnote-756) However, the court strictly construed the exemption’s 56-hour proviso, holding that for any workweek in which an employee covered by the partial exemption worked more than 56 hours without receiving an overtime premium, that employee was entitled to time-and-one-half compensation for each hour over 40 in that week, and not, as defendants contended, merely for each hour over 56.[[756]](#footnote-757)

V. Section 207 Exceptions From the Overtime Requirements of the FLSA

In several subparts of Section 207, certain types of employees are excepted from the overtime requirements of the FLSA, including

• workers employed pursuant to a collective bargaining agreement (Section 207(b)(1) and (2));

• employees of independently owned and controlled local enterprises engaged in the distribution of petroleum products (Section 207(b)(3));

• commission salespersons in retail or service establishments (Section 207(i));

• employees in hospitals or establishments engaged in care of the sick, aged, or mentally ill (Section 207(j));[[757]](#footnote-758)

• fire protection or law enforcement employees (Sections 207(k) and 207(p));[[758]](#footnote-759)

• certain domestic service employees (Section 207(l));[[759]](#footnote-760)

• employees in the tobacco industry (Section 207(m));[[760]](#footnote-761)

• employees on a charter basis of an electric railway or local trolley or motorbus carrier (Section 207(n));

• employees of a public agency that is a state, a political subdivision of a state, or an interstate governmental agency (Section 207(o));[[761]](#footnote-762)

• employees receiving remedial education (Section 207(q));[[762]](#footnote-763) and

• insurance claims adjusters working on insurance claims arising from major disasters (Section 207(s)).[[763]](#footnote-764)

The following sections discuss the exceptions that are not covered elsewhere in this treatise—Section 207(b)(1), (2), (3), and Section 207(i), (n), and (s).

**A. Section 207(b) Exceptions**

Section 207(b) provides three exceptions to the overtime requirements of the FLSA. The first two of these exceptions apply to employees covered by a collective bargaining agreement, and the third applies to employees of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products.

***1. Section 207(b)(1) and (2): Employment Pursuant to a Collective Bargaining Agreement***

Sections 207(b)(1) and (2) of the FLSA provide that if an employee is employed pursuant to an agreement made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board (NLRB), which provides that

(1) no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) [of this section] or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; …[[764]](#footnote-765)

then such employment does not violate Section 207(a) of the FLSA.

The FLSA does not have a daily overtime requirement. However, Section 207(b) provides certain partial exceptions from the general overtime provisions, each of which is conditioned on

the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate of pay for hours worked in the workweek *in excess of daily, as well as weekly, standards specified in either subsection (b)(1) or (b)(2).* Under these provisions, when an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which such an exception is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater.[[765]](#footnote-766)

The partial exceptions provided by Section 207(b) apply to an employee under the conditions specified in clause (1) and (2) of the subsection “if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.”[[766]](#footnote-767) As an example, an employee employed under the conditions specified for exception under Section 207(b) at an hourly rate of $10 works the following schedule:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Hours Worked | M | T | W | T | F | S | S | Total |
| 14 | 9 | 10 | 15 | 12 | 8 | 0 | 68 |

Number of overtime hours: Daily, 5 (hours over 12); weekly, 12 (hours   
over 56)[[767]](#footnote-768)

Since the weekly overtime hours are greater, the employee is entitled to pay for 12 hours at $15 an hour (1.5 times $10), a total of $180 for the overtime hours, and to pay at the regular rate for the remaining 56 hours (56 × $10) in the amount of $560 for a total of $740 for the week. If the employee had not worked the 8 hours on Saturday, the total hours worked in the week would have been 60, of which five were daily overtime hours, and four were weekly overtime hours. Since the daily overtime hours are greater, the employee is entitled to pay for 5 hours of daily overtime pay at time and one-half (5 × 1.5 x $10 = $75) plus pay at the regular rate of pay for the remaining 55 hours (55 × $10 = $550), making a total of $625 due for the week.[[768]](#footnote-769)

In *Cabunac v. National Terminals Corp.*,[[769]](#footnote-770) the Seventh Circuit found the Section 207(b)(1) exception inapplicable where the collective bargaining agreement did not specify that overtime compensation would be paid for all hours worked over 12 in a workday or 56 in a workweek as required under Section 207(b)(1), and the contract only designated two periods of 26 weeks instead of “any period of 26 consecutive weeks.”[[770]](#footnote-771)

To qualify for the Section 207(b)(1) and (2) exceptions, the union must be “certified as bona fide by the National Labor Relations Board.”[[771]](#footnote-772) On the few occasions where the NLRB has received opposition to a certification, the opposition has been based on the ground that it lacks jurisdiction to issue a certification because the employer is in the public sector. The NLRB has dismissed these objections, concluding that

it has authority to process petitions from labor organizations of government employees seeking certification as bona fide for purposes of sections 7(b)(1) and (2) of the FLSA. Consequently, if the tests for exception under section 7(b)(1) and (2) are met and the union receives such certification by the NLRB, the government employees covered under the agreement may qualify for such [exception].[[772]](#footnote-773)

A DOL opinion letter[[773]](#footnote-774) stated that Section 207(b) “requires certification of the collective bargaining representative by the NLRB.”[[774]](#footnote-775) However, it also noted that evidence that a bargaining agent is certified by an authority other than the NLRB—in this instance, the Nevada Employee-Management Relations Board—“might facilitate certification by the NLRB.”[[775]](#footnote-776)

Finally, an employer invoking the exceptions under Section 207(b)(1) and (2) must maintain a record naming each person employed pursuant to the collective bargaining agreement, the period each person is employed under the agreement, and the total hours each person has worked during any period of 26 consecutive weeks or during the specified period of 52 consecutive weeks, whichever exception is applicable.[[776]](#footnote-777)

***2. Section 207(b)(3): Employees of Petroleum Product Distributors***

Subject to certain specific conditions, Section 207(b)(3) provides a limited partial exception from the overtime requirements of the FLSA with respect to employees of an “independently owned and controlled local enterprise” engaged in the wholesale or bulk distribution of petroleum products.[[777]](#footnote-778) The exception was added to Section 207 in 1966 in conjunction with the repeal of a complete overtime exemption previously available to employees of such enterprises (formerly Section 213(b)(10)).[[778]](#footnote-779)

Three specific conditions must be met for this exception to apply:

(1) the annual gross volume of sales of the enterprise must be less than $1 million exclusive of excise taxes,

(2) more than 75 percent of the enterprise’s annual dollar volume of sales must be made within the state in which the enterprise is located, and

(3) no more than 25 percent of the enterprise’s annual dollar volume of sales may be made to customers engaged in the bulk distribution of such products for resale.[[779]](#footnote-780)

If these conditions are met, then an employee working for such an enterprise can receive compensation for employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the applicable minimum wage rate applicable to the employee, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, at a rate not less than one and one-half times the regular rate at which the employee is employed.[[780]](#footnote-781)

According to the regulations, this limited exception is designed to relieve covered enterprises from the FLSA’s general overtime pay requirements when its employees are engaged in activities of distributing petroleum products, which activities are affected by climatic, seasonal, and other pertinent factors characteristic of such business operations.[[781]](#footnote-782)

*a. Scope of the Exception*

Per the regulations, the employee as well as the enterprise must be engaged in the wholesale or bulk distribution of petroleum products for the exception to apply:

[W]henever an enterprise is so engaged, any of its employees will be considered to be “employed by an … enterprise … engaged in the wholesale or bulk distribution of petroleum products” if the duties of his employment require him to perform any operations or provide any services in carrying on such activities of his employer, and if the employee is not engaged in a substantial portion of his workweek in other activities which do not provide a basis for exception under Section 7(b)(3).[[782]](#footnote-783)

“Petroleum products” include gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquefied petroleum gas.[[783]](#footnote-784) “Bulk” distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer (whether or not at “wholesale”), as well as deliveries made in series on a single trip on a delivery route to the storage tanks or facilities of a number of customers from a bulk supply of the product transported by tank truck, motor transport, or other motor carrier operated by the enterprise.[[784]](#footnote-785)

An enterprise need not be exclusively engaged in the wholesale or bulk distribution of petroleum products to qualify for the Section 207(b)(3) exception.[[785]](#footnote-786) According to the regulations, if engaging in such distribution is a regular and significant part of its business, an enterprise that meets the other tests for exception under Section 207(b)(3) will be relieved of overtime obligations with respect to those workers engaged in such distribution activities.[[786]](#footnote-787) The same will be true with respect to employees engaging in related activities customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products.[[787]](#footnote-788)

The regulations provide that the exception is applicable not only to employees such as drivers, helpers, loaders, dispatchers, and warehouse workers who engage in the bulk delivery and storage of petroleum products, but also to office, management, sales, maintenance, custodial, and protective personnel, along with any others who engage in related functions customarily carried on by such an enterprise in conjunction with the wholesale and bulk distribution of the petroleum products.[[788]](#footnote-789)

*b. The “Enterprise” Requirement*

The Section 207(b)(3) tests for exception from the overtime requirements of the FLSA are based on the dollar volume of sales of the enterprise.[[789]](#footnote-790) All “related activities” performed either through unified operation or common control by any person or persons for a common business purpose are included in the calculation of sales volume.[[790]](#footnote-791)

According to the WHD, related activities may include the sale and distribution of tires, batteries, and automotive accessories when performed in conjunction with the wholesale or bulk distribution of petroleum products.[[791]](#footnote-792) Thus, provided all other requirements of Section 207(b)(3) are met, salespersons employed by the tire, battery, and accessory department of a qualifying enterprise are partially excepted from overtime requirements in any workweek in which they spend no more than 20 percent of their time in activities not related to the wholesale or bulk distribution of petroleum products.[[792]](#footnote-793)

Activities unrelated to the customary practices of the petroleum distribution industry are not within the scope of Section 207(b)(3).[[793]](#footnote-794) Examples include construction activities, operation of a sporting goods store, scrap paper and metal operations, and operation of a general repair garage. The WHD has also declined to deem the sale, installation, and servicing of air conditioners to be activities customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products.[[794]](#footnote-795)

As defined in the FLSA, the term “enterprise” “is roughly descriptive of a business rather than of an establishment or of an employer, although on occasion the three may coincide. The enterprise, however, is not necessarily coextensive with the entire business activities of an employer.”[[795]](#footnote-796) The enterprise can be a single establishment operated by one or more employers, or multiple establishments operated by one or more employers. A single employer may operate more than one enterprise.[[796]](#footnote-797)

*c. “Independently Owned and Controlled Local Enterprise”*

The phrase “independently owned and controlled local enterprise” appears in Section 207(b)(3) without further definition or explanation. According to the regulations, the term “local” is intended to embrace enterprises operated by merchants providing farmers, homeowners, country merchants, and others in its locality with petroleum products in bulk quantities or at wholesale.[[797]](#footnote-798) Referencing legislative history, the regulations suggest the term “independently owned and controlled” means an enterprise with its own office, bulk storage, and delivery facilities that pays its own personnel, and that in all respects conducts business independently and is not a subsidiary of nor controlled by a major oil company, although it may sell the branded products of such a company from a leased or owned service station.[[798]](#footnote-799)

In *Wirtz v. Lunsford*,[[799]](#footnote-800) the Sixth Circuit held that distributors of Gulf Oil products did not meet the “independent control” requirement of Section 207(b)(3) where the distributors paid a nominal monthly rental fee for use of the building and storage facilities owned by Gulf Oil under a lease that was to be valid only as long as the distributor continued to operate in compliance with an assignment agreement and wholesale prices were determined by the corporation’s invoice price.[[800]](#footnote-801) Because Gulf Oil retained the title to products pre-sale as well as proceeds of the sales and had the right to terminate all agreements at the end of any contract year, the court held that the distributor did not have “independent control” of the business even though it hired and oversaw its own employees.[[801]](#footnote-802)

Whether a distributor operating pursuant to a franchise or other contractual arrangement qualifies as “an independently owned and controlled … enterprise” depends on the terms of the agreements and arrangements between the parties.[[802]](#footnote-803)

*d. Sales Made Within the State*

Another requirement of the Section 207(b)(3) exception is that at least 75 percent of the sales of the enterprise be made “within the state in which such enterprise is located.”[[803]](#footnote-804) Although, generally speaking, whether a sale of goods or services is made to an out-of-state customer is a question of fact,[[804]](#footnote-805) the regulations provide that sales made to the casual cash-and-carry customer who is indistinguishable from the mass of customers visiting the establishment are “sales made within the State” even if the seller knows or has reason to believe—because of proximity to the state line or frequent patronage by tourists—that some of the customers reside outside the state.[[805]](#footnote-806) However, where an out-of-state company, in the regular course of dealing, picks up the petroleum products at the bulk storage station of the enterprise and transports them out of state in its own trucks, that sale is to an out-of-state customer.[[806]](#footnote-807)

*e. Sales Made to Other Bulk Distributors*

To satisfy the final requirement for the Section 207(b)(3) exception, an enterprise engaged in the wholesale or bulk distribution of petroleum products may not make more than 25 percent of its total sales to customers engaged in the bulk distribution of such products for resale.[[807]](#footnote-808) This requirement turns on (1) whether the customer is engaged in the distribution of petroleum products, (2) whether the customer is engaged in the *bulk distribution* of such products, and (3) whether the customer is engaged in such distribution for resale.[[808]](#footnote-809)

“Petroleum products” include gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquefied petroleum gas.[[809]](#footnote-810) “Bulk” distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer, as contrasted with typical small-quantity individual deliveries into the tank of a motor vehicle.[[810]](#footnote-811) The regulations logically define the word “resale” to mean the act of selling again.[[811]](#footnote-812)

**B. Section 207(i) Exception: Commissioned Employees in Retail or Service Establishments**

Section 207(i) provides that the FLSA’s overtime requirements are inapplicable to (1) employees of a “retail or service establishment,” (2) who are paid at a rate that “is in excess of one and one-half times the minimum hourly rate applicable,” and (3) who receive “more than half [their] compensation for a representative period … [from] commissions on goods or services.”[[812]](#footnote-813)

Although Section 207(i) is an exception to the overtime requirements of Section 207(a), and not an exemption under Section 213, courts interpreting Section 207(i) often disregard the distinction. For example, in *Gieg v. DDR, Inc*.,[[813]](#footnote-814) the Ninth Circuit referred to Section 207(i) as an “exemption.”[[814]](#footnote-815) The Seventh Circuit has described Section 207(i) as a “method of complying with the Act.”[[815]](#footnote-816) Since *Encino Motorcars*,[[816]](#footnote-817) courts have departed from the notion that the exception should be narrowly construed.[[817]](#footnote-818)

The DOL regulations addressing elements of Section 207(i) are found at 29 C.F.R. Part 779, subpart D, entitled “Exemptions for Certain Retail or Service Establishments.” Chapter 21 of the *Field Operations Handbook* is entitled “Retail or Service Establishment Exemptions From Sections 6 and 7.” Part H of that chapter deals with the Section 207(i) exemption.

The DOL’s regulations also contain recordkeeping requirements for employees subject to Section 207(i).[[818]](#footnote-819) These requirements are discussed in Chapter 14, Recordkeeping, §III.F [Recordkeeping Requirements for Employees With Unique Pay Systems Under Section 207 of the FLSA; Commissioned Employees of a Retail or Service Establishment (Section 207(i))].

The meaning of the phrase “retail or service establishment” has developed over time. Several courts in analyzing that question have looked at the historical treatment of that term under the FLSA.[[819]](#footnote-820)

***1. The Employer Must Be a “Retail or Service Establishment”***

The first requirement of Section 207(i) is that the employer must be a retail or service establishment.[[820]](#footnote-821) Section 207(i) does not define the term “retail or service establishment.”[[821]](#footnote-822) Instead, courts have applied the definition of that term contained in the now-repealed FLSA provision, Section 213(a)(2):

A “retail or service establishment” shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.[[822]](#footnote-823)

The DOL regulations also provide that the definition found in the former Section 213(a)(2) should be applied in the Section 207(i) context.[[823]](#footnote-824)

In addition to adopting the Section 213(a)(2) definition of a “retail or service establishment,” the DOL regulations[[824]](#footnote-825) also set forth (1) “characteristics and examples of retail or service establishments”;[[825]](#footnote-826) (2) “establishments outside ‘retail concept’ not within statutory definition”;[[826]](#footnote-827) (3) the fact that “a retail or service establishment must be open to [the] general public”;[[827]](#footnote-828) and (4) the “inapplicability of ‘retail concept’ to some types of sales or services of an eligible establishment.”[[828]](#footnote-829) In addition, the regulations provided lists of establishments that lacked the “retail concept”[[829]](#footnote-830) and those whose sales and services may have been recognized as retail.[[830]](#footnote-831) However, these lists were heavily criticized by the courts for a number of different reasons and, in 2020, the DOL withdrew each of these partial lists without notice or comment.[[831]](#footnote-832) In its Summary of the final rule withdrawing those lists, the DOL wrote:

In this final rule, the Department of Labor (Department) withdraws the “partial list of establishments” that it previously viewed as having “no retail concept” and categorically unable to qualify as retail or service establishments eligible to claim the section 7(i) exemption; and the “partial list of establishments” that, in its view, “may be recognized as retail” for purposes of the exemption. Removing these lists promotes consistent treatment when evaluating section 7(i) exemption claims by treating all establishments equally under the same standards and permits the reevaluation of an industry’s retail nature as developments progress over time. This withdrawal will also reduce confusion, as the list of establishments that “may be recognized as retail” did not necessarily affect the analysis as to whether any particular establishment was, in fact, retail.[[832]](#footnote-833)

A number of courts have criticized the DOL regulations that set out the characteristics of a retail or service establishment as applied in Section 207(i), refusing to accord them any deference, because they lacked the power to persuade.[[833]](#footnote-834)

In *Alvarado v. Corporate Cleaning Services, Inc.*,[[834]](#footnote-835) the Seventh Circuit outright rejected the factors used by the DOL to determine whether an entity was a “retail or service establishment,” disagreeing with those courts that followed the regulations. It found that a definition meant for the Section 213(a)(2) exemption should not apply to the commission exemption:

The Department’s definition comes from section 213(a)(2), which as we’ve noted was the intrastate business exemption. This definition made sense in that context: if Congress’s purpose was to exempt local mom and pop stores from wide-sweeping federal labor legislation (and not just from the overtime requirement), courts would want to ensure that most of the local stores’ output would remain within the state—in other words that they are operating on a small scale in the community. The Department of Labor and some courts, see *Gieg v. DDR, Inc.*, *supra*, 407 F.3d at 1047–49; *Reich v. Delcorp, Inc.*, *supra*, 3 F.3d at 1183 (8th Cir. 1993); *Martin v. The Refrigeration School, Inc.*, 968 F.2d 3, 6–8 (9th Cir. 1992), have woodenly ported the definition from section 213(a)(2) to the commission exemption with no sensitivity to the very different purpose of that exemption.[[835]](#footnote-836)

The Seventh Circuit observed that “[a] retail establishment sounds like a store” while the term “‘service establishment’ is much broader” and encompassed the defendant in the case before it, a window washing company, as the company “is selling a service, not goods, and that as we have seen is supportive of the exemption. Demand for services often varies, and when demand drops the seller cannot make up for it, as a maker of goods can do, by producing for inventory rather than for immediate sale.”[[836]](#footnote-837)

Some district courts have agreed with *Alvarado*,[[837]](#footnote-838) while others have not.[[838]](#footnote-839)

As evidenced in the language of the final rule, the DOL, with the blessing of some courts, has defined a “retail or service establishment” in accordance with the statutory definition found in the repealed Section 213(a)(2):

[A]n establishment to be a “retail or service establishment:” (a) Must engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale.[[839]](#footnote-840)

*a. Establishment in the Retail or Service Sector*[[840]](#footnote-841)

Establishments do not have to be owned by a business to qualify as a retail or service establishment. In *English v. Ecolab, Inc*.,[[841]](#footnote-842) the court held that a pest elimination service specialist’s home office was a qualifying establishment given the availability of direct, two-way communication with the public through a wide range of communication devices.[[842]](#footnote-843) Thus, telephone contact is sufficient to satisfy the public accessibility requirement.[[843]](#footnote-844) As discussed in the following subsections, businesses may qualify as retail or service establishments even if their customers and end users are predominantly commercial entities.[[844]](#footnote-845) Moreover, courts have held that a business need not be frequented by customers every day to qualify as a retail or service establishment.[[845]](#footnote-846) However, the DOL offers the following caution:

Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public. An establishment, however, does not have to be actually frequented by the general public in the sense that the public must actually visit it and make purchases of goods or services on the premises in order to be considered as available and open to the general public. A refrigerator repair service shop, for example, is available and open to the general public even if it receives all its orders on the telephone and performs all of its repair services on the premises of its customers.[[846]](#footnote-847)

*b. Retail Concept*

In *Idaho Sheet Metal Works v. Wirtz*,[[847]](#footnote-848) the Supreme Court deemed the since-repealed Section 213(a)(2) “retail or service establishment” exemption inapplicable to both (1) a company operating a plant that employed 12 persons to fabricate, install, and maintain sheet metal products, where 60 percent of sales were to the general public but 83 percent of the company’s gross income was derived from work done on equipment used by five potato-processing companies; and (2) a franchised tire dealer employing 47 employees to sell, recap, and repair tires, where more than half its gross income came from sales and repairs of tires furnished to businesses operating heavy trucks. In reaching its conclusion, the Court pontificated on the term “retail or service establishment:”

Plainly the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use. As examples of sales that could qualify as retail, the House Conference Report lists those made “by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc. …” Of course Congress’ conceded intent to overrule the *Roland* principle means sales of such goods or services can be retail “whether made to private householders or to business users,” but the goods and services listed nearly all share the common characteristic that they are often purchased by householders. …

What is important for this decision is that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. An indisputable example is the sale of farm implements. Another instance is trucks, at least of some varieties, whose “retailability” is assumed in the legislative history, and confirmed by the presence of another exemption in the Act that would otherwise be difficult to understand. We cannot draw a precise line between such articles and those like industrial machinery which can never be sold at retail, but a few characteristics of items like small trucks and farm implements may offer some guidance: *their employment is very widespread as is that of consumer goods; they are often distributed in stores or showrooms and by means not dissimilar to those used for consumer goods; and perhaps it can be said that they are very frequently used in commercial activities of limited scope.* While the list of strictly commercial items whose sale can be deemed retail is presumably very small, their existence precludes use of the uncomplicated “consumer goods” test proposed by the Administrator in 1949.[[848]](#footnote-849)

Within the category of goods and services that can be sold at retail, naturally not every sale can be so classified. The exemption itself excludes any sale for resale and, beyond that, references in the legislative history and common parlance certainly suggest that the term “retail” becomes less apt as the quantity and the price discount increase in a particular transaction.Drawing on the Supreme Court’s guidance, the DOL regulations provide that a retail or service establishment must possess a “retail concept,”[[849]](#footnote-850) and have certain characteristics:

Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. … Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, and other such local establishments.[[850]](#footnote-851)

Although the DOL has withdrawn regulations 29 C.F.R. §779.317 and 29 C.F.R. §779.320 (lists of establishments lacking the retail concept and potentially having a retail concept),[[851]](#footnote-852) one district court has rejected an argument that the DOL’s withdrawal of 29 C.F.R. § 779.317, which included insurance on a non-exhaustive partial list of industries that lacked a retail concept, meant that establishments in the insurance industry can now qualify for the exemption.[[852]](#footnote-853) The court reasoned that the withdrawal of the regulation did not change the long-standing precedent that there was no “retail concept” in the defendant’s insurance business.[[853]](#footnote-854)

The DOL has since opined regarding several industries that had previously appeared on those lists. For example, in a 2020 opinion letter the DOL noted:

Until recently, the Department’s regulations (former 29 C.F.R. §779.317) listed “waste removal contractors” among a list of establishments that categorically could not qualify as a “retail or service establishment” under any circumstances because they lacked a retail concept … .With the withdrawal of the list, WHD now applies the same analysis to all establishments to determine their “retail concept,” thus reading the Section 7(i) exemption more consistently … . Establishments that had been listed as lacking a retail concept, including waste-removal contractors, may now qualify as retail or service establishment.[[854]](#footnote-855)

The opinion letter went on to conclude that the pumping of liquid waste at commercial oil fields into tanks, and the hauling of those tanks to disposal sites, had a retail concept because although these tasks were performed for a commercial user, they did not require the use of specialized facilities or equipment and the services were not different services from those provided for the general consuming public.[[855]](#footnote-856)

Similarly, the Administrator acknowledged in a 2021 opinion letter that “employment agencies” were among a list of establishments that categorically could not qualify as a “retail or service establishment” under any circumstances and that courts had relied on that list to hold staffing agencies as not a “retail or service establishment” that could qualify for the Section 207(i) exemption.[[856]](#footnote-857) In the 2021 opinion letter, the Administrator took note of the 2020 opinion letter and concluded that, although staffing firms had been listed as lacking a retail concept, “WHD sees no reason why staffing firms cannot also qualify … in light of the Department’s new practice of affording the same analysis to all establishments.”[[857]](#footnote-858) For the following reasons, the Administrator concluded that a “typical staffing firm” could qualify for the Section 207(i) exemption:

[S]taffing firms may provide recruitment services to businesses in the general public, which may serve the employment needs of the community in which the businesses are located. … the placement of a worker with a business is the “end of the stream of distribution” for recruitment services. … staffing firms do not typically place workers “in bulk,” thus seemingly satisfying the “small quantities” criterion. And … staffing firms do not engage in manufacturing.[[858]](#footnote-859)

WHD has yet to withdraw *Field Operations Handbook* Chapter 21c, a chapter that sets forth many examples of industries that the DOL believes have a retail concept and others that it believes do not. “The examples selected have been chosen primarily to serve as guides in those situations where the principle involved is of widespread application or where field experience has indicated a specific need.”[[859]](#footnote-860)

*(i.) Financial Services*

In *Mitchell v. Kentucky Finance Co., Inc*.,[[860]](#footnote-861) the Supreme Court held that enterprises in the financial field, such as banks, credit companies, and personal loan companies, lacked the retail or service concept necessary to qualify as retail or service establishments pursuant to (the since-repealed) Section 213(a)(2).[[861]](#footnote-862) Although *Mitchell* interpreted the term “retail or service establishment” under Section 213(a)(2), courts have looked to *Mitchell* when deciding whether an establishment is a retail or service establishment under Section 207(i).[[862]](#footnote-863) Accordingly, several lower courts have ruled that mortgage and loan companies are not subject to the Section 207(i) exemption.[[863]](#footnote-864)

However, in *Gatto v. Mortgage Specialists of Illinois, Inc.*,[[864]](#footnote-865) the district court determined that a mortgage loan officer for a loan brokerage met the criteria for the Section 207(i) exemption. The court reasoned that, because the employer did not actually extend credit or hold mortgages but instead helped its customers obtain loans from lending institutions, it was not a part of the “financial industry” as that term was used in *Mitchell*.[[865]](#footnote-866)

Other courts have criticized *Gatto.* For example, in *Partida v. American Student Loan Corp.*,[[866]](#footnote-867) an Arizona district court rejected *Gatto* as incompatible with Ninth Circuit precedent, ultimately concluding that a company in the business of matching individuals with third-party lenders to consolidate student loans was “mid-stream” between the public and the lenders, not at the end of the stream of commerce, and thus not retail.[[867]](#footnote-868) In *Saunders v. Ace Mortgage Funding, Inc.*,[[868]](#footnote-869) the court opined that *Gatto*, albeit persuasive, “strained to bring a financial business within the definition of a retail or service establishment on the basis that its activities were limited to brokering, not lending,”[[869]](#footnote-870) and found that a mortgage company licensed in 13 states that did a small amount of direct lending was part of the financial industry and, therefore, non-retail*.*[[870]](#footnote-871)

In *Gieg v. DDR, Inc.*,[[871]](#footnote-872) the Ninth Circuit held that finance and insurance managers employed by retail automobile dealerships were eligible for the Section 207(i) exemption because an automobile dealership was not a financial institution.[[872]](#footnote-873)

In *Parker v*. *ABC Debt Relief, Ltd.*,[[873]](#footnote-874) the court held that a debt negotiation and settlement business lacked a “retail concept,” noting that “Defendants’ debt negotiation and settlement business was similar to other establishments that lack a ‘retail concept’—such as banks, brokers, credit companies, and loan offices.”[[874]](#footnote-875)

*(ii.) Cleaning and Repair Services*

In *Reich v. Delcorp, Inc.*,[[875]](#footnote-876) the Eighth Circuit held that an in-home carpet cleaning business qualified as a retail or service establishment.[[876]](#footnote-877) Similarly, the DOL opined that the term “retail or service establishment” encompassed a carpet and upholstery cleaning service:

They sell their services to the general public. … [They] do not manufacture their product and are at the end of the distribution stream when they perform the cleaning process. Finally, carpet and upholstery cleaning is provided for the comfort and convenience of the public in its daily living.[[877]](#footnote-878)

With respect to “services,” the DOL has found that the retail concept does not apply to construction contractors, but does extend “to businesses that supply the general public with household appliances, including those that perform incidental services on such goods when necessary, such as a refrigerator repair shop.”[[878]](#footnote-879) The DOL has further found that the retail concept applies to establishments engaged in the retail sale to the general public of plumbing and heating equipment, including the incidental installation of such goods at an additional charge,[[879]](#footnote-880) as these establishments provide “plumbing services that serve the everyday needs of the community. Plumbing contractors, on the other hand, are primarily engaged in home construction and remodeling projects involving major structural or installation work. The types of services … members provide are more akin to a repair shop than a plumbing contractor.”[[880]](#footnote-881) According to the DOL:

Such repair services may qualify under Section 207(i) even when they are sometimes performed for a commercial user rather than a homeowner, so long as the commercial repair services do not require the use of specialized facilities or equipment and the services are not different services than those provided for the general consuming public.[[881]](#footnote-882)

Similarly, one court has found that a pest elimination service had a retail concept even though the company serviced commercial as well as residential customers.[[882]](#footnote-883) Among other factors, the court found that the services were not for resale and met the everyday needs of the public to have a pest-free community.[[883]](#footnote-884)

In *Alvarado v. Corporate Cleaning Services, Inc.*,[[884]](#footnote-885) the Seventh Circuit found that a company providing professional interior and exterior window-washing services to commercial and residential customers, including office and residential high rises, hotels, schools and universities, shopping centers, and stadiums, qualified as a retail or service establishment:

[Corporate Cleaning Services, Inc.] is selling a service, not goods, and that as we’ve seen is supportive of the exemption. … As a service establishment CCS meets the “retail or service establishment” requirement in section 207(i). If that weren’t enough (though it is), CCS is probably best described as a retail service establishment. It sells its window-cleaning services to building owners and managers; they are the ultimate customers; they do not resell the window cleaning, and therefore CCS is not a wholesaler.[[885]](#footnote-886)

*(iii.) Learning Institutions*

In *Martin v. The Refrigeration School, Inc.*,[[886]](#footnote-887) the Ninth Circuit held that “trade schools” were not retail or service establishments, explaining that while

[e]lementary schools and high schools are retail establishments because they instill learning that serves society’s basic need that its members be educated[,] [s]pecialized schools such as professional and graduate institutions are not because their role in the community is to produce graduates who are able to serve society’s needs. The latter is more analogous to the “manufacturing” than the “retail” concept.[[887]](#footnote-888)

Applying a similar analysis but reaching the opposite conclusion, in *Viciedo v. New Horizons Computer Learning Center of Columbus, Ltd*.,[[888]](#footnote-889) an Ohio district court held that a company engaged in the sale of computer software training services was a retail or service establishment because not only did the company derive more than 75 percent of its annual sales from the sales of goods or services that were not for resale, but it was also recognized as a retailer within the computer industry.[[889]](#footnote-890) Distinguishing the refrigerator repair schools deemed non-retail in *Martin*, the court observed that “schools that educate on the use of computer programs serve the everyday needs of the community.”[[890]](#footnote-891)

Similarly, in *Selz v. Investools, Inc.*,[[891]](#footnote-892) a Utah district court determined that a company that created and marketed products and services aimed at educating individuals on investing in exchange markets online qualified as a retail or service establishment. The court explained that (1) the company marketed tools to aid individuals in independently investing personal funds in its own industry and not part of the educational, financial, or investment counseling industries, which lack a retail concept; (2) the educational materials were for personal use, the essence of the “retail concept,” and the products were “recognized as retail in the industry”; (3) it did not matter that the company’s products were sold through a call center rather than a traditional retail location because sales were to the general public; (4) the everyday needs of the community were being served because “investing … is a basic need of members of the community in today’s world, and [the company] serves that need”;[[892]](#footnote-893) and (5) the fact that the defendant “developed and produced” the educational materials being sold did not bar the exemption for sales center employees where the sales center was a distinct establishment from the product development areas, occupying a separate floor from the other parts of the company.[[893]](#footnote-894)

*(iv.) Cable/Satellite Installation and Services*

In *Owopetu v. Nationwide CATV Auditing Services, Inc.*,[[894]](#footnote-895) a Vermont district court found that a cable television subcontractor that provided service, installation, and repair of cable and broadband equipment to residential customers of Time Warner Cable (TWC) and was paid by TWC according to a rate schedule had a retail concept,[[895]](#footnote-896) because the services were considered to be “retail” within the industry, were not resold, met the everyday needs of the community, and the customers were at the very end of the stream of distribution.[[896]](#footnote-897)

A similar result was reached by a Georgia district court in *Jones v. Tucker Communications, Inc.*,[[897]](#footnote-898) where the court explained:

[Tucker] provides installation and repair services to the general public—cable and internet users—for their comfort and convenience. Certainly both the provision of internet and cable services and the necessary installation and repair of these services meet the everyday needs of the community. … Finally, Tucker disposes of its services in small quantities and does not take part in the manufacturing process.[[898]](#footnote-899)

The court found that even though Tucker contracted with Charter Communications, it provided its repair and installation services to the end users—the cable and Internet service consumers.[[899]](#footnote-900)

Other courts have similarly found cable and Internet installation to have a “retail concept”;[[900]](#footnote-901) in some cases the issue was not even disputed.[[901]](#footnote-902)

*(v.) Timeshare and Real Estate Companies*

In *Williams v. Trendwest Resorts, Inc.*,[[902]](#footnote-903) a Nevada district court held that a real estate developer selling transferable and perpetual ownership interests in vacation timeshares lacked a retail concept because ultimately customers received non-retail interests that operated much like real estate.[[903]](#footnote-904) “Therefore, Defendant is not selling goods or services under the FLSA.”[[904]](#footnote-905) Arriving at the same conclusion, a Florida district court observed in *Davidson v. Orange Lake County Club, Inc.*[[905]](#footnote-906) “that timeshare sales companies [were] akin to the ‘real estate companies’ listed in Section 779.317 of the Code of Federal Regulations as lacking a retail concept.”[[906]](#footnote-907)

Likewise, the district court in *Russell v. Promove, LLC*[[907]](#footnote-908)held that the matching of apartment-seekers with landlords lacked a retail concept, because this type of business is closely akin to the role of a broker.[[908]](#footnote-909)

*(vi.) Travel Agencies*

In *Reich v. Cruises Only, Inc.*,[[909]](#footnote-910) a Florida district court held that a travel agency specializing in cruise vacations was a retail or service establishment. It reasoned that the agency sold vacation packages to the general public, met the everyday needs of the community (even though it was not used by everyone in the community on a daily basis), was at the very end of the stream of distribution, disposed of its products and skills in small quantities, and was not part of a manufacturing process.[[910]](#footnote-911)

*(vii.) Other Industries*

In *Wells v. Taxmasters, Inc.*,[[911]](#footnote-912) the district court held that a provider of tax-consulting and tax-preparation services, more than 75 percent of whom were consumers, was a retail or service establishment. The court, noting that the Fifth Circuit had declined to follow the DOL’s partial list of establishments lacking a retail concept,[[912]](#footnote-913) focused on the Secretary’s four criteria for identifying establishments with a retail concept.[[913]](#footnote-914) It found that the company’s tax resolution services clearly were “services for the comfort and convenience of such public in the course of its daily living,”[[914]](#footnote-915) that the company provided “small quantities of the products and skills” of its organization directly to the end consumer, and “did not take part in the manufacturing process.”[[915]](#footnote-916) The court acknowledged a consumer does not require tax services on a daily basis “any more than they require frequent visits to the undertaker. Yet these services derive inevitably from the only two certainties in life”[[916]](#footnote-917) and were no less retail in nature than the sale of “automobiles, … radios and refrigerators,” or the “incidental services on such goods when necessary.”[[917]](#footnote-918)

Although the DOL lists telephone companies among the types of businesses that lack a retail concept, in *Haskins v. VIP Wireless* *LLC* *300*,[[918]](#footnote-919)the district court held that a company that marketed telecommunications equipment for various telecommunications companies, and sold cellular telephones and related equipment/services as the agent of these phone service providers, was not a telephone company and qualified as a retail or service establishment. In support of its conclusion, the court noted that the company sold goods or services to the general public, cellular telephone service has become an “everyday need” of the residents in the local community, and the goods and services sold were “at the very end of the stream of distribution.”[[919]](#footnote-920)

In an opinion letter, the Administrator determined that a business-to-business company that sold a technology platform to merchants qualified as a retail or service establishment because (1) it sold services to end users even if the sales were primarily online; (2) the sales were retail, not wholesale; and (3) the platforms were not resold.[[920]](#footnote-921) On the other hand, a district court held that a company in the business of providing credit and debit/check card processing services and processing equipment to merchants did not have a “retail concept” because it did not sell goods or services to the general public.[[921]](#footnote-922) In *La Parne v. Monex Deposit Co*.,[[922]](#footnote-923) a California district court held that there was a retail concept to the sale of precious metals to the general public by advertising on television and on a public website. In arriving at this conclusion, the court expressed the view that “everyday needs” should be deemed to mean “basic” or “integral” needs of members in the community, and found that precious metals were purchased as collectibles or for investment purposes.[[923]](#footnote-924) The court acknowledged that investors may intend to resell the precious metals for a profit, but there was still a “retail concept” to the business because there was no set plan for resale at the time of the sale and, therefore, the goods were at the end of the stream of distribution.[[924]](#footnote-925) In this way, the sale of precious metals was distinguished from the example given in the regulations where raw material is sold to a manufacturer for incorporation into another good to later be resold.[[925]](#footnote-926)

In *Ebersole v. American Bancard, LLC*,[[926]](#footnote-927) the court held that an online ticket broker acted as a retailer—as opposed to a wholesaler—within the ticket resale market, where the broker sold tickets directly to end-user customers, customers did not purchase tickets in order to resell them, and selling individual tickets to events was recognized as “retail” in the ticket sales industry.[[927]](#footnote-928)

In *Carlton v. Jhook Investments, Inc*.,[[928]](#footnote-929) the court found that a tow truck company did not have a “retail concept” because (1) many of the calls received for tow services originated from the police, and “service calls from public officials do not fall with the traditional understanding of a ‘retail concept’”;[[929]](#footnote-930) and (2) the defendants failed to present record evidence that at least 75 percent of their annual dollar volume of sales of goods or services came from retail sales during the relevant period.[[930]](#footnote-931) On the other hand, a district court in *Simmons v. Futo’s, Inc.*,[[931]](#footnote-932) held a towing service to be a retail or service establishment because the services it provided was comprised of towing vehicles from one place to another (not as a component of another service), and because at least 75 percent of those services were recognized as retail in the towing industry.[[932]](#footnote-933)

*c. “Recognized as Retail Sales or Services in the Particular Industry”*

The second component of the “retail or service establishment” definition focuses on whether the sales or services of the business in question are recognized as “retail” in its particular industry.[[933]](#footnote-934) The DOL’s regulations provide that,

[t]o determine whether the sales or services of an establishment are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms “recognized” and “in the particular industry,” and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.[[934]](#footnote-935)

Section 779.323 states the following:

In order to determine whether a sale or service is *recognized* as a retail sale or service in the “particular industry” it is necessary to identify the “particular” industry to which the sale or service belongs. Some situations are clear and present no difficulty. … In other situations, a sale or service is not so easily earmarked and a wide area of overlapping exists.[[935]](#footnote-936)

And Section 779.324 states that

the basis for the determination as to what is recognized as retail “*in the particular industry*” is wider and greater than the views of an employer in a trade or business, or an association of such employers. … Such a determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry, would all be relevant in the determination of the question.[[936]](#footnote-937)

According to the regulations, a number of sources of information are available to assist in determining whether a sale or service is recognized as a “retail” sale or service in a particular industry, including

(a) The legislative history of the Act as originally enacted in 1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term “retail or service establishment” is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary’s experience in the intervening years in interpreting and administering the Act.[[937]](#footnote-938)

In some cases, the determination of whether sales are regarded as “retail” within a particular industry has been based on the testimony of experts, individuals employed by the employer, or trade associations.[[938]](#footnote-939) Courts also have relied on decisional law developed in cases involving employers in the same industry.[[939]](#footnote-940)

A subcontractor may qualify as a retail establishment even though it serves the needs of the general contractor as opposed to the general public.[[940]](#footnote-941)

The Seventh Circuit’s decision in *Alvarado v. Corporate Cleaning Services, Inc.*[[941]](#footnote-942) is illustrative of the point. The court held that a window-cleaning service was a retail establishment, explaining that

[CCS] sells its window-cleaning services to building owners and managers; they are the ultimate consumers; they do not resell the window cleaning, and therefor CCS is not a wholesaler. No doubt the building owners and managers pass on (so far as market conditions allow) the cost of window cleaning to the occupants of the building. But that is not resale. It would be absurd to suggest that a dealer in motor vehicles, when it sells a truck to a moving company, is “wholesaling” the truck because the buyer will doubtless try to recover the cost of the purchase in the price he charges for his moving services, which utilize the truck.[[942]](#footnote-943)

Another issue raised by a subcontracting arrangement in the Section 207(i) context is whether the business is a “wholesale” business. According to DOL regulations, if an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, “it clearly cannot qualify as a retail and service establishment.”[[943]](#footnote-944) The DOL regulations then address the distinction between retail and wholesale operations:

(a) The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. … The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

(b) … In some industries, the sale of a small quantity at a discount may also be regarded as a wholesale sale, in which case it will be so treated for purposes of the exemption. Generally, as the Supreme Court has recognized (*Wirtz v. Steepleton General Tire Co*., 383 U.S. 1900), both the legislative history and common parlance suggest that “the term retail becomes less apt as the quantity and the price discount increases in a particular transaction.”[[944]](#footnote-945)

Several district courts have determined that the retail/wholesale distinction is inapplicable to the Section 207(i) exemption because “29 C.F.R. §779.328 ‘dealt with the distinction [between retail and wholesale] as it related to the §13(a)(2) exemption,’ an exemption that was ‘contingent on the size of the establishment and the types of transactions in which it engaged,’” and “‘[t]he retail/wholesale distinction does not serve the same purpose for the application of the §7(i) exemption, which focuses on the employee’s compensation rather than the employer’s size or business plan … .’”[[945]](#footnote-946)

In a cable installation industry case, the plaintiffs argued that the subcontractor was more wholesaler than retailer because it effectively provided its services in bulk quantities to the general contractor and did so at a discounted rate below what it could charge consumers on an individual basis.[[946]](#footnote-947) The court did not find this argument persuasive, however:

Even assuming that Nationwide delivers its services in bulk quantities (a conclusion that would be in significant tension with the finding that Nationwide serves the general public at the end of the distribution stream), and at discount prices (a proposition for which Mr. Owopetu offers no evidence), that would not negate Nationwide’s status as a retail establishment under Section 7(i).[[947]](#footnote-948)

*d. Sales Must Not Be Made for Resale*

The third component of the “retail or service establishment” definition looks at whether at least 75 percent of the sales made or services provided are not for resale.[[948]](#footnote-949)

The FLSA does not define the term “resale,” but DOL regulations and courts have applied the term’s “common meaning” and defined “resale” as “the act of ‘selling again.’”[[949]](#footnote-950) Elaborating, the regulation provides that

[a] sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold, whether in their original form, or in an altered form, or as a part, component or ingredient of another article.[[950]](#footnote-951)

The regulations also address “goods sold for use as raw materials in other products”:

Goods are sold for resale where they are sold for use as a raw material in the production of a specific product to be sold, such as sales of coal for the production of coke, coal gas, or electricity, or sales of liquefied-petroleum-gas for the production of chemicals or synthetic rubber. However, the goods are not considered sold for resale if sold for general industrial or commercial uses, such as coal for use in laundries, bakeries, nurseries, canneries, or for space heating, or ice for use by grocery stores or meat markets in cooling and preserving groceries and meat to be sold. Similarly, ice used for cooling soft drinks while in storage will not be considered sold for resale. On the other hand, ice or ice cubes sold for serving soft drinks or other beverages will be considered as sales for resale.[[951]](#footnote-952)

As a district court observed,[[952]](#footnote-953) the retail character of goods sold to industrial or commercial customers depends on the customers’ use of such goods; for example, coal sold as a raw material to produce electricity is “for resale,”[[953]](#footnote-954) but coal sold to businesses such as bakeries for purposes of fuel and/or heat is not “for resale.”[[954]](#footnote-955) The distinction turns on whether the good is sold to the end consumer in either its original or altered form, or consumed by the commercial or business entity for general uses.[[955]](#footnote-956)

The regulations also address “services for resale”:

The same principles apply in the case of sales of services for resale. A sale of services where the seller knows or has reasonable cause to believe will be resold is a sale for resale. Where, for example, an establishment reconditions and repairs watches for retail jewelers who resell the services to their own customers, the services constitute a sale for resale. Where a garage repairs automobiles for a secondhand automobile dealer with the knowledge or reasonable cause to believe that the automobile on which the work is performed will be sold, the service performed by the garage is a sale for resale. The services performed by a dental laboratory in the making of artificial teeth for the dentist for the use of his patients is a sale of services (as well as of goods) for resale. The services of a fur repair and storage establishment performed for other establishments who sell these services to their own customers, constitute sales for resale.[[956]](#footnote-957)

The four examples provided in this regulation “have in common the work of a specialty technician on a product or retail good that requires a greater level of care and/or service than a standard retailer can provide.”[[957]](#footnote-958)

In *English v. Ecolab, Inc*.,[[958]](#footnote-959) the plaintiffs contended that Ecolab’s sale of pest elimination services to commercial and business entities were “sales ‘for resale,’” relying on the DOL’s interpretation of that term as expressed in 29 C.F.R. 779.334,[[959]](#footnote-960) but the court did not agree: “Pest elimination services are not consistent with these examples. Ecolab service specialists do not fumigate goods that are then sold to the end consumer by a retailer.”[[960]](#footnote-961)

The court then looked to the last two sentences of 29 C.F.R. §779.334, which provides:

As in the case of the sale of goods, *in certain circumstances*, sales of services to a business for a specific use in performing a different service which such business renders to its own customers are in economic effect sales for resale as a part of the service that the purchaser in turn sells to his customers, even though such services are consumed in the process of performance of the latter service. For example, if a storage establishment uses mothproofing services in order to render satisfactory storage services for its customers, the sale of such mothproofing services to that storage establishment will be considered a sale for resale.[[961]](#footnote-962)

The court noted that the DOL does not explain what “certain circumstances” render a sale of nonrelated services a “resale,” except to provide the mothproofing example. The court held that the plaintiff’s argument that the sale of pest elimination services was one of the regulations’ “certain circumstances” was not persuasive, because it would mean that the sale of any service to a commercial entity would constitute a sale for resale if the distinction turned on whether the commercial customer passed the cost of such services on to the end consumer.[[962]](#footnote-963) The court decided that, in the absence of a more precisely articulated test for determining whether sales of distinct services were for “resale,” it would reach “the common sense conclusion that Ecolab pest elimination services are not for resale.[[963]](#footnote-964)

Other courts faced with the “resale” issue have addressed or relied on the regulations,[[964]](#footnote-965) while others have not even referenced them.[[965]](#footnote-966)

As the district court held in *Schwind v. E.W. & Associates, Inc*.,[[966]](#footnote-967) a resale does not occur when a company provides services directly to customers of third-party clients but is not compensated by the end-user customers themselves. In this case, the company was in the business of providing trainers who would train the client’s employees or the client’s business customers. The court explained:

It is clear that the services provided by EWA were not intended for resale. Defendants supplied trainers to clients who would train the client’s employees or the client’s business customers, whichever was required by the client. This places defendants’ services at the end of the stream of distribution, demonstrating that the services were not intended for resale. The regulations define resale as “selling again.” EWA did not sell a service that was then resold; rather, defendants provided a service to the end customer, even if it was their client’s customer. Consequently, we conclude that EWA did not provide services that were intended for resale.[[967]](#footnote-968)

The Seventh Circuit likewise concluded in *Alvarado v. Corporate Cleaning Services, Inc.*[[968]](#footnote-969) that the services provided by a professional interior and exterior window washing company to building managers and condominium boards were not for resale even though the building tenants benefitted from the services and the cost may have been accounted for in the rent.[[969]](#footnote-970)

In *Alvarado*, the DOL filed an amicus brief supporting the plaintiffs, in which it took a different view of “sales for resale”:

There is a well-established line of appellate cases (many of which are cited in the Department’s regulations) that view goods or services passed onto another via a third party as sales for resale. For example, in *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 654 (9th Cir. 1971), the Ninth circuit held that a towing company that towed cars for members of the National Auto Club and for local repair shops was engaged in a sale of services for resale because the Club and the repair shops passed the towing cost on to their customer in the form of increased membership fees and repair rates.[[970]](#footnote-971)

The Seventh Circuit distinguished the DOL’s cited authority:

The opinions cited to us as being contrary—*Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 653–54 (9th Cir. 1971); *Goldberg v. Furman Beauty Supply, Inc.*, 300 F.2d 16, 18–19 (3d Cir. 1962); *Goldberg v. Warren G. Kleban Engineering Corp.*, 303 F.2d 855, 857–59 (5th Cir. 1962); *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831, 834–35 (4th Cir. 1959)—involve a different statutory exemption from the commission exemption. See 29 U.S.C. § 213(a)(2); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 192–94 (1966). Section 213(a)(2) is an exemption for intrastate businesses from the Fair Labor Standards Act’s overtime and wage requirements. … [W]hy a definition meant for the intrastate business exemption should also apply to the commission exemption [is not clear from the Congressional Record]; the two provisions serve different [purposes].[[971]](#footnote-972)

In *Gieg v. DDR, Inc*.,[[972]](#footnote-973) the Ninth Circuit ruled that long-term automobile leases were not considered “for resale,” because neither the dealer nor the customer entered into a lease with the expectation that the vehicle would be promptly resold.[[973]](#footnote-974)

***2. “More Than Half of an Employee’s Compensation for a Representative Period Must Represent Commissions”***

Section 207(i) requires that “more than half [an employee’s] compensation for a representative period (not less than one month) represents commissions on goods or services.”[[974]](#footnote-975)

The FLSA does not define the term “commission.” In 1966, Congress added the term “bona fide commission rate” to Section 207(i):

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.[[975]](#footnote-976)

There is no legislative history that sheds light on the inclusion of this sentence[[976]](#footnote-977) or on the meaning of the term “commission.”[[977]](#footnote-978) The Third Circuit has held that “the ‘bona fide commission rate’ language is imprecise and capable of ambiguity,” leading the court to conclude that “the plain language of §207(i) does not provide sufficient guidance to govern the application of the statute in this case.”[[978]](#footnote-979)

Courts accordingly have looked to DOL regulations, DOL opinion letters, and case authority to interpret the term.

The purpose of the Section 207(i) exception is discussed in 29 C.F.R. §779.414, which provides:

Section 7(i) was enacted to relieve an employer from the obligation of paying overtime compensation to certain employees of a retail or service establishment paid wholly or in greater part on the basis of commissions. These employees are generally employed in so-called “big ticket” departments and those establishments or parts of establishments where commission methods of payment traditionally have been used, typically those dealing in furniture, bedding and home furnishings, floor covering, draperies, major appliances, musical instruments, radios and television, men’s clothing, women’s ready to wear, shoes, corsets, home insulation, and various home custom orders. There may be other segments in retailing where the proportionate amount of commission payments would be great enough for employees employed in such segments to come within the exemption. Each such situation will be examined, where exemption is claimed, to make certain the employees treated as exempt from overtime compensation under section 7(i) are properly within the statutory exclusion.[[979]](#footnote-980)

In 1970, the DOL issued interpretive regulations to provide guidance concerning the 1966 amendment.[[980]](#footnote-981) These regulations provide a list of the common compensation methods for retail or service establishment employees:

(a) Retail or service establishment employees are generally compensated (apart from any extra payments for overtime or other additional payments) by one of the following methods:

(1) Straight salary or hourly rate: Under this method of compensation the employee receives a stipulated sum paid weekly, biweekly, semimonthly, or monthly or a fixed amount for each hour of work.

(2) Salary plus commission: Under this method of compensation the employee receives a commission on all sales in addition to a base salary (see paragraph (a)(1) of this section).

(3) Quota bonus: This method of compensation is similar to paragraph (a)(2) of this section except that the commission payment is paid on sales over and above a predetermined sales quota.

(4) Straight commission without advances: Under this method of compensation the employee is paid a flat percentage on each dollar of sales he makes.

(5) Straight commission with “advances,” “guarantees,” or “draws.” This method of compensation is similar to paragraph (a)(4) of this section except that the employee is paid a fixed weekly, biweekly, semimonthly, or monthly “advance,” “guarantee,” or “draw.” At periodic intervals a settlement is made at which time the payments already made are supplemented by any additional amount by which his commission earnings exceed the amounts previously paid.[[981]](#footnote-982)

As the regulations further note, the above listing reflects the typical methods of compensation for employees working in a retail or service establishment, but it is not exhaustive of other pay practices that may exist.[[982]](#footnote-983) However, “by definition, all of these compensation plans, except for the ‘straight salary or hourly rate’ may qualify as ‘bona fide commission plans’ under Section 207(i).”[[983]](#footnote-984) Two of the above-listed compensation methods have been at issue when determining whether the Section 207(i) exception applies. These are discussed more fully below.

*a. Straight Commissions Without Advances*

Although 29 C.F.R. §779.413(a) does not define what a “commission” is, it defines a “straight commission” as “a flat percentage on each dollar of sales [the employee] makes.”[[984]](#footnote-985) The DOL has asserted that although the regulation does not define what a “commission” is, it “highlight[s] the need for some correlation between an employee’s compensation and the cost of the goods and services sold.”[[985]](#footnote-986) This relationship is typically expressed as a percentage of sales.

The percentage of sales method of defining a “commission” is found in the *Field Operations Handbook:*

Some retail or service establishments compute an employee’s compensation on the basis of a percentage of the charge to the customer, such as the charge for labor or the charge for service and parts used in repair. Compensation computed in this manner represents commissions on goods or services for purposes of applying Section 7(i).[[986]](#footnote-987)

The *Field Operations Handbook* also addresses when charges for services are not commissions on goods or services for purposes of Section 207(i):

Some auto service garages pay employees a flat fee to recondition used cars which are subsequently sold. Such payments which are paid without regard to the value of the service performed do not represent commissions on goods or services for purposes of section 7(i). Such employees are considered to be compensated on a piece rate basis and not on the basis of commissions. Commissions, for purposes of section 7(i), usually denotes a *percentage* of the amount of monies paid out or received.[[987]](#footnote-988)

As the Seventh Circuit has stated, “the essence of a commission is that it bases compensation on sales” and “decouples [worker pay] from actual time worked.”[[988]](#footnote-989) However, like commission payments, piece rate and job rate payments are likewise decoupled from actual time worked.[[989]](#footnote-990) Thus, employees paid under a commission, piece rate, or job rate basis all have the same incentive to generate more output because the more work they complete, the higher their compensation.[[990]](#footnote-991)

In *Alvarado v. Corporate Cleaning Services, Inc.*,[[991]](#footnote-992) the Seventh Circuit distinguished between the commission-based and piece-rate systems for purposes of the Section 207(i) exemption:

There are real differences between the two compensation systems (commission and piecework), and the reality, which overcomes the nomenclature, is that CCS’s system is a commission system. In a piece-rate system a worker is paid by the item produced by him: so much per scarf, for example, if his job is to make scarves. In a commission system he is paid by the sale—so if he works for a shoe store he’s paid a specified amount per pair of shoes that he sells. Thus the scarf worker is paid for making scarves even if they haven’t been sold—that is, even if he’s producing for inventory—while the shoe salesman is paid only when he makes a sale. In the present case, as in the shoe-store example, the window washers are paid only if there’s been a sale, namely a sale of window-washing service to a building owner or manager.[[992]](#footnote-993)

The DOL views flat-fee payments as being synonymous with piece-rate compensation, and not covered by Section 207(i). Rather, such payments are governed by the piece-rate overtime requirements.[[993]](#footnote-994) Thus, flat fees that “are paid without regard to the value of the service performed do not represent commissions on goods or services for purposes of section 7(i). Such employees are considered to be compensated on a piece rate basis and not on the basis of commissions.”[[994]](#footnote-995)

In *Yi v. Sterling Collision Centers*, *Inc.*,[[995]](#footnote-996) the employer charged its customers as follows:

It calculates the number of hours normally required to do a given type of repair (these are called “booked hours”) and multiplies that number by a dollar figure. The product of this multiplication is the labor price of the repair to the customer. Sterling adds material costs to the labor price to come up with a final price. A team of mechanics is then assigned to the job. Each member of the team keeps track of the hours he works on the job. When it’s completed and the hours of the team members are added up, Sterling determines each member’s compensation by multiplying (1) the number of booked hours for the job by (2) the ratio of the team member’s actual hours worked to the total hours worked by the team, and then by (3) a wage, per booked (not actually worked) hour, based on the skill or quality of the individual team member.  …

The faster the team works, the more it earns per number of hours, since its commission is based not on the total number of hours it puts in on a job but on the number of booked hours times each team member’s booked-hour rate. That is how commissions work; they are decoupled from actual time worked.[[996]](#footnote-997)

For these reasons, the Seventh Circuit found that the mechanics in question earned a “percentage” of the amount charged to the customer and that “the essence of a commission is that it bases compensation on sales, for example a percentage of the sales price.”[[997]](#footnote-998) The Fifth Circuit has found similarly with respect to cable technicians.[[998]](#footnote-999)

Similarly, in *Mechmet v. Four Seasons Hotel, Ltd.*,[[999]](#footnote-1000) “percentage service charges that hotels and restaurants characteristically add to the bill for a banquet, to compensate banquet waiters over and above their regular hourly wage,” were found to be “commissions on good or services.”[[1000]](#footnote-1001) As the Seventh Circuit concluded, “[c]ommission income is a permissible characterization of the banquet service charges that the banquet waiters received, and one that advances the statutory purposes.”[[1001]](#footnote-1002) As the *Field Operations Handbook* notes:

This is so because a service charge that is completely or partially paid to such employees is keyed to sales since it bears a direct relationship to the goods and services which the establishment sells, and it is a specific percentage of the bill presented to the customer. Accordingly service employees paid such service charges may qualify for section 7(i) if the other tests are met.[[1002]](#footnote-1003)

The DOL has also issued several opinion letters setting forth its analysis of the term “commission” under Section 207(i). These letters have “consistently required a degree of proportionality (generally as measured by a percentage) between the payment the employee receives and the amount or cost of the sale or service provided to the customer.”[[1003]](#footnote-1004)

In a 1996 opinion letter,[[1004]](#footnote-1005) the WHD stated that if alarm systems installers “were to be compensated on a percentage of the sales price of the alarm systems they installed, such a method of payment would constitute payment on a commission basis for purposes of section 7(i) of the FLSA.”[[1005]](#footnote-1006) However, installers who were paid a flat fee for each alarm system they installed with no connection to the cost to the consumer were not paid a commission. The flat rate installers did not fall within the scope of Section 207(i).[[1006]](#footnote-1007)

In a 2005 opinion letter,[[1007]](#footnote-1008) the WHD Administrator opined that health and athletic club instructors who were paid based on a “percentage of a ‘club’s revenue per lesson or session’” would qualify for the Section 207(i) exemption.[[1008]](#footnote-1009)

In a 2006 opinion letter,[[1009]](#footnote-1010) the DOL approved of a method of payment common in the automobile detailing and repair industry, called the “flag-rate” method, as meeting the Section 207(i) definition of commission:

Each vehicle is assigned a predetermined number of hours (referred to as “flag hours” or “flat rate” hours). … The detailer or painter is assigned a “flag rate” per hour that is based on the individual’s level of skill and experience. Regardless of the time a detailer or painter spends on each vehicle to complete the job, he or she is paid for the number of flag hours allotted to that vehicle.[[1010]](#footnote-1011)

Under this system, the employees were encouraged to work rapidly and efficiently, and their pay varied from week to week. In its letter, the DOL concluded that this payment arrangement was a commission because “the amount of the payment appears to be related to the value of the service performed.”[[1011]](#footnote-1012)

In sum, it is the DOL’s position that to qualify as a commission for purposes of Section 207(i), “the commission payments must be related to the cost passed on to the customer.”[[1012]](#footnote-1013) “Put differently, to qualify as a commission, an increase in the cost to the consumer must result in a corresponding increase to the amount of the payment made to the employee.”[[1013]](#footnote-1014)

The issue of when flat rate payment plans can qualify as commissions under Section 207(i) has been addressed by several appellate courts. For example, in *Klinedinst v. Swift Investments, Inc.*,[[1014]](#footnote-1015) the plaintiff, an automobile painter, was compensated based on the number of “flag hours” he worked in a 40-hour workweek. “Flag hours” were derived from a database utilized by auto repair shops and insurance adjusters; they did not necessarily reflect the actual time spent completing a job. If more than or fewer than the predetermined number of flag hours were required to complete a job, the employer would nevertheless pay the painter for the predetermined number of hours. The painter was compensated for each paint job he performed based on the following formula: the “flag hours” allotted to the paint labor component of the repair estimate multiplied by his hourly rate. The employer paid the plaintiff for the maximum amount of flag hours, regardless of the actual hours worked. The employer argued that the flat-rate system it utilized was a form of “commissions” because it was incentive-based and encouraged efficiency and speed.[[1015]](#footnote-1016)

The Eleventh Circuit agreed, holding that the flat rates paid were a “commission” as they provided workers with incentives to work efficiently and effectively and allowed them to incur benefits regardless of the actual hours they worked.[[1016]](#footnote-1017) In reaching this finding, the court referenced the *Field Operations Handbook*, which sets forth a pay plan very similar to the one in *Klinedinst*, and found that a “flat rate” system can qualify as a bona fide commission under Section 207(i).[[1017]](#footnote-1018) The court concluded that

[p]ayments of between $12 and $15 per flagged hour provide incentives for employees to work efficiently and effectively to the benefit of the employer, who may then take on more customers at a greater profit margin, and the employee, who reaps the benefits of increased flag hours regardless of the actual amount of hours worked. With this in mind, we conclude that [the plaintiff’s] flat rate wages constitute a “commission” … .[[1018]](#footnote-1019)

The Seventh Circuit adopted the reasoning of *Klinedinst* in *Yi v. Sterling Collision Centers, Inc.*[[1019]](#footnote-1020)In *Yi*, technicians were paid an hourly rate for their actual work hours and also received incentive pay if they completed repair jobs in less time than specified on estimates. The district court found that “a system that increases compensation based in large measure on results is the essence of this elusive concept called commission.”[[1020]](#footnote-1021) The Seventh Circuit affirmed.

Neither *Klinedinst* nor *Yi* discussed the need for proportionality, or whether it existed. In *Huntley v. Bonner’s, Inc.*,[[1021]](#footnote-1022) a Washington district court found that a “‘flat-rate’ compensation system can be a commission-based system,” but that the system before it was not because “the plaintiff was paid the exact same hourly rate regardless of the amount charged to the customer.”[[1022]](#footnote-1023) The court found that there was no correlation between the amount paid to the employee and the amount charged to the customer for labor performed on his or her behalf:[[1023]](#footnote-1024)

Absent some relationship between the amount charged to the customer and the amount paid to the employee, defendant’s system is more akin to piece work, where the technician is paid a set amount per task and the employer is free to keep whatever additional charges it is able to impose on the customer. Such payments are not “commissions” under the FLSA.[[1024]](#footnote-1025)

On similar facts to those in *Huntley*, the district court in *Wilks v. Pep Boys*[[1025]](#footnote-1026) relied on *Huntley* to reach its decision that there was a need for proportionality in any commission-based system.[[1026]](#footnote-1027) The court began its analysis by noting *Klinedinst* did not address the issue of proportionality, nor did the facts of the case indicate whether compensation paid to the employee was linked to the amount the employer charged its customers.[[1027]](#footnote-1028) Rather “it simply determined that the employee’s pay system was similar to the one described in the DOL’s *Field Operations Handbook* and that this similarity meant that the system qualified as ‘commission’ under Section 7(i).”[[1028]](#footnote-1029)

On appeal, the Sixth Circuit agreed with the district court and held that the employer must establish some proportionality between the compensation paid to the employees and the amount charged to the customer for the payment to qualify as a “commission” under Section 207(i):

The district court rejected Defendant’s definition of “commission” and found, as matter of law, that to constitute a commission under 29 U.S.C. § 207(i), the employer must establish some proportionality between the compensation to the employees and the amount charged to the customer. The district court reached its conclusion after thoroughly analyzing relevant case law and Department of Labor publications, noting that “the precedent cited by both parties seems to reinforce—or at least not undermine—the need for proportionality in any commission-based system.”

Given that the relevant authority supports a proportionality requirement to the overtime pay exemption under the FLSA, and that courts must interpret such exemptions narrowly and against the employer, we conclude that the district court’s comprehensive and well-reasoned opinion supports its legal conclusion and the denial of Defendant’s motion for partial summary judgment.[[1029]](#footnote-1030)

Shortly after the *Wilks* decision issued, the plaintiffs filed an action in *Parker v. NutriSystem, Inc.*,[[1030]](#footnote-1031) relying on *Wilks*. NutriSystem argued that its method of compensating its call center employees constituted a commission under Section 207(i) of the FLSA. Under Nutrisystem’s compensation plan, sales associates received the greater of either their hourly pay rate or their flat-rate payments per sale for each pay period. The hourly rate was $10 per hour for the first 40 hours and $15 per hour for overtime; the flat rates per sale varied from $18 for each 28-day program sold via an incoming call during daytime hours, to $40 for each 28-day program sold on an outbound call or during the overnight shift.[[1031]](#footnote-1032) The district court found that the call center employees were paid on a commission basis.[[1032]](#footnote-1033) The court distinguished *Wilks*:

Because the defendant [in *Wilks*] put forth neither argument nor evidence in support of the notion that employee compensation correlates with overall customer price, the court concluded that no proportional relationship existed. *Wilks* is thus distinguishable from the case before us in which NutriSystem has both argued and offered evidence of proportionality.[[1033]](#footnote-1034)

The case was appealed to the Third Circuit and the Secretary of Labor filed an amicus brief in support of the plaintiffs. According to the Secretary’s brief,

[T]he district court erred by ruling that the NutriSystem call center employees were exempt even though there was no showing that the flat fees paid were in any way related to the cost to the customer. Had, for instance, NutriSystem utilized fixed payments that varied according to the differences in the cost to the customer, this could have constituted a commission under section 7(i).[[1034]](#footnote-1035)

The Third Circuit disagreed and affirmed the decision of the district court. In reaching its conclusion, the Third Circuit gave no deference to DOL guidance on what constitutes a “commission” and determined that the fact that NutriSystem’s plan was not calculated strictly as a percentage of sale price did not disqualify it from being a commission under Section 207(i). The Third Circuit declined “to adopt a test that requires a commission, under § 7(i), to be strictly based on a percentage of the end cost to the consumer.”[[1035]](#footnote-1036) Rather, the court cited several factors in finding NutriSystem’s pay plan to be a “commission based” system, including that (1) the payments to the sales associates were sufficiently proportional to the cost to the consumer; (2) the NutriSystem plan “bases compensation on sales”; (3) from a policy standpoint, it was reasonable to permit NutriSystem to offer different commissions depending on the time of the sale and whether the sale was the result of an incoming or outgoing call; and (4) the plan did not offend the purposes of the FLSA.[[1036]](#footnote-1037) The court concluded that “when the flat-rate payments made to an employee based on that employee’s sales are proportionally related to the charges passed on to the consumer, the payments can be considered a bona fide commission rate for the purposes of §7(i).”[[1037]](#footnote-1038)

Five years later, the Seventh Circuit, in *Alvarado v. Corporate Cleaning Services, Inc.*,[[1038]](#footnote-1039) issued a decision supporting the analysis in *Yi* and *Parker*:

Our decision in *Yi*, cited earlier, which involved auto repair, supports CCS’s position. As in this case, the employer in *Yi* made adjustments to the price of its service for such things as differences in costs of materials used. The adjustments made the percentage of the price attributable to its auto mechanics’ compensation vary from repair to repair. We held that this didn’t invalidate the compensation system as a commission system. The Third Circuit agreed. We are unaware of any contrary authority.[[1039]](#footnote-1040)

From the Seventh Circuit’s perspective, the “more important consideration is that commission compensated work involves irregular hours of work.”[[1040]](#footnote-1041)

An employee who is paid by the sale is not a commission worker if his sales are made at a uniform rate (e.g., one sale per hour), so that the ratio of his hours worked to his pay is constant. For in that case his pay is effectively hourly. That’s why piece-rate workers are not within the commission exception: because they keep producing even when no sale is imminent, the relation between the hours they work and their output tends to be constant. But CCS’s employees can work only when CCS is hired to wash a building’s windows. Employment necessarily is irregular (rather than the standard eight-hour workday) because of the peculiar conditions of the window-washing business. [Court describes the reasons for the irregular hours in the window-washing business.]

The window washers make up for this slack by often working more than eight hours a day during spring, summer, and fall, though even in those months there are times when they can’t work eight hours a day, whether because of other work being done on the building, the manager’s failure to notify residents of the window washing, a slowdown in demand for CCS’s services by building owners or managers, or, most exotically, attacks on window washers by peregrine falcons.[[1041]](#footnote-1042)

According to the Seventh Circuit, the “result of these impediments to steady work is that a window washer can’t count on working 40 hours each week for an entire year. This is the reason for exempting his employer from the requirement of paying the worker time and one half for overtime.”[[1042]](#footnote-1043)

Since *Wilks*, a number of district courts have also weighed in on the “proportionality issue.”[[1043]](#footnote-1044) And the Seventh Circuit has reiterated its support for the proportionality argument: “Because pay is proportional and correlated to each technician’s sales, the [Section 207(i)] exception applies to [the plaintiffs], so they are not entitled to additional overtime wages.”[[1044]](#footnote-1045)The plaintiffs in *Reed* argued that their compensation was not commission-based because the company’s compensation plan incorporated the employee’s hours into many parts: (1) the company’s description of its pay plan made reference to “hourly wages”; (2) company executives testified that hours worked was a factor in calculating take-home pay; and (3) the company’s pay algorithm explicitly incorporated hours worked into several of the steps for computing pay.[[1045]](#footnote-1046) The plaintiffs concluded that because the company paid its technicians “an ‘hourly’ wage for each ‘hour’ worked during a pay period, … pay is not ‘decoupled’ from time worked,”[[1046]](#footnote-1047) as required by *Yi v. Sterling Collision Centers, Inc.*[[1047]](#footnote-1048) The court disagreed, noting that “the nomenclature is not determinative”[[1048]](#footnote-1049) and concluding that although the formula was convoluted, “it is mathematically identical to paying a straight commission.”[[1049]](#footnote-1050) The court also noted that the company’s admission that technician pay is partially a function of hours worked did not create a triable issue of fact: “Obviously, to some extent, technicians who work more hours are likely to have more repair opportunities and therefore make more money.”[[1050]](#footnote-1051)

*b. Straight Commissions With Advances, Draws, or Guarantees*

In addition to describing the types of compensation arrangements generally employed in retail or service establishments, DOL regulations address commission arrangements when advances, draws, or guarantees are present. 29 C.F.R. §779.416(a) provides:

Employment arrangements which provide for a commission on goods or services to be paid to an employee of a retail or service establishment may also provide, as indicated in §779.413, for the payment to the employee at a regular pay period of a fixed sum of money, which may bear a more or less fixed relationship to the commission earnings which could be expected, on the basis of experience, for an average period of the same length. Such periodic payments, which are variously described in retail or service establishments as “advances,” “draws,” or “guarantees,” are keyed to a time base and are usually paid at weekly or other fixed intervals which may in some instances be different from and more frequent than, the intervals for payment of any earnings computed exclusively on a commission basis. … A determination of whether or to what extent such periodic payments can be considered to represent commissions may be required in those situations where the employment arrangement is that the employee will be paid the stipulated sum, or the commission earnings allocable to the same period, whichever is the greater amount. The stipulated sum can never represent commissions, of course, if it is actually paid as a salary. If, however, it appears from all the facts and circumstances of the employment that the stipulated sum is not so paid and that it actually functions as an integral part of a true commission basis of payment, then such compensation may qualify as compensation which “represents commissions on goods or services” within the meaning of clause (2) of the section 7(i) exemption.[[1051]](#footnote-1052)

Subsection (b) of the regulation provides:

Under a bona fide commission plan all of the computed commissions will be counted as compensation representing commissions even though the amount of commissions may not equal or exceed the guarantee or draw in some workweeks. The exemption will also apply in the case of an employee who is paid a fixed salary plus an additional amount of earned commissions if the amount of commission payments exceeds the total amount of salary payments for the representative period.[[1052]](#footnote-1053)

In *Keyes v. Car-X Auto Service*,[[1053]](#footnote-1054) auto technicians were paid the greater of a commission rate based on a percentage of services or products sold or a default guaranteed wage rate calculated by multiplying the regular hourly rate by the hours actually worked. The court concluded that the “default guaranteed wage” represented a salary and only the amount exceeding this “salary” represented true commissions.[[1054]](#footnote-1055) Because these commissions did not make up at least half of the technicians’ total compensation, the Section 207(i) exception was inapplicable.[[1055]](#footnote-1056) Similarly, gas station managers and assistant managers paid a monthly draw plus a modest additional amount calculated based on sales volume exceeding a specified threshold were not covered by the Section 207(i) exception, in that “the only true commission portion of the salaries appears to be those amounts over the threshold level” and this amount represented well below half the employees’ total compensation.[[1056]](#footnote-1057)

By contrast, in *Stein v*. *HHGREGG, Inc*.,[[1057]](#footnote-1058) the Sixth Circuit deemed bona fide and consistent with the requirements of Section 207(i) a compensation arrangement where sales employees were advanced a “draw” to meet the minimum-wage requirements whenever commissions fell below minimum wage, and this draw amount was deducted from future earnings in weeks when the draw exceeded the minimum wage. The Sixth Circuit found the validity of this draw-against-commission plan for Section 207(i) purposes was supported by the DOL’s “longstanding position” as articulated in three opinion letters.[[1058]](#footnote-1059)

Similarly, in *Lee v. Ethan Allen Retail, Inc.*,[[1059]](#footnote-1060) a Georgia district court found that a furniture salesperson paid a recoverable draw against commissions was compensated on a bona fide commission plan, as it provided her with a meaningful opportunity to work more to increase sales and earnings, and she exceeded her draw four times.[[1060]](#footnote-1061)

In *Reed v. Brex, Inc*,[[1061]](#footnote-1062) if an auto repair technician’s earned commissions fell below one and one-half times the applicable state minimum hourly rate, the company made up the difference without any attempt by the company to require the employee to pay back any excess of the minimum hour guarantee over the earned commissions. The plaintiffs argued that the DOL’s interpretive regulation (29 C.F.R. §779.416(b)) forbade an alternative wage floor (i.e., one and one-half times the applicable state minimum hourly rate) because the regulations define any wage “guarantee” as a draw against future commissions that requires reconciliation in subsequent pay periods.[[1062]](#footnote-1063) Therefore, the plaintiffs argued, “all compensation up to the guarantee was actually fixed hourly wages even in weeks where the guarantee did not apply,”[[1063]](#footnote-1064) and thus the compensation plan did not meet the requirements of Section 207(i). The Seventh Circuit was not persuaded.

The Court of Appeals began its analysis by noting that under the statute, a “draw” and a “guarantee” are not in fact one and the same: “The plain meaning of the Act allows employers to implement either a guarantee or a draw, which are two distinct arrangements.”[[1064]](#footnote-1065) From there the Seventh Circuit went on to note that DOL regulations permit employers to “smooth the peaks and valleys of a commission-based payment model” by providing employees with “periodic payments, which are described variously in retail or service establishments as ‘advances,’ ‘draws,’ or ‘guarantees.’”[[1065]](#footnote-1066) Moreover, the court found, those regulations allow—but do not require—employers to “claw back” such payments if they exceed actual commissions:

The regulations are sensitive to Congress’s choice of language regarding guarantees. If the payments are greater than commissions, it “may or may not be customary under the employment arrangement,” for the employer to claw back excess payments.[[1066]](#footnote-1067)

The court found that the company’s plan met the flexible criteria of the DOL regulations because the regulations allow that the guarantee can operate as an alternative minimum floor “and [the defendant’s] alternative minimum floor is thus within the regulatory ambit.”[[1067]](#footnote-1068)

*c. Commission Rates That Are Not “Bona Fide”*

29 C.F.R. §779.416(c) provides two example of commission rates that are not “bona fide”:

A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or the guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.[[1068]](#footnote-1069)

A few courts have examined the implications of the term “bona fide” as found in Section 207(i). In *Gruchy v. DirectTech Delaware, Inc.*,[[1069]](#footnote-1070) the district court wrote:

Needless to say, a commission for the purposes of the FLSA exemption must be bona fide; an employer cannot merely call a compensation system “commission-based” to evade the FLSA overtime requirements. Yet, while it is clear that a commission system must be bona fide, the definition of “commission” finds little illumination in the statute or its regulations. Likewise, the First Circuit has not yet enunciated a standard for evaluating whether a commission is bona fide for the purposes of the FLSA.[[1070]](#footnote-1071)

In *Erich v. Venator Group, Inc*.,[[1071]](#footnote-1072) the court found that the two examples in 29 C.F.R. §779.416(c) were not exhaustive, and that “as a general matter, the term ‘bona fide commission rate’ calls courts to consider whether the particular payment plan before it comports with Congress’ purpose in exempting employers from paying overtime in certain situations.”[[1072]](#footnote-1073) In evaluating the plan before it, the court found that a dispute of fact existed regarding whether the commission rate was bona fide:

By utilizing the term “bona fide” commission rate, Congress apparently envisions a smell test, one that reaches beyond the formal structure of the commission rate and into its actual effects and the purpose behind it. Accordingly, as evidenced by the two examples of non-bona fide commission rates provided by § 779.417(c), some payment plans that apparently are commission plans on their face may reveal themselves to be something different upon closer inspection. The “de facto” character of the Plan in this case is a relevant consideration.[[1073]](#footnote-1074)

In *Herman v. Suwannee Swifty Stores, Inc*.,[[1074]](#footnote-1075) the DOL argued that Suwannee failed to maintain a “bona fide commission rate” for certain store managers because it did not comply with Section 779.417(c). The court held that the DOL’s interpretation of “bad faith” was not based on an impermissible construction and Section 779.417(c) can be used to define “bona fide commission rate”; and that Section 779.417(c) is meant only as an interpretive rule, which does not need to be promulgated through the same procedural requirements as a substantive rule. The court granted the Secretary’s motion for summary judgment, finding that the defendant did not comply with the requirements of Section 207(i) for any store managers who never received more than the guaranteed rate or who received the guaranteed rate only once a year.[[1075]](#footnote-1076)

*d. Representative Period*

Not only must “more than half of [an employee’s] compensation … represent[] commissions on goods and services,” but also the commissions must be paid “for a *representative period (not less than one month)*.”[[1076]](#footnote-1077)

*(i.) A One-Month Period*

In a 2019 opinion letter,[[1077]](#footnote-1078) the WHD Administrator responded to whether “four weekly pay periods or two bi-weekly pay periods (four (4) workweeks)” met the representative pay period requirement, and, if not, then whether “six (6) consecutive weekly pay periods or three (3) bi-weekly pay periods” did.[[1078]](#footnote-1079) The Administrator observed that “the regulation explaining Section 7(i)’s representative-period requirement provides no guidance on the meaning of ‘not less than one month’ other than stating that this period ‘cannot, under the express terms of [S]ection 7(i), be less than 1 month ’”[[1079]](#footnote-1080) The Administrator also noted that the term “month” is not defined in the FLSA, although “[n]umerous courts, including the Supreme Court, have recognized that the ordinary meaning of ‘month’ is a calendar month.”[[1080]](#footnote-1081) The Administrator then stated that a “calendar month” includes “the period of time from a given day of a particular month in the calendar to the corresponding day of the following month”[[1081]](#footnote-1082) and that, “except during the month of February in a common year, four weeks from any given date of one month will necessarily fall short of the corresponding date of the next month, and thus will not satisfy the minimum one-month requirement of Section 7(i).”[[1082]](#footnote-1083) The Administrator concluded:

A fair reading of the phrase “not less than one month” in the Section 7(i) exemption requires the conclusion that six, but not four, consecutive weekly pay periods satisfy the retail or service establishment exemption’s requirement that a representative period be not less than one month. It similarly requires the conclusion that three, but not two, consecutive bi-weekly pay periods satisfy the … requirement … .[[1083]](#footnote-1084)

*(ii.) Characteristics of a Representative Period*

A “representative period” must be one that “can reasonably be accepted by the employer, the employee, and disinterested persons as being truly representative of the compensation aspects of the employee’s employment on which this exemption test depends.”[[1084]](#footnote-1085) This means the representative period epitomizes the “total characteristics of an employee’s earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation.”[[1085]](#footnote-1086)

The regulations explain that the representative period “must be as recent a period … as can practicably be used” whether the period is as short as one month or as long as one year.[[1086]](#footnote-1087) With respect to length, the regulations provide that the representative period “should be long enough to stabilize the measure of the balance between the portions of the employee’s compensation which respectively represent commissions and other earnings, against purely seasonal or plainly temporary changes.”[[1087]](#footnote-1088) The representative period or formula for establishing the period must be “appropriate”[[1088]](#footnote-1089) and it “must be designated and substantiated in the employer’s records.”[[1089]](#footnote-1090) However, an Ohio district court held that an employer’s failure to properly designate a period in its records did not render the Section 207(i) exception inapplicable.[[1090]](#footnote-1091)

As the regulations provide, where “factors affecting the proportionate relationship between total compensation and compensation representing commissions [are] substantially identical for a group or groups of employees in a particular occupation or department of a retail or service establishment or in the establishment as a whole,” an employer may use “the same representative period or formula for establishing such a period … for each of the similarly situated employees in the group.”[[1091]](#footnote-1092) For enforcement purposes, the DOL allows employers to treat new employees as if they meet this test from the start of their employment if “it can be reasonably expected that, considering the experience and other qualifications of the new employee[s], there will be no significant difference as to the proportionate relationship between the types of compensation in [their] situation from that prevailing for the other members of the group.”[[1092]](#footnote-1093) Where this cannot reasonably be expected from a new employee, the DOL allows the employer to determine compliance based on the new employee’s earnings “until the completion of the full representative period applicable to other employees in the department or establishment.”[[1093]](#footnote-1094)

The regulations provide a one-month grace period between the end of the prior representative period and the beginning of the current one to permit employers to compute employees’ commission earnings, where it is not “practicably possible” to do so otherwise.[[1094]](#footnote-1095) To illustrate this concept, the regulations offer an example:

[A]ssume that the representative period used is the quarter-year immediately preceding the current quarter, and commissions for the prior period cannot be computed in time to determine the overtime pay obligations for the workweeks included in the first pay period in the current quarter. By applying a month of grace, the next earlier quarterly period may be used during the first month of the current quarter; and the quarter-year immediately preceding the current quarter will then be used for all workweeks ending in a quarter-year period which begins 1 month after the commencement of the current quarter.[[1095]](#footnote-1096)

In a 2020 opinion letter, the Administrator addressed the “representative period” in the following circumstances: (1) the opening of a new store where the sales volume is unknown; and (2) the hiring of a new salesperson with no performance record.[[1096]](#footnote-1097) The Administrator acknowledged that neither of these situations is “explicitly addressed in the regulations, [but] nothing in the FLSA prohibits doing this.”[[1097]](#footnote-1098) The Administrator relied on a 1981 opinion letter,[[1098]](#footnote-1099) which recognized that an employer may use Section 207(i) “simultaneously with the commencement of the representative period.”[[1099]](#footnote-1100) However, the 1981 opinion letter made clear that if an employer chooses to do this and, at the conclusion of that initial representative period, Section 207(i)’s requirement that commissions constitute more than half of the compensation for a representative period has not been satisfied, then the employer must pay overtime premium compensation for any overtime hours worked during that period.[[1100]](#footnote-1101) The 2020 opinion letter concluded: “Consistent with the 1981 opinion letter, the employer could attempt to establish a representative period for the new employee and simultaneously claim the Section 207(i) exemption for that employee on a prospective basis.”[[1101]](#footnote-1102)

*e. Computing an Employee’s Compensation for the Representative Period*

Section 207(i) requires that “more than half” of the employee’s compensation represents commissions on goods or services.[[1102]](#footnote-1103) DOL regulations provide guidance on how to compute an employee’s compensation for the representative period:

In determining for purposes of section 7(i) whether more than half of an employee’s compensation “represents commissions on goods or services” it is necessary first to total all compensation paid to or on behalf of the employee as remuneration for his employment during the period. All such compensation in whatever form or by whatever method paid should be included … .[[1103]](#footnote-1104)

Interpreting that language in *Tom v. Hospitality Ventures LLC*,[[1104]](#footnote-1105)the Fourth Circuit found that both tips and automatic gratuities should have been included in determining whether the automatic gratuities exceeded 50 percent of the employees’ total compensation for a representative period.

***3. An Employee’s Regular Rate of Pay Must Be in Excess of 1.5 Times the Minimum   
Hourly Rate***

For Section 207(i) to apply, “the regular rate of pay of such employee [must be] in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title.”[[1105]](#footnote-1106) The regulations explain that

[t]he meaning of the “regular rate” of pay under the Act is well established. … It is a rate per hour, computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate. By definition, the “regular rate” as used in section 7 of the Act includes “all remuneration paid to, or on behalf of, the employee” except payments expressly excluded by the seven numbered clauses of section 7(e). The computation of the regular rate for purposes of the Act is explained in part 788 of this chapter. … The employee’s “regular rate” of pay must be computed, … on the basis of his hours of work in that particular workweek and the employee’s compensation attributable to such hours. The hourly rate thus obtained must be compared with the applicable minimum rate of pay of the particular employee under the provisions of section 6 of the Act.[[1106]](#footnote-1107)

As the Eleventh Circuit observed in *Klinedinst v. Swift Investments, Inc.*,[[1107]](#footnote-1108) “[w]ithout knowing the regular rate of pay, we cannot determine whether it is greater than one and one half times the minimum wage.”[[1108]](#footnote-1109)

Questions arise as to how the regular rate of pay should be calculated when the employee has a deferred commission payment structure. The regulation provides:

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable or equitable method must be adopted.[[1109]](#footnote-1110)

In *Schwind v. EW & Associates, Inc*.,[[1110]](#footnote-1111) an employee was paid solely on a deferred commission basis in which he “would be paid only after [his employer was] paid by the client for a particular project.”[[1111]](#footnote-1112) Because this pay structure was not among the regulation’s examples, the court “deem[ed] it necessary to adopt a ‘reasonable and equitable’ method other than those provided in the regulation” to calculate the employee’s regular rate of pay.[[1112]](#footnote-1113) The court further stated:

Consequently, in light of the goals of the FLSA, we believe the most reasonable and equitable method in determining plaintiff's regular rate of pay based on the deferred commission payments he received from defendants is to average the commissions received by plaintiff in a given year and allocate the average to each week. This is necessary because of the fluctuating and irregular schedule in which plaintiff was paid.[[1113]](#footnote-1114)

**C. Section 207(n) Exception: Employees Engaged in Charter Activities for Local Passenger Carriers**

In 1974, Congress broadened the coverage of the FLSA to include within the definition of “employer” a “public agency,” and expanded the definition of “enterprises engaged in commerce or in the production of goods for commerce” to encompass an “activity of a public agency.”[[1114]](#footnote-1115) Thus, the 1974 amendments completely removed the FLSA’s prior exemption from overtime for employees of states and their political subdivisions, while providing some exceptions to this overtime coverage (i.e., for individuals holding public elective office or serving as such an officeholder in one of several capacities).[[1115]](#footnote-1116)

One of the exceptions to the new overtime coverage was for public and private local passenger carriers’ “charter activities.” That exception is embodied in Section 207(n) of the statute:

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if

(1) the employee’s employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and

(2) if employment in such activities is not part of such employee’s regular employment.[[1116]](#footnote-1117)

The purpose of Section 207(n) was to exclude from overtime pay the hours of employment that a mass transit employee spent in charter activities if (1) those charter activities were spent pursuant to a prior agreement, and (2) such charter activities were not a part of the employee’s regular employment.[[1117]](#footnote-1118) According to the *Field Operations Handbook*, Section 207(n) is operable only to work undertaken “pursuant to an agreement or understanding arrived at between the employer and the employee *before* performance of the work. If the employees express their unwillingness to accept the exclusion of hours spent in charter activities from the number of hours worked, Section 7(n) is inapplicable.”[[1118]](#footnote-1119)

**D. Section 207(s) Exception: Employees Engaged As Major Disaster Claims Adjusters**

The Major Disaster Claims Adjuster exemption was first enacted in 2016, as part of the Consolidated Appropriations Act,[[1119]](#footnote-1120) and Congress has continued to enact it in subsequent appropriations acts.

The overtime exemption for major disaster claims adjusters applies for a two-year period following the occurrence of a major disaster, meaning a disaster or catastrophe declared or designated by a state or federal agency or department.

To qualify for this overtime exemption, all of the following requirements must be met:

1. The employee is employed to adjust or evaluate claims resulting from or relating to such a major disaster, by an employer not engaged, directly or through an affiliate, in underwriting, selling, or marketing property, casualty, or liability insurance or contracts;

2. The employee receives an average weekly compensation of at least $591, or a greater amount established by the Secretary, for the number of weeks the employee is engaged in any of the duties listed below; and

3. The employee’s duties must include at least one of the following:

a. Interviewing insured individuals, individuals who suffered injuries or other damages or losses arising from or relating to a disaster, witnesses, or physicians;

b. Inspecting property damage or reviewing factual information to prepare damage estimates;

c. Evaluating and making recommendations regarding coverage or compensability of claims or determining liability or value aspects of claims;

d. Negotiating settlements; or

e. Making recommendations regarding litigation.[[1120]](#footnote-1121)

A DOL fact sheet has defined two of the terms found in the exemption language:

1. The term employee “employed to adjust or evaluate claims resulting from or relating to such major disaster” means an individual who

a. In a timely manner, secured or secures a license required by applicable law to engage in and perform the duties described above relating to a disaster, and

b. Is employed by an employer that: (1) maintains worker compensation insurance coverage or protection for its employees, if required by applicable law, and (2) withholds applicable Federal, State, and local income and payroll taxes from the wages, salaries and any benefits of such employees.

2. The term “affiliate” means a company that, by reason of ownership or control holds at least 25 percent of the outstanding shares of any class of voting securities of one or more companies, directly or indirectly, controls, is controlled by, or is under common control with, another company.[[1121]](#footnote-1122)

VI. Section 213(d) Exemption From the Minimum Wage, Overtime, and Child Labor Requirements of the FLSA

Section 213(d) exempts from the minimum wage, overtime, and child labor requirements of the FLSA (1) employees engaged in the delivery of newspapers to the consumer, and (2) any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest product used in making such wreaths).[[1122]](#footnote-1123) The newspaper delivery exemption is discussed in greater detail below; the wreath-making exemption is discussed in Chapter 7, Agricultural Exemptions, §V [Section 213(d) Exemption From the Minimum Wage, Overtime, and Child Labor Requirements: Employment of Homeworkers in Making Wreaths].

**A. Engaged in Delivering “Newspapers”**

To qualify for the newspaper delivery exemption, an employee must satisfy two criteria: (1) he or she must be engaged in the delivery of newspapers, and (2) the delivery must be to the consumer.[[1123]](#footnote-1124)

According to a WHD opinion letter, for purposes of the Section 213(d) exemption, a “newspaper” is defined as a publication having the general physical appearance and form of a newspaper and containing news of general interest, regardless of whether it also contains advertising copy.[[1124]](#footnote-1125) The WHD also stated that the exemption applies to delivery persons who distribute shopping circulars and other advertising materials inserted into newspapers, as long as (1) the delivery person in question is employed by the newspaper publisher or contract tolerance is permitted under Section 13(d).”[[1125]](#footnote-1126) In another opinion letter, the WHD concluded that the exemption does not apply to the delivery of “shoppers” (i.e., circulars consisting of a single sample news item along with a collection of the ads placed in a particular newspaper).[[1126]](#footnote-1127) Thus, according to the DOL, an employer cannot treat as exempt employees who deliver, free of charge, “shoppers” to residential dwellings that do not regularly receive the actual newspaper.[[1127]](#footnote-1128)

**B. Delivery Must Be to the Consumer**

DOL regulations further provide that the newspaper delivery exemption applies only to carriers who engage in either (1) making deliveries to the homes of subscribers or to other consumers of newspapers (including shopping news), or (2) the street sale or delivery of newspapers to the consumer.[[1128]](#footnote-1129) The exemption does not apply to employees engaged in hauling newspapers to drop stations, distributing centers, and newsstands because these are intermediate destinations and not the ultimate consumer of the newspaper.[[1129]](#footnote-1130) A WHD opinion letter stated that where employees carry current issues of a newspaper and attempt to sell them as part of their solicitation work, such work can be regarded as involving the street sale of newspapers to the consumer within Section 213(d).[[1130]](#footnote-1131) Newspaper folding is also considered exempt work as long as it is incidental to the carrier’s own sale or delivery of the newspapers.[[1131]](#footnote-1132) However, the exemption is not so broad as to encompass the solicitation of subscriptions to be delivered by another employee.[[1132]](#footnote-1133)

VII. Section 213(f) Exemption From the Minimum Wage, Overtime, Child Labor,   
and Recordkeeping Requirements of the FLSA

In 1957, Congress enacted Subsection (f) of Section 213, providing that the FLSA requirements regarding minimum wage, overtime, child labor, and recordkeeping did not apply extraterritorially:

(f) The provisions of sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Alaska; Hawaii; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; and the Canal Zone.[[1133]](#footnote-1134)

The legislative history of Section 213(f)[[1134]](#footnote-1135) demonstrates that this section was intended to overrule the Supreme Court’s decision in *Vermilya-Brown Co. v. Connell*,[[1135]](#footnote-1136) in which the Court held that the FLSA applied to the employees of contractors who were working on a U.S. military base on the island of Bermuda.[[1136]](#footnote-1137) The land on which the military base was located had been leased to the United States by the British government for 99 years.[[1137]](#footnote-1138) To reach its conclusion the Court looked at 29 U.S.C. §203(d) and Congress’s use of the term “possession” over many years, and found that there was an intention on the part of Congress to have the FLSA apply to employer–employee relationships on foreign territory under lease for bases.[[1138]](#footnote-1139)

Congress’ reaction to the *Vermilya-Brown* decision was to amend the FLSA by specifying the provisions of the FLSA that did not apply to the territories of the United States. During its deliberations, Congress noted that the FLSA was “designed to apply to a United States economy” and its application “to overseas areas is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of indigenous workers, and is contrary to the best interest of the United States and the foreign areas.”[[1139]](#footnote-1140)

In the years since its enactment, the list of territories set forth in Section 213(f) has been amended as follows:

• 1960, Alaska and Hawaii were struck from the list because they are covered by the term “state”;[[1140]](#footnote-1141)

• 1966, Eniwetok Atoll, Kwajalein Atoll, and Johnston Island were added to the list of covered territories;[[1141]](#footnote-1142)

• 1979, the Canal Zone was struck from the list of covered territories.[[1142]](#footnote-1143)

In *Smith v. Raytheon Co.*,[[1143]](#footnote-1144) a district court determined that the FLSA’s overtime requirements did not apply to employees working in Antarctica as part of the National Science Foundation’s (NSF’s) Antarctic Program,[[1144]](#footnote-1145) explaining that

[t]his court concludes that Antarctica is a “foreign country” within the meaning of section 213(f). There can be no disagreement over the proposition that Antarctica is “foreign” to the United States. And, the Supreme Court has broadly defined the word “country” within the term “foreign country” to mean “[a] region or tract of land.” Antarctica is certainly “[a] region or tract of land.” It, therefore, is not necessary to look any further than the ordinary, commonsense meaning of the language of section 213(f) to reach the conclusion that Antarctica is a “foreign country” within the meaning of that section.[[1145]](#footnote-1146)

In *Cruz v. Chesapeake Shipping, Inc.*,[[1146]](#footnote-1147) the Third Circuit noted that “seamen present an unusual case because, unlike other workers potentially covered by the FLSA, their services very often are not rendered within the United States or one of the enumerated territories [set forth in Section 213(f)],”[[1147]](#footnote-1148) ultimately holding that “foreign seamen employed on vessels engaged in foreign operations entirely outside of the United States, its waters and territories do not become subject to FLSA when their vessels are transitorily reflagged under the United States.”[[1148]](#footnote-1149) In reaching its decision, the Third Circuit noted that Congress’s “exclusion of ships flying foreign flags was presumably to avoid interference in the delicate field of international relations by imposing domestic labor law on foreign ships employing foreign nationals at foreign wages.”[[1149]](#footnote-1150) Similarly, in *Priyanto v. M/S Amsterdam*,[[1150]](#footnote-1151) a district court determined that the FLSA did not apply to Indonesian citizens working as stateroom cleaners on Holland America Line ships under the flag of Netherlands, reasoning that to hold otherwise would interfere with the internal affairs of a foreign-flagged ship.[[1151]](#footnote-1152)

Although the FLSA’s antiretaliation provision is not referenced in Section 213(f), in *Reyes-Fuentes v. Shannon Produce Farm, Inc*.,[[1152]](#footnote-1153) a district court declined to dismiss claims for retaliation brought by Mexican farm workers legally employed in the United States. The employer argued that the FLSA was inapplicable because the retaliatory act of denying rehire occurred in Mexico, a position the court found “inconsistent with the plain language of §213(f) as well as case law holding that the location of the workplace controls whether §213(f)’s extraterritoriality exemption applies.”[[1153]](#footnote-1154)

For a discussion of the minimum wage applicable in Guam, Puerto-Rico, Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, see Chapter 9, Minimum Wage Requirements, §VII.C [Special Minimum Wage Requirements; Territories of the United States].

1. *Field Operations Handbook*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Oct. 30, 2020). [↑](#footnote-ref-2)
2. In promulgating this bulletin, the DOL described the regulations as “interpretive rules.” At least one federal court has found the DOL’s interpretative rules regarding “establishments” to be “particularly instructive” because they are “well-reasoned, internally consistent, and generally consistent with judicial interpretations of the exemption.” *See* Chen v. Major League Baseball Props., Inc., 6 F. Supp. 3d 449, 457 n.4 (S.D.N.Y. 2014), *aff’d*, 798 F.3d 72 (2015). Other courts, as described in this chapter, have not found the “interpretative rules” to be persuasive. *See, e.g.*,Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987). [↑](#footnote-ref-3)
3. 29 C.F.R. §779.23 (internal citations omitted). [↑](#footnote-ref-4)
4. 324 U.S. 490 (1945). [↑](#footnote-ref-5)
5. *Id*. [↑](#footnote-ref-6)
6. *Id*. [↑](#footnote-ref-7)
7. *Id.* at 496 (footnote omitted). [↑](#footnote-ref-8)
8. 29 C.F.R. §779.302. [↑](#footnote-ref-9)
9. 29 U.S.C. §213(a)(3). [↑](#footnote-ref-10)
10. *Id*. §213(b)(10). [↑](#footnote-ref-11)
11. *Id*. §213(b)(27). [↑](#footnote-ref-12)
12. *Id*. §213(b)(29). [↑](#footnote-ref-13)
13. 29 U.S.C. §207(b). [↑](#footnote-ref-14)
14. *Id*. §207(i). [↑](#footnote-ref-15)
15. 29 C.F.R. §779.23. [↑](#footnote-ref-16)
16. *Id*. [↑](#footnote-ref-17)
17. Wright v. Adventures Rolling Cross Country, Inc., 2013 WL 1758815, at \*5 (N.D. Cal. Apr. 24, 2013) (employer organized and led trips to wilderness areas and foreign countries during which teenagers were engaged in recreational and other activities; holding that because employer’s only “establishment” was administrative office, it did not operate qualifying recreational establishment or organized camp). [↑](#footnote-ref-18)
18. Chen v. Major League Baseball Props., Inc., 6 F. Supp. 3d 449 (S.D.N.Y. 2014) (citing 29 C.F.R. §779.23, .203, & .303)), *aff’d*, 798 F.3d 72 (2015). [↑](#footnote-ref-19)
19. Each of the requirements for enterprise coverage in Section 203(r) and 203(s) is discussed in Chapter 4, Employer Coverage, §III [Enterprise Coverage]. [↑](#footnote-ref-20)
20. 29 C.F.R. §779.303. [↑](#footnote-ref-21)
21. *Id.* [↑](#footnote-ref-22)
22. 375 F.3d 393 (6th Cir. 2004). [↑](#footnote-ref-23)
23. *Id*. at 398. [↑](#footnote-ref-24)
24. *Id.* at 397–98. [↑](#footnote-ref-25)
25. 29 C.F.R. §779.304. [↑](#footnote-ref-26)
26. *Id*. [↑](#footnote-ref-27)
27. *Id*. §779.305.“The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit.” *Id.* [↑](#footnote-ref-28)
28. *Id.* §779.307. [↑](#footnote-ref-29)
29. *Id.* [↑](#footnote-ref-30)
30. 29 C.F.R. §779.309. [↑](#footnote-ref-31)
31. *Id*. §779.308. For a discussion of “employed by,” *see* *Does v. Butler Amusements, Inc.*, 71 F. Supp. 3d 1125, 1139 (N.D. Cal. 2014) (key consideration in determining whether employee was employed “by” exempt establishment was type of work performed by employee). [↑](#footnote-ref-32)
32. 407 F.3d 1038 (6th Cir. 2005). [↑](#footnote-ref-33)
33. *Id.* at 1051–53. [↑](#footnote-ref-34)
34. 29 C.F.R. §779.310(a). [↑](#footnote-ref-35)
35. *Id.* §779.311(a). [↑](#footnote-ref-36)
36. *Id.* [↑](#footnote-ref-37)
37. 29 U.S.C. §213(a)(3). An exception in §213(a)(3) is that “the exemption from [minimum wage] and [overtime] does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from [minimum wage], a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture … .” *Id*. [↑](#footnote-ref-38)
38. Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 288 (10th Cir. 1973). [↑](#footnote-ref-39)
39. Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1118 n.6 (5th Cir. 1974). [↑](#footnote-ref-40)
40. But that history has been described as “skimpy” (*see* *Texas City Dike*, 492 F.2d at 1118; *see also* Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1329 (1st Cir. 1977) (“Application of the Section 13(a)(3) exemption in these circumstances is, to put it mildly, not self-evident.”)) or “sparse” (*see* Chen v. Major League Baseball Props., Inc., 6 F. Supp. 3d 449, 455 (S.D.N.Y. 2014), *aff’d*, 798 F.3d 72 (2d Cir. 2015) (“This rather limited legislative history little aids our interpretation of “establishment.”)). [↑](#footnote-ref-41)
41. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 71 (1961). [↑](#footnote-ref-42)
42. *Id.*, 75 Stat. 66. [↑](#footnote-ref-43)
43. *Id*., 75 Stat. 71 (emphasis added). [↑](#footnote-ref-44)
44. Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987) (quoting S. Rep. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1647–48). [↑](#footnote-ref-45)
45. Pub. L. No. 89-601, §§201(b)(2) and 202, repealed the previous   
    §213(a)(3) exemption relating to laundering, cleaning, or repairing and enacted a new §213(a)(3) solely devoted to amusement or recreational establishments. 80 Stat. 833 (1966). [↑](#footnote-ref-46)
46. 112 Cong. Rec. 10,757 (1966). Previously, the employees of an amusement or recreational establishment that operated on a seasonal basis were exempt only if the establishment was also a “retail or service establishment,” more than 50% of the sales of which were within the state where the establishment was located. 29 U.S.C. §213(a)(2)(ii). [↑](#footnote-ref-47)
47. Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1329 (1st Cir. 1977). [↑](#footnote-ref-48)
48. Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, §§4(a), 11. [↑](#footnote-ref-49)
49. 29 U.S.C. §213(b)(29). For a discussion of §213(b)(29), see §IV.L [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees of Amusement or Recreational Establishments Located in a National Park, National Forest, or on Land in the National Wildlife Refuge System] of this chapter. [↑](#footnote-ref-50)
50. For a discussion of the requirements needed to be an “establishment,” see §II [The Establishment Requirement] of this chapter. [↑](#footnote-ref-51)
51. 798 F.3d 72, 25 WH Cases2d 299 (2d Cir. 2015). [↑](#footnote-ref-52)
52. 798 F.3d at 78, n.5 (finding that legislative history of §213(a)(3) supports *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), interpretation: “During Senate floor debates on a 1949 amendment that included the retail or service establishment exemption, Senator George, the amendment’s sponsor, stated, ‘I wish to say that the word “establishment” has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business … and it does not mean an entire business enterprise.’ 95 Cong. Rec. 12,579 (1949).”). [↑](#footnote-ref-53)
53. WH Op. FLSA2003-1, 2003 WL 23374597, at \*3 (Mar. 17, 2003). [↑](#footnote-ref-54)
54. 85 F.3d 494, 3 WH Cases2d 577 (10th Cir. 1996). [↑](#footnote-ref-55)
55. 85 F.3d at 496 (quotations omitted). [↑](#footnote-ref-56)
56. *Id.* at 497 (citing 29 C.F.R. §779.302; Hays v. City of Pauls Valley, 74 F.3d 1002, 1006 (10th Cir. 1996); Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 596 (11th Cir. 1995); Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1331 n.4 (1st Cir. 1977); Brennan v. Southern Prods., Inc., 513 F.2d 740, 746–47 (6th Cir. 1975)). [↑](#footnote-ref-57)
57. H.R. Rep. No. 871-89, 35 (1965). “The report discussed H.R. 10518, a proposed amendment to the Fair Labor Standards Act which Congress did not pass. Although H.R. 10518 did not pass in 1965, the committee’s examples of exempt amusement activities are relevant because the following year Congress enacted into law an FLSA amendment whose amusement-recreation exemption is quite similar to that found in H.R. 10518. *Compare* 29 U.S.C.A. 213(a)(3) (Supp. 1973) with H.R. Rep. No.871, 89th Cong., 1st Sess. 35 (1965).” Brennan v. Texas City Dike & Marina, Inc.,492 F.2d 1115, 1118 n.8 (5th Cir. 1974). [↑](#footnote-ref-58)
58. WH Op. No. 600 (May 25, 1967), Lab. L. Rep. (CCH) ¶30,589). [↑](#footnote-ref-59)
59. WH Op. No. 623 (June 22, 1967), Lab. L. Rep. (CCH) ¶30,612). [↑](#footnote-ref-60)
60. WH Op. FLSA2006-39, 2006 WL 3406598 (Oct. 12, 2006) (overnight vacation cruise was found to meet requirements of §213(a)(3) because (1) primary activities of vessels included sightseeing, exploring sights and nature, nature- and sight-related discussions and lectures, group activities and programs, and meals and similar activities; and (2) cost of ticket appeared to reflect significant premium for nature and sightseeing aspect of excursion, making these vessels different from resort hotel). [↑](#footnote-ref-61)
61. U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook §25j11, https://www.dol.gov/agencies/whd/field-operations-handbook [hereinafter FOH]. [↑](#footnote-ref-62)
62. *Id.* §25j14. [↑](#footnote-ref-63)
63. *Id.* §25j16. [↑](#footnote-ref-64)
64. *Id.* §25j17. [↑](#footnote-ref-65)
65. *Id.* §25j09. [↑](#footnote-ref-66)
66. FOH §25j10. [↑](#footnote-ref-67)
67. *Id.* §25j15. “[I]f a campsite or campground merely provides space and parking facilities which the traveling public uses while in transit to a recreational area, … the campsite or campground is not an amusement or recreational establishment for purposes of §13(a)(3).” *Id*. *See also* Mann v. Falk,523 F. App’x 549 (11th Cir. 2013);Karnes v. Happy Trails RV Park, LLC,361 F. Supp. 3d 921 (W.D. Mo. 2019). For a discussion of recreational vehicle (RV) parks found not to meet the requirements of §213(a)(3), see§III.A.3 [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Employees Employed by Amusement or Recreational Establishments, Organized Camps, or Religious or Nonprofit Educational Conferences; A Distinct Physical Place of Business Versus Integrated Establishments] of this chapter*.* [↑](#footnote-ref-68)
68. FOH §25j05. In *Chen v. Major League Baseball Properties, Inc.*, 798 F.3d 72, 25 WH Cases2d 299 (2d Cir. 2015), the plaintiff argued that “FanFest”—an event that included baseball memorabilia displays and a collectors’ showcase where attendees could buy, sell, or trade baseball cards, similar to a baseball card convention—should be considered a “convention” so as to fall outside the scope of the   
    § 213(a)(3) exemption per the *Field Operations Handbook.* The Second Circuit found that the *Field Operations Handbook* provision regarding “conventions” was ambiguous and, therefore, declined to defer to the DOL’s guidance to the extent it conflicted with Congress’s plain intent to exempt amusement and recreational establishments. Ultimately, the court determined that the plaintiff did not effectively challenge the characterization of FanFest as a sports event or theme park. [↑](#footnote-ref-69)
69. FOH §25j03. [↑](#footnote-ref-70)
70. *Id.* §25j07. [↑](#footnote-ref-71)
71. WH Op. FLSA-469, 1979 WL 62129 (Sept. 12, 1979). [↑](#footnote-ref-72)
72. WH Op. FLSA, 1994 WL 1004822 (May 6, 1994). [↑](#footnote-ref-73)
73. WH Op. FLSA2018-26, 2018 WL 5921454 (Nov. 8, 2018). [↑](#footnote-ref-74)
74. WH Op., 1986 WL 1171127 (May 12, 1986). [↑](#footnote-ref-75)
75. *See* FOH §§25j04(b), 25j10; WH Op., 1999 WL 33210917 (Oct. 5, 1999). [↑](#footnote-ref-76)
76. WH Op. FLSA2009-5, 2009 WL 648997 (Jan. 14, 2009). [↑](#footnote-ref-77)
77. 492 F.2d 1115 (5th Cir. 1974). [↑](#footnote-ref-78)
78. *Id.* at 1117. [↑](#footnote-ref-79)
79. *Id.* at 1120. [↑](#footnote-ref-80)
80. *Id.* at 1118–19. [↑](#footnote-ref-81)
81. *Id*. [↑](#footnote-ref-82)
82. Dole v. Mr. W. Fireworks, Inc., 889 F.2d 543, 29 WH Cases 992 (5th Cir. 1989). [↑](#footnote-ref-83)
83. 889 F.2d at 546. [↑](#footnote-ref-84)
84. Mann v. Falk,523 F. App’x 549, 552–53 (11th Cir. 2013). [↑](#footnote-ref-85)
85. *Id.* *See also* Karnes v. Happy Trails RV Park, LLC, 361 F. Supp. 3d 921, 937 (W.D. Mo. 2019) (holding that RV park that derived at least 85% of its business from rental of long- and short-term RV campsites and collected money from camp store and propane sales, “both decidedly non-recreational sources of income,” did not qualify for exemption, rejecting notion that presence of ancillary pool transformed establishment into recreational facility). [↑](#footnote-ref-86)
86. 375 F.3d 393 (6th Cir. 2004). [↑](#footnote-ref-87)
87. *Id.* at 395–96. [↑](#footnote-ref-88)
88. *Id*. at 398. [↑](#footnote-ref-89)
89. Brennan v. Texas City Dike & Marina, 492 F.2d 1115, 1119–20 (5th Cir. 1974). [↑](#footnote-ref-90)
90. Double JJ Resort Ranch, 375 F.3d at 398. [↑](#footnote-ref-91)
91. 184 F.3d 1188, 5 WH Cases2d 739 (10th Cir. 1999). [↑](#footnote-ref-92)
92. 184 F.3dat 1191–92. [↑](#footnote-ref-93)
93. *Id.* at 1193–94. [↑](#footnote-ref-94)
94. *Id.* at 1194 (citing *Texas City Dike,* 492 F.2d at 1119–20). [↑](#footnote-ref-95)
95. 658 F. App’x 621 (2d Cir. 2016). [↑](#footnote-ref-96)
96. *Id.* at 625 (citing Chen v. Major League Baseball Props., Inc., 798 F.3d 72, 82, 25 WH Cases2d 299 (2d Cir. 2015)). [↑](#footnote-ref-97)
97. *Id*. [↑](#footnote-ref-98)
98. *Id.* at 626. [↑](#footnote-ref-99)
99. *Id*. [↑](#footnote-ref-100)
100. 29 C.F.R. §779.385. [↑](#footnote-ref-101)
101. Futrell v. Columbia Club, Inc.,338 F. Supp. 566, 571 (S.D. Ind. 1971); Shultz v. Deane-Hill Country Club, Inc., 310 F. Supp. 272, 278 (E.D. Tenn. 1969), *aff’d*, 433 F.2d 1311 (6th Cir. 1970) (per curiam). [↑](#footnote-ref-102)
102. WH Op. No. 983 (Apr. 23, 1969); WH Op. No. 968 (Mar. 19, 1969); WH Op. No. 655 (Sept. 5, 1967). [↑](#footnote-ref-103)
103. 29 C.F.R. §779.318, .319. [↑](#footnote-ref-104)
104. 817 F.2d 1255 (6th Cir. 1987). [↑](#footnote-ref-105)
105. *Id.* at 1258 (“After consideration of the language and purpose of the retail and service exemption and the seasonal amusement-recreational exemption, we conclude that Congress did not intend a public accessibility requirement in the seasonal exemption. The seasonal exemption serves a completely different function than the retail and service exemption.”). *See* Adams v. Detroit Tigers, Inc., 961 F. Supp. 176, 179 (1997) (“Although plaintiffs posit that because some of batboys’ work is not open to the public, they are like administrative personnel, ‘Congress did not intend a public accessibility requirement in the seasonal exemption.’”) (quoting *Louvers & Dampers*, 817 F.2d at 1258). [↑](#footnote-ref-106)
106. *See*WH Op. FLSA2018-26, 2018 WL5921454 (Nov. 8, 2018). [↑](#footnote-ref-107)
107. WH Op. FLSA2018-26, at 2 (citing WH Op. WH-312, 1975 WL 40936, at \*1 (May 7, 1975)). [↑](#footnote-ref-108)
108. *Id.* at 3(citing WH Op. WH-312, 1975 WL 40936, at \*1 (country clubs with nonprohibitive fees and nonexclusive memberships may be frequented by the public)). [↑](#footnote-ref-109)
109. FOH §25j06. However, a country or town club that is not open to the general public, but is available to only a select group of persons (or their guests) who have been specifically selected to club membership or whose membership fees are so high as to exclude the general public, is not considered an amusement or recreational establishment for purposes of the §213(a)(3) exemption. [↑](#footnote-ref-110)
110. For a discussion of the term “enterprise,” see §II [The Establishment Requirement] of this chapter. [↑](#footnote-ref-111)
111. WH Op. FLSA2021-3, 2021 WL 240824, at \*6 (Jan. 15, 2021)(citing 29 C.F.R. §§779.23, 779.303–.305). *See also* A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945); WH Op. FLSA 2018-26 (Nov. 8, 2018); WH Op. FLSA2009-11 (Jan. 15, 2009); WH Op. FLSA2006-39, 2006 WL 3406598, at \*1 (Oct. 12, 2006). [↑](#footnote-ref-112)
112. WH Op. FLSA2021-3, at \*6. [↑](#footnote-ref-113)
113. *Id.* at \*1. [↑](#footnote-ref-114)
114. *Id.* at \*6–7. [↑](#footnote-ref-115)
115. *Id.* (citing 29 C.F.R. §§779.23, 779.303–.305); Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 289–90 (10th Cir. 1973) (applying this definition under §213(a)(3)); citing Chen v. Major League Baseball Props., 798 F.3d 72, 79, 25 WH Cases2d 299 (2d Cir. 2015) (same)*. See also* WH Op. FLSA2018-26, 2018 WL 5921454 (Nov. 8, 2018); WH Op. (July 21, 1970). [↑](#footnote-ref-116)
116. WH Op. FLSA2021-3, at \*9. [↑](#footnote-ref-117)
117. *Id.* at \*10 (noting that the WHD has recognized that carnivals and circuses, which are typically mobile, may qualify as seasonal amusement and recreational establishments, citing WH Op. FLSA-718 (Jan. 14, 1977)). [↑](#footnote-ref-118)
118. *Id.* [↑](#footnote-ref-119)
119. *Id.* at \*2. [↑](#footnote-ref-120)
120. *Id.* at \*14. [↑](#footnote-ref-121)
121. *Id.* [↑](#footnote-ref-122)
122. *See, e.g.*, Adams v. Detroit Tigers, Inc., 961 F. Supp. 176, 179 (E.D. Mich. 1997) (holding that “an establishment is a distinct physical place of business—in this case, the Tigers’ establishment at Tiger Stadium, and not the Tigers’ organization as a whole”); *see also* Brennan v. Yellowstone Park Lines, Inc.,478 F.2d 285, 289 (6th Cir. 1987) (“Congress used the word ‘establishment’ to mean a distinct physical place of business rather than an integrated business enterprise.”) (citing A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945)). [↑](#footnote-ref-123)
123. Chao v. Double JJ Resort Ranch, 375 F.3d 393, 397–98 (6th Cir. 2004). [↑](#footnote-ref-124)
124. FOH §25j04(a). *See*Hill v. Delaware N. Cos. Sportservice, Inc., 838 F.3d 281, 292 (2d Cir. 2016) (finding that concessionaire was separate establishment). [↑](#footnote-ref-125)
125. *See Hill*, 838 F.3d at 292(noting that its holding on single-establishment issues did not preclude concessionaires from qualifying for exemption “because their operations and those of their host establishment constitute a single qualifying establishment”). [↑](#footnote-ref-126)
126. 838 F.3d 281 (2d Cir. 2016). [↑](#footnote-ref-127)
127. *Id.* at 289. [↑](#footnote-ref-128)
128. *Id.* at 292. The court decided not to harmonize conflicting DOL opinion letters, choosing instead to follow the legislative history adopted in 29 C.F.R. §779.385. [↑](#footnote-ref-129)
129. 29 C.F.R. §779.305. [↑](#footnote-ref-130)
130. *Id. See also* Jones v. Bryant Park Mkt. Events, LLC, 658 F. App’x 621 (2d Cir. 2016) (finding that entire Winter Village enterprise was operated by single entity, and yearly revenues from Winter Village flowed into common treasury where defendant paid all its employees––whether they worked in restaurant, skating rink, or shops––using single payroll database, and that contract permitting defendant to maintain Winter Village defined Winter Village as single “installation,” and restaurant, rink, and shops were marketed jointly to public). [↑](#footnote-ref-131)
131. 29 C.F.R. §779.305 (“The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit. The requirement has reference to the indiscriminate use of the employee in both units without regard to the segregated functions of such units.”); *see also* WH Op. FLSA2009-11, 2009 WL 649013 (Jan. 15, 2009); WH Op. (Nov. 30, 1984). [↑](#footnote-ref-132)
132. 562 F.2d 1323 (1st Cir. 1977). [↑](#footnote-ref-133)
133. *Id.* at 1330 (citing 29 C.F.R. §779.303–.305). [↑](#footnote-ref-134)
134. *Id.* at 1331. [↑](#footnote-ref-135)
135. WH Op. FLSA2006-37, 2006 WL 3227792 (Sept. 28, 2006) (“It appears from your description that the separate base camps are physically remote from one another. Thus, each base camp would meet the definition of a separate establishment.”); *see* *also* Does v. Butler Amusements, Inc., 71 F. Supp. 3d 1125 (N.D. Cal 2014) (entire enterprise was not relevant establishment; questions remained as to whether individual carnivals’ mobile unit offices set up to handle operations of carnivals were relevant establishments). [↑](#footnote-ref-136)
136. Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 288–90, 21 WH Cases 133, 136 (10th Cir. 1973) (rejecting district court’s finding that as result of integrated management of company, §213(a)(3) exempted all employees of company from minimum wage and overtime requirements; parties agreed that if court found that each physically separate facility or location operated by defendant constituted single establishment, Secretary of Labor would be entitled to injunction for violation of Act). [↑](#footnote-ref-137)
137. 184 F.3d 1188 (10th Cir. 1999). [↑](#footnote-ref-138)
138. *Id.* at 1192–93. In addition to finding that Keystone and Arapahoe Basin were separate establishments, the court found that the Keystone operations met the recreational requirements for the §213(b)(29) exemption. [↑](#footnote-ref-139)
139. 798 F.3d 72, 25 WH Cases2d 299 (2d Cir. 2015). [↑](#footnote-ref-140)
140. 798 F.3d at 79. [↑](#footnote-ref-141)
141. *Id*. at 81. [↑](#footnote-ref-142)
142. WH Op. FLSA2004-6NA, 2004 WL 5303034 (Aug. 4, 2004) (not only were two operations not physically separate, but they both employed two individuals at same time). [↑](#footnote-ref-143)
143. WH Op. FLSA2018-26, 2018 WL 5921454 (Nov. 8, 2018). [↑](#footnote-ref-144)
144. *Id*. at \*2. [↑](#footnote-ref-145)
145. *Id*. (citing WH Op. FLSA-830, 1972 WL 34909 (June 8, 1972)). [↑](#footnote-ref-146)
146. *Id*. at \*3. [↑](#footnote-ref-147)
147. 85 F.3d 494, 3 WH Cases2d 577 (10th Cir. 1996). [↑](#footnote-ref-148)
148. 85 F.3d at 496 (quotations omitted). [↑](#footnote-ref-149)
149. *Id*. at 497–98; *see also* Gibbs v. Montgomery Cnty. Agric. Soc’y, 140 F. Supp. 2d 835 (S.D. Ohio 2001) (holding that defendant’s lease of areas to nonexempt organizations did not result in destruction of exempt status); Chaney v. Clark Cnty. Agric. Soc’y, 629 N.E.2d 513, 517, 1 WH Cases2d 1658, 1660 (Ohio Ct. App. 1993) (holding that where, by statute, board was nonprofit entity responsible for holding annual fair and for managing and maintaining grounds on which fair held, board was amusement or recreational “establishment” for purposes of §213(a)(3) exemption, even though on occasion it rented out its facilities to nonexempt businesses). *But see* Brennan v. Southern Prods., Inc., 513 F.2d 740, 745, 22 WH Cases 233, 237 (6th Cir. 1975) (holding that business that operated for about eight weeks per year in cooperation with county police officers’ association to produce music show did not qualify for exemption because business did not have as principal activity provision of amusement or recreational activity). [↑](#footnote-ref-150)
150. Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 595, 2 WH Cases2d 1537 (11th Cir. 1995). *See also* WH Op. FLSA2018-26, 2018 WL 5921454 (Nov. 8, 2018) (citing *Jeffery*, DOL opined that company that operated and maintained swimming pool facilities at hotels, motels, apartments, and condominiums was amusement or recreational establishment even if company did not own swimming pools that it serviced). [↑](#footnote-ref-151)
151. FOH §25j00(b). [↑](#footnote-ref-152)
152. *Id.* §25j00(c). [↑](#footnote-ref-153)
153. *Id.* §25j01(a). Tests A and B refer to a calendar year throughout which the operations of an establishment can be tested to determine whether it is a “seasonally operated place of business.” [↑](#footnote-ref-154)
154. *Id*.§25j01(b). [↑](#footnote-ref-155)
155. *Id*. [↑](#footnote-ref-156)
156. *Id*. [↑](#footnote-ref-157)
157. WH Op. (Jan. 24, 1975). [↑](#footnote-ref-158)
158. 64 F.3d 590 (11th Cir. 1995). [↑](#footnote-ref-159)
159. *Id.* at 596–97 (holding exemption applicable even though groundskeeper was employed during six-month off-season). The DOL has advised that “lifeguards’ off-season maintenance work would not cause their establishment to fail the seven months test.” *Id.*  [↑](#footnote-ref-160)
160. *Id*. at 596. [↑](#footnote-ref-161)
161. *Id.* (citations omitted). [↑](#footnote-ref-162)
162. Bridewell v. Cincinnati Reds, 68 F.3d 136, 2 WH Cases2d 1573 (6th Cir. 1995); *accord* Liger v. New Orleans Hornets NBA Ltd. P’ship,565 F. Supp. 2d 680, 684 (E.D. La. 2008) (finding that reasoning and holding of *Bridewell* more analogous than *Jeffery* because Hornets operated in summer even when they did not make playoffs; “[c]onsequently … the Hornets are a year-round operation”). [↑](#footnote-ref-163)
163. *Bridewell*, 68 F.3d at 138–39. [↑](#footnote-ref-164)
164. *Id.* at 139. The Sixth Circuit reversed the order of summary judgment in favor of the Reds and remanded the case to the district court for further proceedings. On remand, the Reds argued that it met the §213(a)(3)(B) requirements because its average receipts from the six-month off season did not amount to more than 1/3 of its average receipts from the six-month season. This argument is addressed in §III.A.6.b [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Employees Employed by Amusement or Recreational Establishments, Organized Camps, or Religious or Nonprofit Educational Conferences; The Seasonality Tests Under the Section 213(a) Exemption; Test B: The 33 1/3% Test] of this chapter. [↑](#footnote-ref-165)
165. 29 U.S.C. §213(a)(3)(B). [↑](#footnote-ref-166)
166. FOH §25j01(c)(1). [↑](#footnote-ref-167)
167. *Id.* §25j01(c)(2). [↑](#footnote-ref-168)
168. 155 F.3d 828, 4 WH Cases2d 1061 (6th Cir. 1998) (on appeal, Cincinnati Reds dropped its seven-months argument for seasonal status and argued that 33 1/3% receipt test should apply). [↑](#footnote-ref-169)
169. 155 F.3dat 830. [↑](#footnote-ref-170)
170. *Id.* at 829. [↑](#footnote-ref-171)
171. *Id*. [↑](#footnote-ref-172)
172. *Id.* at 832. *See also* Liger v. New Orleans Hornets NBA Ltd. P’ship, 565 F. Supp. 2d 680 (E.D. La. 2008) (finding “receipts” test set out in *Bridewell* on remand to be logical, fair, and accurate assessment of year-round activity of organization, but that data submitted by plaintiffs showed that for years in which receipt data were available, Hornets failed average receipt test by large margin). *But see* Adams v. Detroit Tigers, Inc., 961 F. Supp. 176 (E.D. Mich. 1997) (comptroller of Tigers showed that Tigers met 33 1/3% test by presenting Tigers’ receipts using accrual method; plaintiffs did not challenge figures, and court accepted them without discussion); McMillan v. Boy Scouts of Am.-Aloha Council, 2012 WL 2282539, at \*4 (D. Haw. June 15, 2012) (chief executive officer stated in declaration that Aloha Council’s average receipts met “33 1/3 test”; because plaintiff failed to make proper request for further discovery on whether receipts were obtained on cash or accrual basis, court relied on record before it in deciding that employer met 33 1/3 test). [↑](#footnote-ref-173)
173. FOH §25j12. [↑](#footnote-ref-174)
174. *Id*. [↑](#footnote-ref-175)
175. 74 F.3d 1002 (10th Cir. 1996). [↑](#footnote-ref-176)
176. *Id*. at 1006. [↑](#footnote-ref-177)
177. WH Op. FLSA2021-3, 2021 WL 240824, at \*2 (Jan. 15, 2021). [↑](#footnote-ref-178)
178. *Id.* at \*12 (internal citations omitted). [↑](#footnote-ref-179)
179. *Id.* at \*13. [↑](#footnote-ref-180)
180. FOH §25j08. [↑](#footnote-ref-181)
181. 838 F.3d 281 (2d Cir. 2016). [↑](#footnote-ref-182)
182. *Id*. at 295 (quoting Skidmore v. Swift & Co., 323 U.S. 134 (1944)). [↑](#footnote-ref-183)
183. 838 F.3d 281 (2d Cir. 2016). [↑](#footnote-ref-184)
184. *Id.* at 294. [↑](#footnote-ref-185)
185. WH Op., 2000 WL 35432058 (May 23, 2000). [↑](#footnote-ref-186)
186. 474 F.2d 18 (5th Cir. 1973). [↑](#footnote-ref-187)
187. *Id.* at 19. [↑](#footnote-ref-188)
188. WH Op., 2000 WL 35432058 (May 23, 2000) (quoted in McMillan v. Boy Scouts of Am.-Aloha Council, 2012 WL 2282539 (D. Haw. June 15, 2012)). *See also* Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 596–97 (11th Cir. 1995) (holding that exemption is based not on length of time plaintiff performed work, but on length of defendant’s seasonal operation). *But see* Bridewell v. Cincinnati Reds, 68 F.3d 136, 2 WH Cases2d 1573 (6th Cir. 1995) (maintenance staff was not within exemption because no fewer than 120 employees worked in “off-season”). [↑](#footnote-ref-189)
189. 2012 WL 2282539 (D. Haw. June 15, 2012). [↑](#footnote-ref-190)
190. *Id.* at \*1. [↑](#footnote-ref-191)
191. 29 C.F.R.§784.120. [↑](#footnote-ref-192)
192. *Id.* §784.118 (quoting 83 Cong. Rec. 7408, 7443; S. Rep. No. 145, 33 on H.R. Rep. No. 3935 (1961)). [↑](#footnote-ref-193)
193. 29 U.S.C. §213(a)(5). Much of this section was in the original version of the FLSA, except for the following:

     • In 1949, the words “canning of any kind of fish, shellfish or other aquatic forms of life” were dropped from this section and placed in §213(b)(4). Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, 63 Stat. 910 (1949). Section 213(b)(4) was eventually repealed in 1976. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §11(c), 88 Stat. 55, 64 (1974).

     • In 1961, Congress inserted the word “propagating” after the word “taking” and inserted the following after the words “vegetable life”: “or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations.” Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §9 (1961). [↑](#footnote-ref-194)
194. 29 C.F.R.§784.106. [↑](#footnote-ref-195)
195. *Id*. [↑](#footnote-ref-196)
196. 279 F.3d 688, 7 WH Cases2d 1041 (9th Cir. 2002). [↑](#footnote-ref-197)
197. 29 C.F.R. §784.106. [↑](#footnote-ref-198)
198. *Id*. [↑](#footnote-ref-199)
199. *Id*. §784.128; *see* *Do*, 279 F.3d at 693 (processing that occurred onboard fishing trawlers was conducted exactly as defined in regulations as “first processing”). [↑](#footnote-ref-200)
200. 279 F.3d 688, 7 WH Cases2d 1041 (9th Cir. 2002). [↑](#footnote-ref-201)
201. 279 F.3d at 692. [↑](#footnote-ref-202)
202. *Id.* at 693. [↑](#footnote-ref-203)
203. 796 F.2d 337, 27 WH Cases 1327 (9th Cir. 1986). [↑](#footnote-ref-204)
204. 796 F.2d at 338; 29 C.F.R. §784.131. [↑](#footnote-ref-205)
205. 29 C.F.R. §784.107. [↑](#footnote-ref-206)
206. *Id*. §784.108. [↑](#footnote-ref-207)
207. *Id*. §784.110, .111. As an enforcement policy, the DOL takes the position that a commodity contains a “substantial amount” of a non-enumerated product if it is made up of more than 20% of such a product. *Id*. §784.112. [↑](#footnote-ref-208)
208. *Id*. §784.113. [↑](#footnote-ref-209)
209. 29 C.F.R. §784.116. [↑](#footnote-ref-210)
210. *Id*. [↑](#footnote-ref-211)
211. 29 U.S.C. §213(a)(8). Much of this section was in the original version of the FLSA, except for the following:

     • In 1949, the exemption added the words “or daily” after “semiweekly,” changed “three thousand” to “four thousand” and added the words “or counties contiguous thereto” after “published.” Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393 (1949).

     • In 1966, Congress substituted “where published” for “where printed and published.” Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §205 (1966) [↑](#footnote-ref-212)
212. 327 U.S. 186, 5 WH Cases 864 (1946). [↑](#footnote-ref-213)
213. 327 U.S. at 193–95. [↑](#footnote-ref-214)
214. FOH §23a00(b). [↑](#footnote-ref-215)
215. *Id*. [↑](#footnote-ref-216)
216. *Id.* §23a01. [↑](#footnote-ref-217)
217. *Id.* §23a02. [↑](#footnote-ref-218)
218. *Id.* §23a10. [↑](#footnote-ref-219)
219. FOH §23a06. [↑](#footnote-ref-220)
220. *Id.* §23a07. [↑](#footnote-ref-221)
221. Robinson v. North Ark. Printing Co., Inc., 71 F. Supp. 921, 923, 7 WH Cases 242, 245 (W.D. Ark. 1947). [↑](#footnote-ref-222)
222. 29 C.F.R. §786.250; *see also* FOH §23a05. [↑](#footnote-ref-223)
223. WH Admin. Op. 376 (June 29, 1965). [↑](#footnote-ref-224)
224. 13 F.3d 685, 1 WH Cases2d 1313 (3d Cir. 1994). Gateway Press published 19 community newspapers serving the Pittsburg suburbs; the 19 papers had different mastheads and different local news items. 13 F.3dat 688. [↑](#footnote-ref-225)
225. *Id.* at 696. [↑](#footnote-ref-226)
226. *Id*. at 697. [↑](#footnote-ref-227)
227. *Id.* [↑](#footnote-ref-228)
228. 29 U.S.C. §213(a)(10). This exemption was not in the original version of the FLSA. In 1939, the language of this exemption was added to the statute as   
     §213(a)(11). It provided that the switchboard operator had to be employed by a “public telephone exchange” with “less than 500 stations.” The Act of August 9, 1939, 53 Stat. 1266 (1939). Subsequent amendments to this section include the following:

     • In 1949 the number of stations was increased from 500 to “not more than 750 stations.” Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, §11 (1949).

     • In 1961, the words “by an independently owned public telephone company” were substituted for “is a public telephone exchange.” Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §9 (1961).

     • In 1966, Congress repealed this version of §213(a)(10), moved its subject matter to §209(d), and redesignated §213(a)(11) as §213(a)(10). Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §§204(a), 215(b)(1) (1966). [↑](#footnote-ref-229)
229. *See* Southern Bell Tel. & Tel. Co. v. Davis, 202 S.W.2d 753, 754, 7 WH Cases 30, 31 (Ky. Ct. App. 1947). [↑](#footnote-ref-230)
230. Cherry Lake, Inc. v. Kearce, 26 So. 2d 434, 437, 6 WH Cases 322, 325 (Fla. 1946). [↑](#footnote-ref-231)
231. Mitchell v. Telephone Answering Serv., Inc., 183 F. Supp. 607, 617, 14 WH Cases 747, 754 (D.P.R. 1959), *aff’d sub nom*. Telephone Answering Serv., Inc. v. Goldberg, 290 F.2d 529, 15 WH Cases 67 (1st Cir. 1961). [↑](#footnote-ref-232)
232. 29 U.S.C. §213(a)(12). As originally enacted in 1938, §213(a)(3) of the FLSA exempted from both the minimum wage and overtime pay requirements “any employee employed as a seaman.” Pub. L. No. 75-718, 52 Stat. 1050. In 1949, the exemption was renumbered as §213(a)(14). Fair Labor Standards Act, Pub. L. No. 81-393, 63 Stat. 910. In 1961, §213(a)(14) was amended by adding the words “on a vessel other than an American vessel,” Pub. L. No. 87-30, §9, and an overtime exemption was provided for seamen working on an American vessel (§213(b)(6)), providing therefore that those employed as seamen on an American vessel were brought within the minimum wage provisions of the Act. In 1966, Congress redesignated §213(a)(14) as §213(a)(12). Pub. L. No. 89-601, §206(b)(1). [↑](#footnote-ref-233)
233. Both “seaman” and “vessel” are fully discussed in §IV.D [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Employed as Seamen] of this chapter. For a discussion of what constitutes an “American vessel,” see §IV.D.2 [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Employed as Seamen; “Vessel”] of this chapter. [↑](#footnote-ref-234)
234. 474 F. Supp. 2d 866 (S.D. Tex.), *aff’d*, 504 F.3d 511, 523 (5th Cir. 2007) (affirming without addressing FLSA issue, Fifth Circuit said that “because we find that 46 U.S.C. §§10301 and 10501’s voyage requirements dispose of this appeal, we decline to venture into a discussion of the FLSA”). [↑](#footnote-ref-235)
235. 474 F. Supp. 2d at 877. [↑](#footnote-ref-236)
236. *Id.* *See also* Senegal v. Fairfield Indus., Inc., 2018 WL 6079354, at \*8 (S.D. Tex. Nov. 21, 2018). [↑](#footnote-ref-237)
237. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 231 (3d Cir. 1991); Priyanto v. M/S Amsterdam, 2009 WL 650734, at \*8 (C.D. Cal. Mar. 11, 2009)(citing *Cruz*,932 F.2d at 226); *see also* *Kaluom*, 474 F. Supp. 2d 866. [↑](#footnote-ref-238)
238. 29 U.S.C. §213(a)(15). [↑](#footnote-ref-239)
239. Where domestic service employees were employed by an enterprise engaged in commerce, they would be covered by the FLSA. [↑](#footnote-ref-240)
240. Corrales v. Bello, 2009 WL 302271, at \*2 (S.D. Fla. Feb. 9, 2009) (finding that, given grammatical structure of §213(a)(15), term “casual basis” referred only to “babysitting services” and not to “companionship services”). [↑](#footnote-ref-241)
241. Pub. L. No. 93-259, §7, 88 Stat. 55, 62 (1974). [↑](#footnote-ref-242)
242. 29 U.S.C. §213(b)(21). For a discussion of §213(b)(21), see §IV.I [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Domestic Servants Who Reside in a Household] of this chapter. [↑](#footnote-ref-243)
243. *See* 40 Fed. Reg. 7,404 (Feb. 20, 1975); 29 C.F.R. pt. 522. [↑](#footnote-ref-244)
244. *See* 29 C.F.R. §552.4, .5, .103, & .104. [↑](#footnote-ref-245)
245. For a discussion of these regulatory changes, see §III.F.2 [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Casual-Basis Babysitters and Domestic Companionship Service Providers; Companionship Services] of this chapter. [↑](#footnote-ref-246)
246. 29 C.F.R. §552.4. [↑](#footnote-ref-247)
247. *Id*. “While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household.” *Id*. [↑](#footnote-ref-248)
248. *Id*. §552.5 [↑](#footnote-ref-249)
249. *Id.* §552.104(d). [↑](#footnote-ref-250)
250. 29 C.F.R. §552.109(b). [↑](#footnote-ref-251)
251. *Id*. [↑](#footnote-ref-252)
252. *Id*. §552.5. [↑](#footnote-ref-253)
253. *Id.* §552.104(c). [↑](#footnote-ref-254)
254. *Id*. [↑](#footnote-ref-255)
255. 29 C.F.R. §552.104(b). [↑](#footnote-ref-256)
256. *Id*. [↑](#footnote-ref-257)
257. *Id*. [↑](#footnote-ref-258)
258. 78 Fed. Reg. 60,454 (Oct. 1, 2013). [↑](#footnote-ref-259)
259. Home Care Ass’n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015), *cert*. *denied*, 136 S. Ct. 2506 (2016). [↑](#footnote-ref-260)
260. 799 F.3d at 1087. [↑](#footnote-ref-261)
261. 551 U.S. 158 (2007). [↑](#footnote-ref-262)
262. *Weil*, 799 F.3d at 1087. Following the D.C. Circuit’s decision in *Weil*, district courts disagreed as to whether the final rule’s original effective date of January 1, 2015, remained in place, or if the rule should be deemed effective only after the D.C. Circuit issued *Weil* in October 2015. *Compare* Bangoy v. Total Homecare Solutions, LLC, 2015 WL 12672727 (S.D. Ohio Dec. 21, 2015) (granting motion to dismiss claims seeking unpaid overtime for work performed prior to October 2015), *with* Kinkead v. Humana, Inc., 206 F. Supp. 3d 751 (D. Conn. 2016) (denying motion to dismiss claims seeking unpaid overtime for work performed prior to October 2015). The Ninth Circuit held that the final rule’s original effective date of January 1, 2015, stands. *See* Ray v. County of L.A., 935 F.3d 703, 716 (9th Cir. 2019). [↑](#footnote-ref-263)
263. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §7, 88 Stat. 55, 62 (1974). [↑](#footnote-ref-264)
264. 29 C.F.R. §552.2(b); *see also* 29 U.S.C. §206(f). [↑](#footnote-ref-265)
265. 29 C.F.R. §552.2(b); *see also* 60 Fed. Reg. 46,767 (Sept. 8, 1995) (revising thresholds for purposes of §206(f) and making other technical corrections in pt. 552). Interestingly, the regulations take the position that overtime protection was extended only to those domestic service employees meeting the test of §206(f) for minimum wage coverage. However, §207(1) itself does not reference the coverage thresholds contained in §206(f). [↑](#footnote-ref-266)
266. Pub. L. No. 93-259, §207(b)(3), added §213(a)(15) to the statute. [↑](#footnote-ref-267)
267. Pub. L. No. 93-259, §207(b)(4), added §213(b)(21) to the statute. [↑](#footnote-ref-268)
268. 78 Fed. Reg. 60,454, 60,457 (Oct. 1, 2013) (quoting S. Rep. No. 93-690, at 20 (1974); H.R. Rep. No. 93-913, at 36 (1974)). [↑](#footnote-ref-269)
269. *See* 29 U.S.C. §213(a)(15). [↑](#footnote-ref-270)
270. *See* 40 Fed. Reg. 7,404 (Feb. 20, 1975); 29 C.F.R. pt. 552. [↑](#footnote-ref-271)
271. 78 Fed. Reg. at 60,457. *See* 29 C.F.R. pt. 552, subpt. B, “Interpretations.” [↑](#footnote-ref-272)
272. 29 C.F.R. §552.109. [↑](#footnote-ref-273)
273. 78 Fed. Reg. 60,454, 60,455 (Oct. 1, 2013). [↑](#footnote-ref-274)
274. *Id.* at 60,458. [↑](#footnote-ref-275)
275. *Id.* at 60,455. [↑](#footnote-ref-276)
276. The changes to this regulation are discussed in §IV.I [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Domestic Servants Who Reside in a Household] of this chapter. [↑](#footnote-ref-277)
277. 78 Fed. Reg. at 60,455. See Chapter 14, Recordkeeping. [↑](#footnote-ref-278)
278. 78 Fed. Reg. 60,454, 60,460 (Oct. 1, 2013). [↑](#footnote-ref-279)
279. *Id*. [↑](#footnote-ref-280)
280. *Id*. [↑](#footnote-ref-281)
281. *Id*. Additional conforming changes were also made to 29 C.F.R. §552.101(a). [↑](#footnote-ref-282)
282. 29 C.F.R. §552.3. [↑](#footnote-ref-283)
283. *Id.*; *see also id.* §552.101. [↑](#footnote-ref-284)
284. *Id.* §552.101(a). [↑](#footnote-ref-285)
285. *Id*. [↑](#footnote-ref-286)
286. 29 C.F.R. at §552.101(b). [↑](#footnote-ref-287)
287. *Id*. [↑](#footnote-ref-288)
288. Palana v. Mission Bay, Inc., 2014 WL 5867430 (N.D. Cal. Nov. 11, 2014). [↑](#footnote-ref-289)
289. 78 Fed. Reg. 60,454, 60,461 (Oct. 1, 2013). [↑](#footnote-ref-290)
290. 78 Fed. Reg. at 60,462 (citing WH Op. FLSA2006-13NA (June 23, 2006); WH Op. FLSA2001-14, 2001 WL 1869966 (May 14, 2001); WH Op., 2001 WL 15558952 (Feb. 9, 2001); WH Op., 1999 WL 1002387 (Apr. 8, 1999)). [↑](#footnote-ref-291)
291. 78 Fed. Reg. at 60,463. [↑](#footnote-ref-292)
292. 353 F.3d 1214, 9 WH Cases2d 1001 (10th Cir. 2004). [↑](#footnote-ref-293)
293. 353 F.3d at 1218. [↑](#footnote-ref-294)
294. *Id*. at 1219. [↑](#footnote-ref-295)
295. *Id*. at 1219–20. *See, e.g*.,

     *Third Circuit:* Madison v. Resources for Human Dev., Inc., 233 F.3d 175, 6 WH Cases2d 961 (3d Cir. 2000) (*Madison II*) (determining that residences were not private homes, even though homes rented by corporation were subleased to clients, where clients lacked possessory interest, control over access to homes, and complete freedom in daily activities).

     *Sixth Circuit:* Gay v. Extended Family Concepts,102 F. Supp. 2d 449, 6 WH Cases2d 1061 (N.D. Ohio 2000) (holding that “shared-living facilities” were not private residences as provided by companion services exemption where they were organized for profit, community was designed to accommodate 96 people, residents did not maintain property, and residents did not have primary control over property).

     *Tenth Circuit:* Johnston v. Volunteers of Am., Inc., 213 F.3d 559, 6 WH Cases2d 65 (10th Cir. 2000) (holding that defendant did not conclusively establish that its facilities were “private residences” where patients were placed in group residence with other developmentally disabled individuals, controlled by staff instead of family, and subject to defendant’s right to appropriate their rooms for its own purposes).

     *But see* Terwilliger v. Home of Hope, Inc.,21 F. Supp. 2d 1294, 4 WH Cases2d 1661 (N.D. Okla. 1998) (deeming residences of employer’s clients to be “private homes” because (1) 22% of clients’ homes were owned by client or client’s guardian while remaining residences were rented in clients’ names from third parties, (2) employer did not co-sign lease and had no property interest in client’s residence, (3) each client selected and purchased own furniture, (4) employer maintained set of keys to residences only for emergencies, (5) client chose whether he or she would have housemate and who that housemate would be, and (6) employer paid rent to landlord from client’s trust account); Bowler v. Deseret Village Ass’n, 922 P.2d 8, 14, 3 WH Cases2d 754 (Utah 1996) (holding that facility qualified as private home for purposes of exemption where it was originally financed and built by family members of residents, privately funded, not open to public, organized as nonprofit corporation, and housed 14 disabled residents) [↑](#footnote-ref-296)
296. *Welding*, 353 F.3d at 1219(citing Madison v. Resources for Human Dev., Inc., 39 F. Supp. 2d 542, 548 (E.D. Pa. 1999) (*Madison I*), *vacated on other grounds by* 233 F.3d 175 (3d Cir. 2000)). [↑](#footnote-ref-297)
297. Welding v. Bios Corp., 353 F.3d 1214, 1219, 9 WH Cases2d 1001 (10th Cir. 2004) (noting that if service provider leased unit, there was some indication that it was not private home). [↑](#footnote-ref-298)
298. 353 F.3dat 1220 (“If both the client and/or the client’s family and the service provider provide these essentials, then the factor is more ambiguous.”) [↑](#footnote-ref-299)
299. *Id.* (citing *Madison II*, 233 F.3d at 176 (relying on fact that clients could not remain in residence if they terminated relationship with service provider in holding that residences were not private homes)). [↑](#footnote-ref-300)
300. This factor is relevant to the issue of control*. Welding*,353 F.3d at 1220. In remanding the case, the Tenth Circuit advised the district court that, using these factors, it must determine whether each living unit was a private residence for purposes of the §213(a)(15) exemption. *Id*. at 1219–21. [↑](#footnote-ref-301)
301. 78 Fed. Reg. 60,454, 60,464 (Oct. 1, 2013). *See, e.g.*,Johnston v. Volunteers of Am., Inc., 213 F.3d 559, 563–65, 6 WH Cases2d 65 (10th Cir. 2000); Linn v. Developmental Servs. of Tulsa, Inc., 891 F. Supp. 574 (N.D. Okla. 1995); Lott v. Rigby, 746 F. Supp. 1084 (N.D. Ga. 1990). [↑](#footnote-ref-302)
302. Lochiano v. Compassionate Care, LLC, 2012 WL 4059873 (W.D. Mo. Sept. 14, 2012). Relying also on *Solis v. FirstCall Staffing Solutions, Inc.*, 2009 WL3855702, at \*5 (W.D. Mo. Nov. 18, 2009), the court analyzed each of the factors and found that the plaintiff was not covered by the companionship services exemption. [↑](#footnote-ref-303)
303. 809 F.3d 1006 (8th Cir. 2016). [↑](#footnote-ref-304)
304. *Id*. at 1010–11; *see also* Tinsley v. Covenant Care Servs., LLC, 228 F. Supp. 3d 911 (E.D. Mo. 2017) (while distinguishing living arrangements from those in *Fezard*, court followed reasoning in *Fezard* to determine that employees had provided services in “private home” because employer did not have control over residences of its independent senior-living clients). [↑](#footnote-ref-305)
305. *Fezard*,809 F.3d at 1011. [↑](#footnote-ref-306)
306. 78 Fed. Reg. 60,454, 60,462 (Oct. 1, 2013) (citing WH Op. FLSA2006-13NA (June 23, 2006); WH Admin. Op. FLSA2001-14, 2001 WL 1869966 (May 14, 2001); WH Op., 2001 WL 15558952 (Feb. 9, 2001); WH Op., 1999 WL 1002387 (Apr. 8, 1999)). [↑](#footnote-ref-307)
307. 29 C.F.R. §552.6. [↑](#footnote-ref-308)
308. 78 Fed. Reg. at 60,463*.* [↑](#footnote-ref-309)
309. *Id*. [↑](#footnote-ref-310)
310. *Id*. [↑](#footnote-ref-311)
311. *Id*. [↑](#footnote-ref-312)
312. 29 C.F.R. §552.6(a). [↑](#footnote-ref-313)
313. *Id*. [↑](#footnote-ref-314)
314. *Id.* [↑](#footnote-ref-315)
315. 78 Fed. Reg. 60,454, 60,463 (Oct. 1, 2013). [↑](#footnote-ref-316)
316. *Id.* at 60,464 (citing 119 Cong. Rec. S24,773, S24,801 (daily ed. July 19, 1973)). [↑](#footnote-ref-317)
317. 29 C.F.R. §552.6(b). *See also* 78 Fed. Reg.at 60,464–65, 60,468. [↑](#footnote-ref-318)
318. 78 Fed. Reg.at 60,464–65, 60,468. In the final rule regarding §552.6(b), the DOL chose to use the term “care” rather than “intimate personal care services,” which had been in the notice of proposed rulemaking (NPRM), “to make more explicit that care remains part of companionship services.” *Id.* at 60,465. The DOL decided to replace the proposed detailed list of intimate personal care services with the more commonly used industry phrases “activities of daily living” and “instrumental activities of daily living,” to simplify the transition to the new regulation. *Id.* at 60,466. [↑](#footnote-ref-319)
319. *Id.* at 60,467 (citing 119 Cong. Rec. S24,773, S24,801 (daily ed. July 19, 1973)). [↑](#footnote-ref-320)
320. *Id*. See [↑](#footnote-ref-321)
321. 218 F. Supp. 3d 978 (W.D. Ark. 2016). [↑](#footnote-ref-322)
322. *Id*. at 984–85. Adopting the burden-shifting approach, the court in *Stansbury v. Faulkner*, 2020 WL 807540 (W.D. Tenn. Feb. 18, 2020), denied the defendant’s motion for summary judgment, finding that the plaintiff’s testimony that she performed care-related tasks that met the 20% threshold for the care exception precluded summary judgment. In support, the court cited three pre-2015 cases in which summary judgment was also denied, where the plaintiffs listed the household-related tasks that they performed and the amount of time spent on such tasks. Anglin v. Maxim Health Care Servs., Inc., 2009 WL 2473685, at \*4 (M.D. Fla. Aug, 11, 2009); Fernandez v. Elder Care Option, Inc., 2005 WL 8165440, at \*21 (S.D. Fla. Aug. 1, 2005); Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294, 1301–02 (N.D. Okla. 1998). In the *Stansbury* case, following a two-day trial, the court ultimately denied the plaintiff’s claim for failure to pay overtime under the FLSA. *See* Stansbury v. Faulkner, 2020 WL 3249983 (W.D. Tenn. June 16, 2020). [↑](#footnote-ref-323)
323. 2021 BL 308527, 2021 WL 3619677 (S.D. Fla. Aug. 16, 2021). [↑](#footnote-ref-324)
324. 29 C.F.R. §552.6(c). *See also* 78 Fed. Reg. 60,454, 60,469 (Oct. 1, 2013). [↑](#footnote-ref-325)
325. 78 Fed. Reg. at 60,468. [↑](#footnote-ref-326)
326. *Id.* at 60,469. [↑](#footnote-ref-327)
327. *Id*. [↑](#footnote-ref-328)
328. *Id*. [↑](#footnote-ref-329)
329. 29 C.F.R. §552.6(d). *See also* 78 Fed. Reg. 60,454, 60,470 (Oct. 1, 2013). [↑](#footnote-ref-330)
330. 29 C.F.R. §552.6(d). In its NPRM, the DOL proposed to revise its regulation regarding the provision of “medical care” by describing the medical care that was typically provided by trained personnel and offering examples of particular medical services rather than by naming occupations. But after reviewing comments received, and “for purposes of simplicity and clarity,” the DOL decided not to adopt the text as proposed. Rather, it adopted text closer to the prior version of the regulations. 78 Fed. Reg. at 60,471. [↑](#footnote-ref-331)
331. 78 Fed. Reg. at 60,470. According to the final rule, the decision to add “certified nursing assistants” to the list of examples of “trained personnel” was based on the legislative history of §13(a)(15) and on the training and duties of the certified nursing assistants. “It is the Department’s view that [certified nursing assistants] are the sort of ‘trained personnel’ who provide direct care services as a vocation and thus are entitled to the protections of the FLSA.” *Id.* at 60,471. [↑](#footnote-ref-332)
332. *Id.* at 60,472. [↑](#footnote-ref-333)
333. *Id.* at 60,480. The DOL uses the term “third party employer” to refer to an employer of a direct care worker other than the individual receiving services or his or her family or household. *Id.* [↑](#footnote-ref-334)
334. *See* *id.* at 60,482. [↑](#footnote-ref-335)
335. 551 U.S. 158 (2007). In *Long Island Care*, the Court addressed the distinction between a general regulation and an interpretive regulation. 29 C.F.R. §552.3 was a “general regulation” that defined the statutory term “domestic service employment.” A second regulation, 29 C.F.R. §552.109(a), found in a later subsection of Part 552, subpart B, entitled “Interpretations,” provided that the companionship exemption could be applied to workers who were employed by an employer or agency other than the family using their services. The respondent argued that this “third party” regulation was an interpretive regulation and should not be given deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court did not agree. It noted that “when promulgating this [regulation] the agency used full public notice-and-comment procedures, which under the Administrative Procedure Act an agency need not use when producing an ‘interpretive’ rule.’” *Coke*, 551 U.S. at 173. The Court also noted that the subpart B heading “Interpretations” “could well refer to the fact that Subpart B contains matters of detail, interpreting and applying the more general definitions of Subpart A.” *Id*. For these reasons the Court deferred to the interpretive regulation holding that the §213(a)(15) exemption applied to workers employed by third parties as well as to workers employed by the family or household of the one receiving services. [↑](#footnote-ref-336)
336. 78 Fed. Reg. 60,454, 60,482 (Oct. 1, 2013) (citing U.S. Dep’t of Labor, Wage & Hour Div., Advisory Memo. 2005-1 (Dec. 1, 2005), http://www.dol.gov/whd/FieldBulletins/AdvisoryMemoranda2005.pdf). [↑](#footnote-ref-337)
337. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79.pdf (Sept. 2013). [↑](#footnote-ref-338)
338. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79a.pdf (Sept. 2013). [↑](#footnote-ref-339)
339. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79b.pdf (Sept. 2013). [↑](#footnote-ref-340)
340. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79c.pdf (Sept. 2013). [↑](#footnote-ref-341)
341. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79d.pdf (Apr. 2016). [↑](#footnote-ref-342)
342. *See* https://kdads.ks.gov/docs/default-source/CSP/HCBS/CMS/peior-to-july-2015/joint-employment-fact-sheet.pdf?sfvrsn=0. [↑](#footnote-ref-343)
343. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79f.pdf (updated June 2014). [↑](#footnote-ref-344)
344. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79g.pdf (Mar. 2014). [↑](#footnote-ref-345)
345. Act of June 25, 1938, ch. 676, 52 Stat. 1068 (codified as amended at 29 U.S.C. §213(b)(1), (2)). [↑](#footnote-ref-346)
346. *See generally* 29 U.S.C.§213(b). The overtime requirements of the FLSA are found in 29 U.S.C. §207. [↑](#footnote-ref-347)
347. *Id*. §213(b)(1). [↑](#footnote-ref-348)
348. *Id*. §213(b)(2). [↑](#footnote-ref-349)
349. *Id*. §213(b)(3). [↑](#footnote-ref-350)
350. *Id*. §213(b)(6). [↑](#footnote-ref-351)
351. 29 U.S.C.§213(b)(9). [↑](#footnote-ref-352)
352. *Id*. §213(b)(10)(A). [↑](#footnote-ref-353)
353. *Id*. §213(b)(10)(B). [↑](#footnote-ref-354)
354. *Id*. §213(b)(11). [↑](#footnote-ref-355)
355. *Id*. §213(b)(17). [↑](#footnote-ref-356)
356. 29 U.S.C.§213(b)(21). [↑](#footnote-ref-357)
357. *Id*. §213(b)(24). [↑](#footnote-ref-358)
358. *Id*. §213(b)(27). [↑](#footnote-ref-359)
359. *Id*. §213(b)(29). [↑](#footnote-ref-360)
360. *See* *id.* §206. [↑](#footnote-ref-361)
361. The MCA referred to in this section appears in various places in Title 49 of the *United States Code*. In 1966, all of the functions, powers, and duties of the Interstate Commerce Commission (ICC) were invested in the Secretary of Transportation to the extent they relate to qualifications and maximum hours of service of employees and safety of operations and equipment. Pub. L. No. 89-670 (1966). Therefore, decisions that predate this transfer of authority refer to the ICC as opposed to the Secretary of Transportation. *See* 29 C.F.R. §782.0. [↑](#footnote-ref-362)
362. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #19: The Motor Carrier Exemption Under the Fair Labor Standards Act (FLSA) (Nov. 2009), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs19.pdf. [↑](#footnote-ref-363)
363. This section incorporates both case law issued after the statutory changes and earlier case law where there was no statutory change to coverage under §213(b)(1). [↑](#footnote-ref-364)
364. Turk v. Buffets, Inc., 940 F. Supp. 1255, 1258–59 (N.D. Ill. 1996). Congress created this exemption to eliminate any conflict between the jurisdiction exercised by the DOL over the FLSA and the mutually exclusive jurisdiction exercised by the DOT over the MCA. *See* Spires v. Ben Hill Cnty.,980 F.2d 683, 686, 1 WH Cases2d 300 (11th Cir. 1993). [↑](#footnote-ref-365)
365. *See*

     *Supreme Court:* Morris v. McComb, 332 U.S. 422, 434–37, 7 WH Cases 423, 428 (1947) (holding that existence of ICC authority (now Secretary of Transportation authority) to regulate safety was test for whether exemption applied).

     *Fourth Circuit:* Brennan v. Schwerman Trucking Co., 540 F.2d 1200, 1204, 22 WH Cases 983, 987 (4th Cir. 1976) (finding that carrier may not be subjected simultaneously to regulation by Secretaries of Labor and Transportation).

     *Fifth Circuit:* Shew v. Southland Corp., 370 F.2d 376, 380, 17 WH Cases 552, 555 (5th Cir. 1966) (holding that there was no concurrent jurisdiction between FLSA and MCA).

     *Eleventh Circuit:* *Spires*, 980 F.2d at 686, 1 WH Cases2d at 303 (finding that there was no concurrent jurisdiction between FLSA and MCA) [↑](#footnote-ref-366)
366. 49 U.S.C. §13102. [↑](#footnote-ref-367)
367. Pub. L. No. 109-59, 23 U.S.C. §101 (2005), *amended* *by* Pub. L. No. 109-163, div. C, tit. XXXV, 119 Stat. 3557, §3508 (2006). [↑](#footnote-ref-368)
368. Section 4142 of SAFETEA-LU reads as follows: “(a) Definitions Relating to Motor Carriers.—Paragraphs (6), (7), (12), and (13) of section 13102 of title 49, United States Code, are each amended by striking ‘motor vehicle’ and inserting ‘commercial motor vehicle as defined in section 31132’.” Pub. L. No. 109-59, §4142, 119 Stat. 1747. [↑](#footnote-ref-369)
369. 49 U.S.C. §31132(1). [↑](#footnote-ref-370)
370. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2007-2 (May 23, 2007). [↑](#footnote-ref-371)
371. *See* 153 Cong Rec. H3041, H3052 (daily ed. Mar. 26, 2007) (statement of Rep. Duncan). [↑](#footnote-ref-372)
372. *See, e.g*., Letter from International Brotherhood of Teamsters to Senate Appropriations Subcommittee regarding H.R. 5576 (July 17, 2006). [↑](#footnote-ref-373)
373. Pub. L. No. 110-244, §306, 122 Stat. 1572 (2008). [↑](#footnote-ref-374)
374. The TCA also reverted to use of the term “motor vehicle” instead of “commercial motor vehicle” in some, but not all, of the provisions amended by SAFETEA-LU. Pub. L. No. 110-244, §305, 122 Stat. 1620 (2008) (“(c) Definitions Relating to Motor Carriers.—Paragraphs (6)(B), (7)(B), (14), and (15) of section 13102 of such title are each amended by striking ‘commercial motor vehicle (as defined in section 31132)’ and inserting ‘motor vehicle’.”). [↑](#footnote-ref-375)
375. Pub. L. No. 110-244, §306, 122 Stat. 1572 (2008). [↑](#footnote-ref-376)
376. The FOH discusses the transportation of explosives and other dangerous materials, noting that the MCA and the Explosives and Other Dangerous Articles Act, which governs interstate and foreign shipment of explosives and other dangerous articles, are separate pieces of legislation. As a result, application of the exemption under §213(b)(1) shall be determined under the normal course. *See* FOH §24a07. [↑](#footnote-ref-377)
377. 2013 WL 656327 (M.D. Fla. Feb. 22, 2013). [↑](#footnote-ref-378)
378. The analysis discussed in this section also applies to vehicles that transport at least 8 passengers for compensation or 15 passengers without compensation, regardless of weight. Passenger vehicles satisfying these minimum capacities are not covered by the small vehicle exception in the TCA. For further discussion of the small vehicle exception, see §IV.A.3 [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered Under the Motor Carrier Act; Small Vehicle Exception (for Vehicles of 10,000 Pounds or Less)] of this chapter. [↑](#footnote-ref-379)
379. 29 C.F.R. §782.2(a)(1). Several cases cited in this section predate passage of SAFETEA-LU and involve vehicles weighing less than 10,000 pounds that no longer fit the definition of “commercial vehicle.” However, the analysis regarding the performance of duties that affect safety remains applicable regardless of weight. For further discussion, see §IV.A.3 [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered Under the Motor Carrier Act; Small Vehicle Exception (for Vehicles of 10,000 Pounds or Less)] of this chapter. [↑](#footnote-ref-380)
380. 29 C.F.R. §782.2(a)(2). [↑](#footnote-ref-381)
381. *Id*. §782.2(a)(2), (e). [↑](#footnote-ref-382)
382. 49 U.S.C. §13501(1)(A), (B), (E). [↑](#footnote-ref-383)
383. A “motor private carrier” is defined as “a person, other than a motor carrier, transporting property by motor vehicle when—(A) the transportation is as provided in section 13501 of this title; (B) the person is the owner, lessee, or bailee of the property being transported; and (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.” 49 U.S.C. §13102(15). [↑](#footnote-ref-384)
384. FOH §24a01(a); *see, e.g.*, Boutell v. Walling, 327 U.S. 463, 467 (1946) (not extending exemption to mechanics employed by trucking service company even though work performed was supplied to carrier because service company itself was not carrier); Piazza v. Associated Wholesale Grocers Inc., 2019 WL 1862644 (E.D. La. Apr. 25, 2019) (holding that distribution warehouse did not qualify as motor private carrier when hiring contractor to transport goods); Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 913 (D. Minn. 2010) (finding that insurance investigators were not covered by MCA exemption because employer did not qualify as “motor private carrier” where employee, not employer, owned vehicles and most of property transported over state lines belonged to investigator and not employer). [↑](#footnote-ref-385)
385. FOH §24a01(a). [↑](#footnote-ref-386)
386. *Id. See also*

     *First Circuit:* Tidd v. Adecco USA, Inc., 2010 WL 996769, at \*2 (D. Mass. Mar. 16, 2010) (holding that Secretary of Transportation’s power applies to leasing company that employed plaintiff drivers in joint employment relationship and thus met requirements of 29 C.F.R. §782.2(a)(1)).

     *Third Circuit:* Moore v. Universal Coordinators, Inc., 423 F.2d 96, 99–100 (3d Cir. 1970) (same).

     *Fifth Circuit:* Songer v. Dillon Res., Inc., 618 F.3d 467, 473 (5th Cir. 2010) (same) [↑](#footnote-ref-387)
387. FOH §24a01(b). [↑](#footnote-ref-388)
388. *See, e.g.*, Walters v. American Coach Lines of Miami, Inc., 576 F.3d 1221, 1227 (11th Cir. 2009). [↑](#footnote-ref-389)
389. *See, e.g.*, Guyton v. Schwan Food Co., 2004 WL 533942 (D. Minn. Mar. 16, 2004). [↑](#footnote-ref-390)
390. 29 C.F.R. §782.1(a) (citing Morris v. McComb, 332 U.S. 422 (1947); Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695 (1947); Levinson v. Spector Motor Serv., 330 U.S. 649 (1947); Boutell v. Walling, 327 U.S. 463 (1946); Southland Gasoline Co. v. Bayley, 319 U.S. 44 (1943)). [↑](#footnote-ref-391)
391. *See id.; see also*

     *Supreme Court:* *Morris*, 332 U.S. at 434; *Ispass*, 330 U.S. at 708; *Levinson*, 330 U.S. at 678; *Boutell*, 327 U.S. at 467; *Southland Gasoline Co.*, 319 U.S. at 47.

     *Third Circuit:* Friedrich v. U.S. Computer Servs., 974 F.2d 409, 410 (3d Cir. 1992).

     *Fourth Circuit:* Brennan v. Schwerman Trucking Co., 540 F.2d 1200, 1202, 22 WH Cases 983, 986 (4th Cir. 1976).

     *Fifth Circuit:* White v. U.S. Corr., LLC, 996 F.3d 302, 308 (5th Cir. 2021) (holding private prisoner transport company governed by Interstate Transportation of Dangerous Criminals Act of 2000 still subject to regulatory power of Secretary of Transportation; authority of Attorney General to regulate transportation of violent prisoners does not obviate authority of Secretary of Transportation to regulate employees of motor carriers or motor private carriers); Shew v. Southland Corp., 370 F.2d 376, 17 WH Cases 552 (5th Cir. 1966).

     *Sixth Circuit:* Bensen v. Universal Ambulance Serv., 675 F.2d 783, 785, 25 WH Cases 485, 486 (6th Cir. 1982); Baird v. Wagoner Transp. Co., 425 F.2d 407, 410, 19 WH Cases 450, 453 (6th Cir. 1970).

     *Ninth Circuit:* Klitzke v. Steiner, 110 F.3d 1465, 1469 (9th Cir. 1997) [↑](#footnote-ref-392)
392. *Klitzke*, 110 F.3d at 1469 (noting that Secretary declined regulatory authority over laundry service route salesmen). [↑](#footnote-ref-393)
393. Bilyou v. Dutchess Beer Distribs., Inc., 300 F.3d 217, 7 WH Cases2d 1793 (2d Cir. 2002) (upholding exemption despite fact that employer failed to comply with applicable DOT regulations and pointing out that exemption flowed from DOT authority, not from its exercise of that authority or from employer’s compliance); Bumgarner v. Joe Brown Co., 376 F.2d 749, 750, 18 WH Cases 26, 27 (10th Cir. 1967) (holding that exemption applies despite employer’s failure to obtain certificate of exemption under MCA); *cf.* *Wagoner Transp.*, 425 F.2d at 409, 19 WH Cases at 453 (determining that mere possession of interstate commerce certificate alone did not give ICC (now Secretary of Transportation) power over company and thereby exempt it from FLSA coverage). [↑](#footnote-ref-394)
394. 49 U.S.C. §13506. [↑](#footnote-ref-395)
395. *Id.* §13506(a)(2); *see also* Cariani v. D.L.C. Limousine Serv., Inc., 363 F. Supp. 2d 637, 10 WH Cases2d 819 (S.D.N.Y. 2005) (addressing relationship between taxicab exemption and MCA and finding that while taxicab exemption applied, MCA exemption was alternate ground of exemption). [↑](#footnote-ref-396)
396. 49 U.S.C. §13506(a)(1) (“Neither the Secretary nor the Board has jurisdiction under this part over a motor vehicle transporting only school children and teachers to or from school.”); *see also* Mielke v. Laidlaw Transit, Inc., 102 F. Supp. 2d 988, 6 WH Cases2d 869 (N.D. Ill. 2000) (holding that because Secretary did not have jurisdiction over school bus operations, school bus drivers were not exempt under MCA). *But see* Almy v. Kickert Sch. Bus Line, 2009 WL 2972487 (N.D. Ill. Sept. 11, 2009) (finding that because §13506 of MCA was designed as exemption from economic regulations but not safety regulations, Secretary of Transportation was not deprived of authority to regulate maximum hours of school bus drivers and exemption applied), *aff’d*, 722 F.3d 1069 (7th Cir. 2013). [↑](#footnote-ref-397)
397. 49 C.F.R. §390.3(g)(4); *see also* Smith v. F-M Ambulance Serv., Inc., 914 F. Supp. 359, 2 WH Cases2d 1682 (D.N.D. 1995) (holding that ambulance service not exempt from FLSA and employees were entitled to proceed on claims for overtime compensation); Bayles v. American Med. Response of Colo., Inc., 937 F. Supp. 1477, 3 WH Cases2d 845 (D. Colo. 1996) (finding that ambulance service did not fall within motor carrier exemption and was subject to FLSA requirements), *reconsideration granted in part*, 950 F. Supp. 1053, 3 WH Cases2d 1317 (D. Colo. 1996); WH Op. Ltr., 1994 WL 975106 (Aug. 15, 1994); FOH §24c08. [↑](#footnote-ref-398)
398. 84 F. Supp. 2d 470, 7 WH Cases2d 1366 (S.D.N.Y. 2000). [↑](#footnote-ref-399)
399. Klitzke v. Steiner, 110 F.3d 1465 (9th Cir. 1997) (§13505 of MCA does not exempt employees of non-transportation companies from cross application of federal labor laws, but rather limits authority to impose certain licensing, permit, and certificate requirements on interstate motor carriers—requirements completely different from Secretary of Transportation’s regulation of working hours and safety); Friedrich v. U.S. Computer Servs., 974 F.2d 409 (3d Cir. 1992) (computer repairmen who used vans to deliver supplies to carry out repairs at clients’ places of business were covered by MCA). [↑](#footnote-ref-400)
400. *McGuiggan*, 84 F. Supp. 2d at 483. [↑](#footnote-ref-401)
401. For a discussion of seating capacity and vehicle modifications to seating capacity, see §IV.A.3.b [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered Under the Motor Carrier Act; Small Vehicle Exception (for Vehicles of 10,000 Pounds or Less); Vehicle Modifications] of this chapter. [↑](#footnote-ref-402)
402. 418 F.3d 246 (3d Cir. 2005). [↑](#footnote-ref-403)
403. *Id.* at 258. [↑](#footnote-ref-404)
404. *Id.* at 248–49. [↑](#footnote-ref-405)
405. 332 U.S. 218 (1947). [↑](#footnote-ref-406)
406. *Id.* at 231. [↑](#footnote-ref-407)
407. *See* Walters v. American Coach Lines of Miami, Inc., 576 F.3d 1221, 1228–31 (11th Cir. 2009). Under either part of the analysis, “the Secretary of Transportation’s jurisdiction (over either the employer’s transportation business or the employee’s activities) turns on the scope of the MCA’s interstate commerce requirement.” Abel v. Southern Shuttle Servs., Inc., 631 F.3d 1210, 1215 (11th Cir. 2011). See also discussion at §IV.A.2.c.iii [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered Under the Motor Carrier Act; Application of the Exemption (for Vehicles in Excess of 10,000 Pounds); Transportation in Interstate Commerce; Intrastate Transportation] of this chapter. [↑](#footnote-ref-408)
408. *See Southern Shuttle*, 631 F.3d at 1217; *Walters*, 576 F.3d at 1230; Packard v. Pittsburgh Transp. Co., 418 F.3d 246, 258 (3d Cir. 2005). When a motor carrier engages in both intrastate and interstate travel, courts may also consider the number of interstate trips made or the amount of revenue received from its interstate operations in determining application of the MCA. *Walters*, 576 F.3d at 1227–28. *See also* Morris v. McComb, 332 U.S. 422 (1947) (business was subject to MCA jurisdiction when about 4% of total trips and revenue stemmed from interstate commerce); Fonseca v. AllTour Am. Transp., Inc., 750 F. App’x 883, 887 (11th Cir. 2018) (holding that MCA exemption applied where shuttle drivers were engaged in interstate transport for 20% of total work time); Turk v. Buffets, Inc., 940 F. Supp. 1255, 1261–62 (N.D. Ill. 1996) (summarizing cases). *Cf.* Rossi v. Associated Limousine Servs., Inc., 438 F. Supp. 2d 1354, 1361 (S.D. Fla. 2006) (company’s interstate business is de minimis if it constitutes less than 1% of overall trips taken by company). [↑](#footnote-ref-409)
409. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #19: The Motor Carrier Exemption Under the Fair Labor Standards Act (FLSA) (Nov. 2009), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs19.pdf; *see also* 29 C.F.R. §782.2(a); Levinson v. Spector Motor Serv., 330 U.S. 649, 652, 6 WH Cases 731, 734 (1947); United States v. American Trucking Ass’ns, 310 U.S. 534, 535, 1 WH Cases 64, 65 (1940); WH Op. FLSA2004-10NA, 2004 WL 3177909 (Aug. 17, 2004) (opining that sales representatives of food manufacturer were exempt employees under §13(b)(1) because as drivers transporting job-related items, they engaged in activity directly affecting safety under 29 C.F.R. §782.2(a)). [↑](#footnote-ref-410)
410. 29 C.F.R. §782.2(b)(2) and (3); *see also* Morris v. McComb, 332 U.S. 422, 7 WH Cases 423 (1947); Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 6 WH Cases 749 (1947); *Levinson*, 330 U.S. 649; Smith v. United Parcel Serv., 890 F. Supp. 323, 2 WH Cases2d 1387, 1389–90 (S.D. W. Va. 1995) (finding that package drivers, feeder drivers, and mechanics were exempt). [↑](#footnote-ref-411)
411. 29 C.F.R. §782.2(b)(2) (citing cases). [↑](#footnote-ref-412)
412. *Third Circuit:* Friedrich v. U.S. Computer Servs., 974 F.2d 409, 416–18, 30 WH Cases 1729, 1734 (3d Cir. 1992) (holding that exemption applied even though employees may have devoted more time to field service than to transportation of property).

     *Ninth Circuit:* Reich v. American Driver Serv., 33 F.3d 1153, 1155, 2 WH Cases2d 417, 419 (9th Cir. 1994) (finding that minor involvement in interstate commerce as regular part of employee’s duties can subject employee to Secretary of Transportation’s power); Shoemaker v. United Parcel Servs., Inc., 2011 WL 836998, at \*8–11 (D. Idaho Feb. 10, 2011) (finding that supervisor who provided hands-on training to drivers engaged in activities directly affecting safety exempt under MCA).

     *Eleventh Circuit:* Wilson v. Notheis, Inc., 1999 WL 1142531, 5 WH Cases2d 1287 (N.D. Ga. Nov. 16, 1999) (applying exemption to employees who drove hostler-tractors to move trailers because employees performed safety checks on trailers) [↑](#footnote-ref-413)
413. 29 C.F.R. §782.2(b)(3); *see also* *Shoemaker*, 2011 WL 836998 (finding that supervisor who spent majority of his time on road with drivers either training or observing them and spent de minimis amount of time driving vehicles was exempt from overtime under MCA exemption because de minimis principle should seldom if ever be applied). [↑](#footnote-ref-414)
414. 29 C.F.R. §782.3(a); 49 C.F.R. §390.5. [↑](#footnote-ref-415)
415. 29 C.F.R. §782.3(a). [↑](#footnote-ref-416)
416. *Id.* [↑](#footnote-ref-417)
417. *Id. See also*

     *Eighth Circuit:* Guyton v. Schwan Food Co., 2004 WL 533942 (D. Minn. Mar. 16, 2004) (finding that sales managers who operated route delivery trucks occasionally when route managers were unavailable were exempt).

     *Ninth Circuit:* *Shoemaker*, 2011 WL 836998 (finding that supervisor who spent majority of his time on road with drivers either training or observing them and spent de minimis amount of time driving vehicles was exempt from overtime under MCA exemption because de minimis principle should seldom if ever be applied).

     *Tenth Circuit:* Bowe v. SMC Elec. Prods., Inc., 935 F. Supp. 1126, 1132–33, 3 WH Cases2d 710 (D. Colo. 1996) (finding that if defendant could show that sales/service representative transported tools, parts, and equipment in interstate commerce, then instructors would qualify for MCA exemption), *opinion adhered to on reconsideration*, 945 F. Supp. 1482, 3 WH Cases2d 1310 (D. Colo. 1996).

     *Eleventh Circuit:* McIntyre v. FLX of Miami, Inc., 2008 WL 4541017, at \*7 (S.D. Fla. Oct. 8, 2008) (concluding that truck dispatcher whose duties included calling mechanics for stranded truckers, assigning particular drivers and trucks based on safety issues, and verifying that vehicles were in safe operating condition before they were used affected safety and operation of motor vehicles and thus was exempt from overtime requirements under MCA exemption); Hutson v. Rent-A-Center, Inc., 209 F. Supp. 2d 1353 (M.D. Ga. 2001) (finding that driver who made intrastate deliveries of goods ordered from out-of-state vendors, including intrastate deliveries of goods specially ordered from out of state for local customers, sufficed to meet interstate commerce test); Wilson v. Notheis, Inc., 1999 WL 1142531, 5 WH Cases2d 1287 (N.D. Ga. Nov. 16, 1999) (determining that hostler-tractor drivers that moved trailers from distribution center to staging areas of clients were covered by MCA and therefore exempt where they took various safety measures and performed multiple safety checks on trailers) [↑](#footnote-ref-418)
418. Bethel v. Lazer Spot, Inc., 2022 BL 184975, 2022 WL 1683738, at \*6 (N.D. Ga. Mar. 28, 2022) (“yard driver” restricted to moving trailers around a private yard, even if cross-trained to drive on public roads, was not covered under MCA); *cf.* Green v. Lazer Spot, Inc., 2021 BL 488333, 2021 WL 6063590, at \*5 (M.D. Pa. Dec. 22, 2021) (finding “yard jockey” who only drove intrastate and only occasionally on public roads was a driver under the MCA because, “[b]y moving loaded trailers, [plaintiff] acts as an intermediate, intrastate step in the goods’ ultimate interstate journey”). [↑](#footnote-ref-419)
419. Barefoot v. Mid-America Dairymen, Inc., 826 F. Supp. 1046, 1050, 1 WH Cases2d 924, 926 (N.D. Tex. 1993). [↑](#footnote-ref-420)
420. 29 C.F.R. §782.4; *see also* Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 15 WH Cases 321 (5th Cir. 1962). [↑](#footnote-ref-421)
421. 29 C.F.R. §782.4(a). [↑](#footnote-ref-422)
422. *Id*. Relief drivers who actually drive may come within the driver category. *See* *id*. §782.3(a). [↑](#footnote-ref-423)
423. *See, e.g.,*

     *Fifth Circuit:* Texas Farm Prods. Co. v. Williams, 406 S.W.2d 256, 262, 18 WH Cases 84, 85 (Tex. Civ. App. 1966) (deeming that “swamper” who rode with driver to provide assistance was exempt, even where very little safety-affecting work was performed).

     *Sixth Circuit:* Walling v. Silver Fleet Motor Express, 67 F. Supp. 846, 854, 6 WH Cases 392, 397 (W.D. Ky. 1946) (finding that drivers’ helpers performed work that directly related to safety of operation).

     *Eleventh Circuit:* Hernandez v. Brink’s, Inc., 2009 WL 113406, at \*4 (S.D. Fla. Jan. 15, 2009) (holding that messengers and automatic teller machine technicians for armored vehicle transportation protection and security company qualified as drivers’ helpers because they helped direct drivers when trucks were in reverse or making tight turns) [↑](#footnote-ref-424)
424. 29 C.F.R. §782.4(c). [↑](#footnote-ref-425)
425. FOH §24b03. [↑](#footnote-ref-426)
426. 29 C.F.R. §782.4(c); *see also* Gordon’s Transports, Inc., v. Walling, 162 F.2d 203, 6 WH Cases 831 (6th Cir. 1947) (determining that “breakout men,” “hostlers,” and “wheelers” were not engaged in safety-related tasks and not covered by exemption). [↑](#footnote-ref-427)
427. 29 C.F.R. §782.4(c). [↑](#footnote-ref-428)
428. *Id*. §782.5(a). [↑](#footnote-ref-429)
429. *Id.* [↑](#footnote-ref-430)
430. *Id. See, e.g.,*

     *Supreme Court:* Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 708 (1947) (ruling that for exemption to apply, loading activities must be of character that affects safety of operations); Levinson v. Spector Motor Serv., 330 U.S. 649, 656 (1947) (holding that as long as substantial part of activity is “loading,” exemption applies).

     *Fifth Circuit:* Brewer’s, Inc. v. Wirtz, 375 F.2d 911, 914, 17 WH Cases 664, 665 (5th Cir. 1967) (applying exemption to employees who unloaded furniture shipped to warehouse from out of state).

     *Sixth Circuit:* Vaughn v. Watkins Motor Lines, Inc., 291 F.3d 900, 7 WH Cases2d 1478 (6th Cir. 2002) (finding that dockworkers who loaded trailers were exempt even where supervisor always checked trailer before it departed).

     *Eighth Circuit:* Williams v. Central Transp. Int’l, Inc., 830 F.3d 773 (8th Cir. 2016) (affirming district court that because substantial part of plaintiff’s time during relevant period was spent loading defendants’ trailers for interstate transportation, MCA exemption applied).

     *Tenth Circuit:* Vanartsdalenv. Deffenbaugh Indus., Inc*.*, 2011 WL 1002027, at \*3 (D. Kan. Mar. 18, 2011) (finding plaintiff to be loader because he exercised discretion in determining what trash to load into trucks).

     *Eleventh Circuit:* Lewis v. Eskridge Trucking Co., 449 F. App’x 780, 781 (11th Cir. 2011) (affirming summary judgment for defendant where loader filled trailers with wood shavings and spent substantial part of time ensuring loads were balanced).

     *Accord*

     *Second Circuit:* Chaohui Tang v. Wing Keung Enters., Inc., 210 F. Supp. 3d 376 (E.D.N.Y. 2016) (determining that plaintiffs’ acknowledged responsibility in loading and unloading freight was sufficient to qualify them as “loaders” within meaning of MCA); McBeth v. Gabrielli Truck Sales Ltd., 768 F. Supp. 2d 383, 388 (E.D.N.Y. 2010) (ruling plaintiff was not “loader” despite fact that he loaded batteries on truck because he did not have requisite discretion to affect safety of truck during travel).

     *Fourth Circuit:* Veney v. John W. Clarke, Inc., 28 F. Supp. 3d 435, 442 (D. Md. 2014) (finding that plaintiffs’ activities in picking up trash and throwing it onto truck affected safety of operation because plaintiffs were instructed not to pick up items that could be hazardous to operation of truck).

     *Eighth Circuit:* Graham v. Town & Country Disposal of W. Mo., Inc., 865 F. Supp. 2d 952, 960 (W.D. Mo. 2011).

     *Eleventh Circuit:* Williams v. R.W. Cannon, Inc., 2008 WL 4097613, at \*11 (S.D. Fla. Sept. 4, 2008) (denying summary judgment in favor of defendant on issue of whether plaintiff was a “loader” within the meaning of MCA where issues of fact remained regarding whether plaintiff’s loading duties consisted of providing physical labor in lifting and moving of goods pursuant to supervisor’s direction, or whether plaintiff was exercising independent judgment and discretion when doing so) [↑](#footnote-ref-431)
431. 29 C.F.R. §782.5(b). *Compare* Crum v. Forward Air Sols., Inc., 2023 WL 1788533 (N.D. Ala. Feb. 6, 2023) (holding dock supervisor exempt when loading trucks and supervising subordinates even if the supervisor paid little to no attention to safe loading practices) *with* Yellow Transit Freight Lines v. Balven, 320 F.2d 495, 499, 16 WH Cases 93, 96 (8th Cir. 1963) (holding that dock foreman was nonexempt where duties had no substantial bearing on safety of motor vehicles operating in interstate commerce). [↑](#footnote-ref-432)
432. 29 C.F.R. §782.5(c). *See also*

     *Supreme Court:* *Ispass*, 330 U.S. at 708, 6 WH Cases at 754 (holding that exemption does not apply if loading activities do not come within safety-affecting category).

     *Fifth Circuit:* Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 42, 15 WH Cases 321, 325 (5th Cir. 1962) (finding that warehouseman who only occasionally assisted with loading was not exempt); Foremost Dairies v. Ivey, 204 F.2d 186, 170, 11 WH Cases 405, 407 (5th Cir. 1953) (ruling that loaders who did not exercise discretion with regard to how trucks were loaded did not qualify for exemption).

     *Eighth Circuit:* *Balven*, 320 F.2d at 499, 16 WH Cases at 96 (holding that load checker should not receive exemption because he did not affect safety of truck).

     *Cf.*

     *Fourth Circuit:* Troutt v. Stavola Bros., Inc. 107 F.3d 1104, 3 WH Cases2d 1400 (4th Cir. 1997) (finding that employee of race car team responsible for moving equipment to end of transporter, where it was secured by someone else, could not be said to affect safety of operations).

     *Fifth Circuit:* Wirtz v. C & P Shoe Corp., 336 F.2d 21, 25, 16 WH Cases 624, 629–30 (5th Cir. 1964) (determining that warehouse manager and assistant manager were not exempt where loading followed “last out, first in” order and only incidentally related to safety of vehicles).

     *Sixth Circuit:* West Ky. Coal Co. v. Walling, 153 F.2d 582, 584, 5 WH Cases 880, 883 (6th Cir. 1946) (holding that employees who lifted packages to tailboard of truck and helped employees to “stack and pile” freight into vehicle were not exempt) [↑](#footnote-ref-433)
433. 29 C.F.R. §782.5(c). *See also*

     *Supreme Court:* *Ispass*, 330 U.S. at 708, 6 WH Cases at 753 (finding that substantial period of loaders’ time must be spent performing safety-affecting work to qualify for exemption); *Levinson*, 330 U.S. at 651, 6 WH Cases at 732 (same).

     *Second Circuit:* Khan v. IBI Armored Servs., Inc., 474 F. Supp. 2d 448 (E.D.N.Y. 2007) (concluding that plaintiff did not meet motor carrier exemption where he spent 75% of his time inventorying valuables as they were removed from armored trucks and remainder of time loading pallets and bins to be placed on trucks by someone else).

     *Fourth Circuit:* Troutt v. Stavola Bros., Inc., 905 F. Supp. 295, 2 WH Cases2d 1359, 1360–61 (M.D.N.C. 1995).

     *Ninth Circuit:* Coast Van Lines v. Armstrong, 167 F.2d 705, 707, 7 WH Cases 969, 971 (9th Cir. 1948) (holding that employer had burden to prove quantum of employee activities that affected safety of operation).

     *Tenth Circuit:* Porter v. Poindexter, 158 F.2d 759, 761, 6 WH Cases 586, 588 (10th Cir. 1947) (ruling that duties of freight checker and bill collector did not qualify as loader activities under exemption) [↑](#footnote-ref-434)
434. Amaya v. NOYPI Movers, LLC, 741 F. App’x 203, 207 (5th Cir. 2018) (holding that triable issue of fact remained as to whether installers’ loading activities were too casual or occasional to quality them as loaders); Hopkins v. Texas Mast Climbers, LLC, 2005 WL 3435033 (S.D. Tex. Dec. 14, 2005) (finding that exemption did not apply where employee’s primary duty was to erect and dismantle scaffolding for construction projects, and employee rarely assisted with loading of equipment onto trucks but did so at direction of driver). [↑](#footnote-ref-435)
435. WH Op. FLSA2001-9 (May 5, 2001). [↑](#footnote-ref-436)
436. *Id*. [↑](#footnote-ref-437)
437. *Id*. [↑](#footnote-ref-438)
438. *Id*. (quoting 29 C.F.R. §782.5(c)). [↑](#footnote-ref-439)
439. 29 C.F.R. §782.6(a). [↑](#footnote-ref-440)
440. *Id. See also*

     *Third Circuit:* McComb v. New York & New Brunswick Auto Express Co., 95 F. Supp. 636, 642, 9 WH Cases 379, 384 (D.N.J. 1950) (holding that although mechanic who filled oil, gas, and water did not qualify for exemption, mechanic’s helper who worked on truck bodies and fifth wheels did qualify).

     *Fifth Circuit:* Cunningham v. Circle 8 Crane Servs., L.L.C., 64 F.4th 597 (5th Cir. 2023) (holding that MCA exemption applied to mechanics who repaired cranes and parts of the trucks attached to cranes including trucks’ horns, brakes, lights, wheels and axles); Wirtz v. Tyler Pipe & Foundry Co., 369 F.2d 927, 930, 17 WH Cases 549, 551 (5th Cir. 1966) (holding that MCA exemption requires that repairs be to trucks operating in interstate commerce).

     *Sixth Circuit:* Tobin v. Mason & Dixon Lines, 102 F. Supp. 466, 470, 10 WH Cases 517, 518–19 (E.D. Tenn. 1951) (holding that where repairs took place in shop away from vehicle, mechanic did not qualify for exemption).

     *Tenth Circuit:* Shultz v. Kelley, 431 F.2d 1364, 1371, 19 WH Cases 699, 704 (10th Cir. 1970) (holding that for MCA exemption to apply, repairs must affect safety of vehicle operating on highways); Buckner v. Voss Truck Lines, 92 F. Supp. 483, 487, 9 WH Cases 582, 585 (W.D. Okla. 1950) (finding that mechanics who overhauled/repaired glass, lights, fenders, and fifth wheels qualified for exemption).

     *Eleventh Circuit:* Williams v. R.W. Cannon, Inc., 2008 WL 4097613, at \*12 (S.D. Fla. Sept. 4, 2008) (finding that mechanic was not exempt because he did not maintain safety of trucks, but rather simply reported to owner all concerns about conditions of trucks such as low air in tires) [↑](#footnote-ref-441)
441. 29 C.F.R. §782.6(a) (citing cases). [↑](#footnote-ref-442)
442. *Id*. [↑](#footnote-ref-443)
443. FOH §24b02. [↑](#footnote-ref-444)
444. 29 C.F.R. §782.6(b); *see also* FOH §24b01. [↑](#footnote-ref-445)
445. FOH §24b01(b). [↑](#footnote-ref-446)
446. 29 C.F.R. §782.6(c)(1)–(3). [↑](#footnote-ref-447)
447. *Id*. §782.6(c)(3); Tobin v. Mason & Dixon Lines, 102 F. Supp. 466, 470, 10 WH Cases 517, 519 (E.D. Tenn. 1951) (holding that repairs done entirely away from vehicles did not qualify as exempt work of “mechanic”). [↑](#footnote-ref-448)
448. 29 C.F.R. §782.6(c)(2) (stating that errors in judgment by dispatchers are not proximate causes of vehicle accidents, and that dispatchers engage in no activities that directly affect safety of operation of motor vehicles in interstate or foreign commerce). [↑](#footnote-ref-449)
449. 2008 WL 4541017, at \*7 (S.D. Fla. Oct. 8, 2008). [↑](#footnote-ref-450)
450. 29 C.F.R. §782.7(a); *see also* Herman v. Hector I. Nieves Transp., Inc., 244 F.3d 32, 34, 6 WH Cases2d 1441 (1st Cir. 2001) (ruling, in case of first impression, that motor carrier exemption did not apply to trucking company whose routes were entirely within boundaries of Puerto Rico and that Secretary of Transportation had no power to “establish qualifications and maximum hours of service pursuant to the provisions of [49 U.S.C. §31502]” for intra-island transportation). [↑](#footnote-ref-451)
451. 29 C.F.R. §782.7(a). [↑](#footnote-ref-452)
452. *Id*.; *see, e.g.*, Reich v. American Driver Serv., Inc., 33 F.3d 1153, 1157, 2 WH Cases2d 417, 419 (9th Cir. 1994) (reversing district court and finding that from beginning of each harvesting season and continuing until one of its drivers actually engaged in interstate commerce, defendant was not engaged in interstate commerce and thus not subject to jurisdiction of Secretary of Transportation; therefore, drivers were not covered by MCA exemption). [↑](#footnote-ref-453)
453. For a detailed discussion of individual coverage under the FLSA, see Chapter 4, Employer Coverage, §II [Individual Coverage]. [↑](#footnote-ref-454)
454. 29 C.F.R. §782.7(a); *see* Richardson v. James Gibbons Co., 132 F.2d 627, 630 (4th Cir.) (applying exemption to haulers of asphalt because employees drove product in interstate commerce, but not because of activity of constructing highway), *aff’d*, 319 U.S. 44, 2 WH Cases 72 (1942). *See also*

     *Supreme Court:* Levinson v. Spector Motor Servs., 330 U.S. 649, 653, 6 WH Cases 731, 735 (1947) (holding that employees who qualified for coverage under MCA were not entitled to overtime).

     *Fourth Circuit:* Thompson v. Daugherty, 40 F. Supp. 279, 282–83, 1 WH Cases 679, 684–85 (D. Md. 1941) (finding that contract mail carriers were covered by FLSA but not by MCA).

     *Fifth Circuit:* Galbreath v. Gulf Oil Corp., 413 F.2d 941, 945, 19 WH Cases 66, 70 (5th Cir. 1969) (deeming that petroleum products moved on regular basis and not commingled or processed remained in interstate commerce and drivers who delivered such products were exempt).

     *Sixth Circuit:* Secretary of Labor v. Timberline S., LLC, 925 F.3d 838 (6th Cir. 2019) (holding that exemption did not apply where defendant had no control over whether timber shipped across state lines); Baird v. Wagoner Transp. Co., 425 F.2d 407, 412, 19 WH Cases 450, 453 (6th Cir. 1970) (holding that exemption did not apply because petroleum products were no longer moving in interstate commerce when local drivers began delivery).

     *Seventh Circuit:* Hager v. Brinks, Inc., 6 WH Cases 262, 263–64 (N.D. Ill. 1946) (explaining that situations may exist where employee was covered by FLSA but not MCA).

     *Opinion Letters:* WH Op. FLSA2006-3 (Jan. 13, 2006) (observing that large beverage distributor qualified for motor carrier exemption where slightly less than half of beverages sold by distributor were from out of state); WH Op. Ltr., 1999 WL 1002402 (May 17, 1999) (holding that employer in business of repossessing leased and financed property from defaulting parties was entitled to exemption under §213(b)(1) where agents flew to locations where property was repossessed, picked up truck and collected property, and returned property to home office, doing approximately 90% of their work in field and crossing state lines routinely).

     *But see*

     *Fourth Circuit:* *James Gibbons Co.*, 132 F.2d at 630, 2 WH Cases at 241 (finding that haulers of asphalt were covered by both FLSA and MCA).

     *Fifth Circuit:* Mitchell v. Independent Ice & Cold Storage Co., 294 F.2d 186, 189, 15 WH Cases 203, 206 (5th Cir. 1961) (determining that producers of ice for packing goods to be delivered in commerce were covered by FLSA but not by §213(b)(1)); American Fed’n of State, Cnty. & Mun. Emps. v. Louisiana, 2001 WL 29999 (E.D. La. Jan. 9, 2001) (holding that plaintiff sergeant of Louisiana Department of Wildlife and Fisheries Covert Section of Enforcement Division, who occasionally drove to Mississippi to pretend he was legitimate seller or purchaser of fish and game illegally caught in State of Louisiana, was not exempt under §213(b)(1) because travel was primarily related to plaintiff’s duties as law enforcement officer and was not related to interstate commerce); Walton v. Louisiana Compressor Maint., 1997 WL 129393, 3 WH Cases2d 1630 (E.D. La. Mar. 19, 1997) (finding that repair technician required to transport equipment interstate was exempt).

     *Seventh Circuit:* Cederblade v. Parmelee Transp. Co., 166 F.2d 554, 556–57, 7 WH Cases 751, 753 (7th Cir. 1948) (deeming transportation of goods delivered by rail to be covered by both FLSA and MCA). [↑](#footnote-ref-455)
455. FOH §24c00(a). [↑](#footnote-ref-456)
456. 29 C.F.R. §782.7(a); FOH §24c00(a). Under this enforcement policy, it will ordinarily be assumed by the WHD Administrator that the interstate commerce requirements of the §213(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver, driver’s helper, loader, or mechanic in transportation by motor vehicle that, although confined to a single state, is a part of an interstate movement of the goods or persons being transported. *Id*. [↑](#footnote-ref-457)
457. 29 C.F.R. §782.7(b)(1); *cf*. Kautsch v. Premier Comm’cns, 502 F. Supp. 2d 1007 (W.D. Mo. 2007) (denying employer’s motion for summary judgment where plaintiffs did not use commercial vehicles as defined by SAFETEA-LU). [↑](#footnote-ref-458)
458. Ballou v. DET Distrib. Co., 2006 WL 2035729, 11 WH Cases2d 1188 (M.D. Tenn. July 17, 2006) (determining that employees who drove in interstate commerce on “as needed” basis were exempt under MCA because their licenses and driving activities were regulated by DOT safety regulations). *See also*

     *Third Circuit:* Resch v. Krapf’s Coaches, Inc., 785 F.3d 869 (3d Cir. 2015) (finding that drivers could reasonably expect to drive interstate where they trained on all available routes and employer retained discretion to assign them to interstate routes at any time and disciplined drivers who refused such routes).

     *Fourth Circuit:* Roberts v. Cowan Distrib. Servs., LLC, 58 F. Supp. 3d 593 (E.D. Va. 2014) (finding that employer’s effort to comply with federal requirements, information conveyed from employer to employee, treatment of entire group of employees, and actual job performance of individual employee all played important role in determining whether employee had reasonable expectation to be called on to drive in interstate commerce).

     *Fifth Circuit:* Allen v. Coil Tubing Servs., LLC, 755 F.3d 279 (5th Cir. 2014) (affirming district court’s decision to measure interstate activities of drivers by looking at companywide basis rather than employee-by-employee basis; some drivers’ engagement in interstate travel gave rise to reasonable expectation that other drivers might drive across state lines); Songer v. Dillon Res., Inc., 618 F.3d 467, 474 (5th Cir. 2010) (holding that drivers who had never traveled interstate during employment but could have been expected to drive in interstate commerce consistent with job duties were exempt from overtime under MCA exemption); Garza v. Smith Int’l, Inc., 2011 WL 835820 (S.D. Tex. Mar. 7, 2011) (relying on *Songer* and finding that, regardless of whether they frequently drove commercial motor vehicles outside Texas, drivers were hired as employees who might be called on from time to time to perform safety-affecting activities of driver).

     *Eighth Circuit:* Chao v. Gary Bauerly, LLC, 2005 WL 1923716 (D. Minn. 2005) (holding that reasonable expectation of driving in interstate commerce might be sufficient even if employee had not actually done so); Guyton v. Schwan Food Co., 2004 WL 533942 (D. Minn. Mar. 16, 2004) (finding that sales managers who only operated route delivery trucks when route managers were unavailable were exempt).

     *Eleventh Circuit:* Little v. Groome Transp. of Ga., Inc., 2008 WL 4280362, at \*9 (N.D. Ga. Sept. 15, 2008) (holding that drivers were engaged in interstate ­transportation where they were advised they could be assigned any company route, which included routes across state lines) [↑](#footnote-ref-459)
459. *Supreme Court:* Morris v. McComb, 332 U.S. 422, 433, 7 WH Cases at 430 (1947) (applying exemption where driver made one or more interstate trips each week); Levinson v. Spector Motor Serv., 330 U.S. 649, 651, 652, 6 WH Cases 731, 734 (1947) (applying exemption where some “terminal foreman” activities each workweek were devoted to direction of loading interstate motor freight carriers).

     *Second Circuit:* Chaohui Tang v. Wing Keung Enters., Inc., 210 F. Supp. 3d 376 (E.D.N.Y. 2016) (applying week-by-week approach to determine whether employees were assigned to intrastate routes and determining that plaintiffs were not likely to be engaged in activities affecting safety of operations in interstate commerce during those periods).

     *Fourth Circuit:* Richardson v. James Gibbons Co., 132 F.2d 627, 630, 2 WH Cases 238, 240 (4th Cir.) (applying exemption where part of workweek required hauling in interstate commerce), *aff’d*, 319 U.S. 44, 2 WH Cases 72 (1942).

     *Eighth Circuit:* Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866 (8th Cir. 2016) (holding that drivers had sufficient connection to interstate commerce where they spent majority of their time driving within Arkansas, because drivers were subject to being assigned interstate trip at any time, and 9 of 11 plaintiffs drove at least one interstate route during relevant time period); King v. Asset Appraisal Servs., Inc., 470 F. Supp. 2d 1025, 1032 (D. Neb. 2006) (holding that exemption did not apply on week-by-week basis due to MCA’s safety requirement, which emphasizes “the effect of the duties on safety operation rather than the proportion of time spent in doing those activities”).

     *But see* Crooker v. Sexton Motors, 469 F.2d 206, 211, 20 WH Cases 963, 966 (1st Cir. 1972) (finding that failure to operate truck in interstate or foreign commerce in any week precluded application of exemption and entitled driver to overtime pay) [↑](#footnote-ref-460)
460. Coleman v. Jiffy June Farms, 324 F. Supp. 664, 668, 19 WH Cases 927, 931 (S.D. Ala. 1970) (finding that minimal interstate activity did not have character of safety-affecting nature), *aff’d*, 458 F.2d 1139, 20 WH Cases 321 (5th Cir. 1972). *See also*

     *Fourth Circuit:* Griffin v. Consolidated Foods Corp., 771 F.2d 826, 828, 829, 27 WH Cases 533, 534 (4th Cir. 1985) (determining that, where sales routes were indiscriminately assigned and some routes crossed state lines, all route delivery employees were “in interstate commerce”).

     *Fifth Circuit:* Olibas v. Barclay, 838 F.3d 442 (5th Cir. 2016) (holding that substantial evidence supported jury’s finding as to inapplicability of MCA exemption where employer was unable to produce any documentary evidence conclusively showing interstate travel by driver); Kline v. Wirtz, 373 F.2d 281, 282, 17 WH Cases 94, 96 (5th Cir. 1967) (holding that cessation of interstate movement resulted in loss of exemption for local drivers); Shew v. Southland Corp., 370 F.2d 376, 380, 17 WH Cases 552, 555 (5th Cir. 1966) (finding that substantial movement of commodities in interstate commerce resulted in coverage under MCA).

     *Seventh Circuit:* Turk v. Buffets, Inc., 940 F. Supp. 1255, 3 WH Cases2d 867 (N.D. Ill. 1996) (applying motor carrier exemption to restaurant service technicians even though interstate driving consumed less of their time than did other duties).

     *But see* Quartararo v. J. Kings Food Serv. Prof’ls, Inc., 2021 BL 120250, 2021 WL 1209716, at \*11–12 (E.D.N.Y. Mar. 31, 2021) (denying application of exemption on summary judgment where employer did not assign interstate routes indiscriminately such that pool of drivers could expect to be assigned interstate routes at any time). [↑](#footnote-ref-461)
461. 29 C.F.R. §782.7(b)(2) (citing Ex parte No. MC-48, Determination of Jurisdiction Over Transp. of Petroleum Prods. by Motor Carriers Within Single State, 71 M.C.C. 17, 29 (1957)). *See also* Baird v. Wagoner Transp. Co., 425 F.2d 407 (6th Cir. 1970). [↑](#footnote-ref-462)
462. ICC Policy Statement, Motor Carrier Interstate Transportation: From Out-of-State Through Warehouses to Points in Same State, Ex Parte No. MC-207, 57 Fed. Reg. 19,812 (May 8, 1992). [↑](#footnote-ref-463)
463. 57 Fed. Reg. at 19,813. [↑](#footnote-ref-464)
464. *Id*. [↑](#footnote-ref-465)
465. WH Op. FLSA2005-10 (Jan. 11, 2005). [↑](#footnote-ref-466)
466. *Id*. (citing Martin v. Coyne Int’l Enters., Inc., 966 F.2d 61 (2d Cir. 1992)). [↑](#footnote-ref-467)
467. *Id*. (noting that specific criteria in 29 C.F.R. §782.7(b)(2) have been supplemented for specific situations by more recent interpretation from DOT). [↑](#footnote-ref-468)
468. *See, e.g.*, Ehrlich v. Rich Prods. Corp., 767 F. App’x 845, 848–50 (11th Cir. 2019) (holding that defendant intended continuity of product movement and maintained control over product, rejecting plaintiffs’ argument that storage of product in third-party warehouse interrupted stream of commerce); Billings v. Rolling Frito-Lay Sales, L.P., 413 F. Supp. 2d 817 (S.D. Tex. 2006) (“totality of the circumstances” test best summarized in DOT’s Policy Statement of 1992). [↑](#footnote-ref-469)
469. Collins v. Heritage Wine Cellars, Ltd., 589 F.3d 895, 899–901 (7th Cir. 2009) (applying four criteria from 1992 DOT Policy Statement while criticizing test’s overall approach). [↑](#footnote-ref-470)
470. *See, e.g.,*

     *Third Circuit:* Atlantic Indep. Union v. Sunoco, Inc., 2004 WL 1368808, at \*7–8 (E.D. Pa. June 16, 2004) (many reasons compel application of more recent test delineated by DOT).

     *Fourth Circuit:* Veney v. John W. Clarke, Inc., 28 F. Supp. 3d 435, 442 (D. Md. 2014) (citing DOT Policy Statement, court found that defendants’ evidence fell far short of establishing “fixed and persisting intent” that trash and recyclables they transported to dumping facilities in Maryland were to be delivered to destination outside of Maryland, relying largely on case law to reach conclusion).

     *Fifth Circuit:* *Billings*, 413 F. Supp. 2d 817 (holding that delivery methods utilized by Frito-Lay met all but one of DOT Policy Statement factors).

     *Sixth Circuit:* Finn v. Dean Transp., Inc., 53 F. Supp. 3d 1043, 1055 (S.D. Ohio 2014) (agreeing with *Musarra v*. *Digital Dish, Inc*. that “in the face of modern advancements and new shipping techniques, MC-48 is no longer sufficient to determine a shipper’s intent accurately”; applying ICC Policy Statement, Motor Carrier Interstate Transportation: From Out-of-State Through Warehouses to Points in Same State, Ex Parte No. MC-207, 57 Fed. Reg. 19,812 (May 8, 1992), standard, court found that driver transported dairy products in interstate commerce); Musarra v. Digital Dish, Inc., 454 F. Supp. 2d 692, 723 (S.D. Ohio 2006) (finding that delivery methods employed by DISH Network and Digital Dish met most of DOT’s seven criteria).

     *Seventh Circuit:* Craft v. Ray’s, LLC, 2009 WL 3163148, at \*7 (S.D. Ind. Sept. 29, 2009) (applying test in DOT’s 1992 Policy Statement to find that defendants were entitled to summary judgment as matter of law).

     *Ninth Circuit:* Montoya v. 3PD, Inc., 2015 WL 1469752 (D. Ariz. Mar. 31, 2015) (following reasoning in *Ruiz v*. *Affinity Logistics Corp*., court applied seven factors in DOT Policy Statement to find that plaintiffs engaged in interstate commerce); Ruiz v. Affinity Logistics Corp.,2006 WL 3712942, at \*11 (S.D. Cal. Nov. 9, 2006) (applying test in DOT’s 1992 Policy Statement over test in 29 C.F.R. §782.7(b)(2) to find that defendant met burden of showing “fixed and persistent intent” to ship products in interstate commerce).

     *Eleventh Circuit:* Williams v. Kenco Logistic Servs., Inc., 2010 WL 2670852 (M.D. Fla. July 2, 2010) (applying factors set forth in 1992 DOT Policy Statement, court held that Whirlpool met burden of establishing intent that stay at distribution center did not interrupt journey of appliances in interstate commerce).

     *But see* Mena v. McArthur Dairy, LLC, 352 F. App’x 303, 307 (11th Cir. 2009) (affirming summary judgment for defendants by applying “totality of circumstances” test without reference to DOT’s 1992 Policy Statement test) [↑](#footnote-ref-471)
471. 29 C.F.R. §782.7(b)(1) (citing cases). *See also*

     *First Circuit:* Noll v. Flowers Foods Inc., 442 F. Supp. 3d 345 (D. Me. 2020) (finding where shipper has fixed and persistent intent to transport products interstate to fulfill existing orders of identifiable customers, employees who drive intrastate legs of journey in commercial vehicles are subject to MCA).

     *Second Circuit:* Kennedy v. Equity Transp. Co., Inc., 663 F. App’x 38 (2d Cir. 2016) (affirming lower court and holding that even if driver does not transport across state lines, interstate commerce requirement is satisfied if goods that are transported within borders of one state are involved in practical continuity of movement in flow of interstate commerce); Bilyou v. Dutchess Beer Distribs., Inc., 300 F.3d 217, 223 (2d Cir. 2002) (interstate commerce present when “the property is carried to a selected destination for out of state travel”); McGuiggan v. CPC Int’l, Inc., 84 F. Supp. 2d 470, 7 WH Cases2d 1366 (S.D.N.Y. 2000) (finding that distributors who picked up baked goods in same state where they delivered goods were nonetheless subject to regulation by DOT where goods being delivered were baked in another state).

     *Third Circuit:* Friedrich v. U.S. Computer Servs., 974 F.2d 409, 419 (3d Cir. 1992) (holding that computer repairmen who used vans to deliver supplies to carry out repairs at clients’ places of business were covered by exemption); Walling v. American Stores Co., 133 F.2d 840, 844, 3 WH Cases 52, 57 (3d Cir. 1943) (determining that warehouse where retail goods were stored until shipment to retail stores did not break movement in interstate commerce); Badgett v. Rent-Way, Inc.,350 F. Supp. 2d 642 (W.D. Pa. 2004) (defendant produced evidence that it occasionally filled special order for customers from merchandise supplied by out-of-state vendors); Atlantic Indep. Union v. SUNOCO, Inc*.*, 2004 WL 1368808 (E.D. Pa. June 16, 2004) (because defendant determined how much product to ship via pipeline and when to ship it based on customer demand projections that took into consideration historical need and anticipated weather projections, these factors among others indicated that there was continuity of movement from out-of-state location to ultimate destination).

     *Fourth Circuit:* Haynes v. S. Carolina Waste LLC, 633 F. Supp. 3d 769 (D.S.C. 2022) (holding MCA inapplicable where waste hauling truckers were involved in wholly intrastate activity and defendant had no intent for items shipped to enter interstate commerce).

     *Fifth Circuit:* Olibas v. Barclay, 838 F.3d 442 (5th Cir. 2016) (holding that substantial evidence supported jury’s finding as to inapplicability of MCA exemption where employer was unable to produce any documentary evidence, such as customer orders, to support interstate commerce); Shew v. Southland Corp., 370 F.2d 376, 380 (5th Cir. 1966); Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37 (5th Cir. 1962) (holding that although employees themselves traveled only intrastate, cargo being transported was destined for neighboring state and therefore drivers were exempt from overtime under §213(b)(1)); Vallejo v. Garda CL Sw., Inc., 56 F. Supp. 3d 862 (S.D. Tex. 2014) (finding that because regular course of plaintiffs’ duties as armored car drivers/messengers/guards was to engage in transport of checks and currency from retailers and automated teller machines to financial institutions, those activities formed part of practical continuity of movement across state lines); Billings v. Rolling Frito-Lay Sales, LP, 413 F. Supp. 2d 817 (S.D. Tex. 2006) (holding that route salespersons delivering snack foods from Frito-Lay–owned distribution center to local retailers were engaged in interstate commerce); Pearse v. Interstate Brands Corp., 2 WH Cases2d 1402, 1405–06 (E.D. La. 1995) (holding that employer was not entitled to summary judgment with respect to route salesman’s overtime claim, even though 14–22% of products handled and sold had been produced outside of state, where salesman claimed he never traveled across state lines); Barefoot v. Mid-America Dairymen, 826 F. Supp. 1046, 1049, 1 WH Cases2d 924, 925 (N.D. Tex. 1993) (deeming that temporary storage of unprocessed milk in silos for shipment to customers outside of state was not sufficient break in flow of commerce to warrant application of FLSA to drivers).

     *Sixth Circuit:* Secretary of Labor v. Timberline S., LLC, 925 F.3d 838 (6th Cir. 2019) (absent evidence that drivers transported goods as part of practical continuity of movement in interstate commerce, MCA exemption did not apply); Baird v. Wagoner Transp. Co., 425 F.2d 407, 410 (6th Cir. 1970) (holding that because (1) “specific quantity” to be shipped to given destination was not fixed at time of shipment to terminal storage; (2) goods at terminal were inventory-in-store for actual orders to be placed by Standard’s customers; and (3) no portion of any of products shipped had been allocated before they arrived in Muskegon terminal, in-state transportation did not have interstate continuity).

     *Seventh Circuit:* Jones v. Centurion Inv. Assocs., Inc., 268 F. Supp. 2d 1004 (N.D. Ill. 2003) (holding that drivers who delivered bread products on plastic delivery trays from warehouse to customers in state still were exempt where plastic delivery trays returned to bakery out of state); Barron v. Lee Enters., Inc., 183 F. Supp. 2d 1077 (C.D. Ill. 2002) (holding that drivers who delivered newspapers on daily basis that included preprinted and dated supplements shipped to employer by paying advertisers were engaged in “interstate commerce”).

     *Eighth Circuit:* Walling v. Mutual Wholesale Food & Supply Co.,141 F.2d 331, 334, 4 WH Cases 277, 285 (8th Cir. 1944) (finding that goods stored temporarily in warehouse for distribution to chain of grocery stores remained in interstate commerce); Guyton v. Schwan Food Co., 2004 WL 533942 (D. Minn. Mar. 16, 2004) (holding that defendant had fixed and persisting intent to ship its products beyond its in-state depots).

     *Ninth Circuit:* Watkins v. Ameripride Servs., 375 F.3d 821 (9th Cir. 2004) (holding that because intrastate warehouse was only designated destination at time of shipment from out of state to in state for future delivery to customers yet to be identified, there was pause in practical continuity of movement and commerce was intrastate); Reich v. American Driver Serv., Inc., 33 F.3d 1153, 1155 n.3 (9th Cir. 1994) (wholly intrastate commerce satisfies interstate requirement when part of “continuing transportation”).

     *Tenth Circuit:* Compton v. Rent-A-Center, Inc., 2008 WL 4899221, at \*7 (W.D. Okla. Nov. 12, 2008), *aff’d*, 350 F. App’x 216 (10th Cir. 2009) (furniture and appliances shipped from out of state to particular store where order originated and plaintiff delivered items intrastate in company truck; exemption applied because goods moved in interstate commerce); Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 672 (10th Cir. 1993) (“Transportation within a single state may remain ‘interstate’ in character when it forms a part of a ‘practical continuity of movement’ across state lines from the point of origin to the point of destination.”).

     *Eleventh Circuit:* Abel v. Southern Shuttle Servs., Inc., 631 F.3d 1210, 1217 (11th Cir. 2011) (“Southern Shuttle’s local transport of these package-deal travelers has a ‘practical continuity of movement’ with the overall interstate journey.”); Walters v. American Coach Lines of Miami, Inc., 575 F.3d 1221 (11th Cir. 2009) (holding that passengers on “through ticketing arrangement” for airport to seaport routes shared practical continuity of movement with interstate or international travel of cruise lines); Baez v. Wells Fargo Armored Serv. Corp., 938 F.2d 180, 181–82 (11th Cir. 1991); Williams v. Kenco Logistic Servs., Inc., 2010 WL 2670852 (M.D. Fla. July 2, 2010) (holding that Whirlpool appliances’ stay at regional distribution center did not interrupt journey of appliances in interstate commerce); Hernandez v. Brink’s, Inc., 2009 WL 113406, at \*3 (S.D. Fla. Jan. 15, 2009) (holding that defendant met interstate commerce requirement even though plaintiffs did not engage in interstate travel because plaintiffs transported checks and other property destined at time of shipment for delivery to specific locations out of state); McIntyre v. FLX of Miami, Inc., 2008 WL 4541017, at \*5 (S.D. Fla. Oct. 8, 2008) (finding that defendant’s secretary and president attested to fact that defendant’s deliveries within Florida completed deliveries in Florida of shipments from another state or completed deliveries originating in Florida to travel outside Florida); Alvarado v. I.G.W.T. Delivery Sys., Inc., 410 F. Supp. 2d 1272, 1277 (S.D. Fla. 2006) (holding that drivers played key intermediary role in fulfillment of preexisting orders by delivering letters and packages to and from DHL terminal for travel to ultimate interstate or international destination) [↑](#footnote-ref-472)
472. *Second Circuit:* *Bilyou*, 300 F.3d at 225 (pick-up of empty containers destined for out-of-state bottling facilities and delivery to in-state storage facility was found to be “interstate commerce”).

     *Third Circuit:* Green v. Lazer Spot, Inc., 2021 BL 488333, 2021 WL 6063590, at \*2–5 (M.D. Pa. Dec. 22, 2021) (yard jockey who moved loaded and empty trailers in and out of loading bays and occasionally over public roads served as intrastate step of a larger interstate journey, thereby participating in interstate commerce).

     *Fifth Circuit:* Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 42–43, 15 WH Cases 321 (5th Cir. 1962) (distributor’s pick-up and return of empties to out-of-state brewery was part of interstate movement of goods, where it was clear from moment of pick-up that empties had intended final destination to specific out-of-state brewery).

     *Seventh Circuit:* Burlaka v. Contract Transp. Servs. LLC, 971 F.3d 718 (7th Cir. 2020) (spotters who drove loaded or empty trailers intrastate between corrugated box facilities, warehouses, and loading docks participated in goods’ interstate journey); *Jones*, 268 F. Supp. 2d 1004, 1009 (“defendant’s bread and trays were shipped from the Indiana bakery to Illinois stores and in the case of the trays, back to Indiana, in a ‘practical continuity of movement’ so as to constitute transportation in interstate commerce”).

     *Tenth Circuit:* *Foxworthy*, 997 F.2d at 672 (pick-up and deposit of empty milk crates at distribution center that were then shipped to out-of-state processing plant exempted employee drivers from FLSA overtime provisions); Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1025, 30 WH Cases 1606 (10th Cir. 1992).

     *See also* FOH Chapter 24, which lists the following examples of “interstate commerce” when the travel involved was “intrastate”: vending machine servicepersons (FOH §24c03); transportation of checks drawn on out-of-state banks (FOH §24c10(a)–(b)); drivers delivering newspapers within the state (FOH §24d00(a)–(b)); and drivers of buses/shuttle services/limousines (FOH §24c04). [↑](#footnote-ref-473)
473. Fonseca v. AllTour Am. Transp., Inc., 750 F. App’x 883, 887 (11th Cir. 2018); Abel v. Southern Shuttle Servs., Inc., 631 F.3d 1210, 1214 (11th Cir. 2011); Walters v. American Coach Lines, 575 F.3d 1221, 1229 (11th Cir. 2009). [↑](#footnote-ref-474)
474. 575 F.3d 1221 (11th Cir. 2009). [↑](#footnote-ref-475)
475. *Id.* at 1229–30. [↑](#footnote-ref-476)
476. *Id.* at 1230. [↑](#footnote-ref-477)
477. 23 U.S.C §306. [↑](#footnote-ref-478)
478. *See, e.g.*, Noll v. Flowers Foods Inc., 478 F. Supp. 3d 59 (D. Me. 2020) (holding transportation of stale bakery products in personal vehicles falls within the small vehicle exception); Westberry v. William Joule Marine Transport, Inc., 2013 WL 656327 (M.D. Fla. Feb. 22, 2013) (finding that escort drivers driving vehicles less than 10,000 pounds were not exempt under TCA despite following and assisting semi-trucks weighing more than 10,000 pounds). *But see* Tucker v. Oscar Mike, Inc., 671 F. Supp. 3d 1313 (N.D. Ala. 2023) (holding diesel mechanic exempt who drove a vehicle weighing less than 10,001 pounds to repair vehicles weighing more than 10,000 pounds did not fall within the small vehicle exception). [↑](#footnote-ref-479)
479. White v. U.S. Corr., LLC, 2022 BL 163683, 2022 WL 1491349 (W.D. Tex. May 11, 2022) (vehicle designed or used to transport more than eight passengers for compensation satisfies definition of commercial motor vehicle regardless of weight); Fiveash v. South E. Pers. Leasing, Inc., 2022 BL 128246, 2022 WL 1105750, at \*4 (W.D. Tex. Apr. 13, 2022) (holding that vehicle need only satisfy weight or passenger requirements to meet exception, not both); Avery v. Chariots for Hire, 748 F. Supp. 2d 492, 499 (D. Md. 2010). [↑](#footnote-ref-480)
480. 890 F.3d 575 (5th Cir. 2018). [↑](#footnote-ref-481)
481. *Id*. at 580; *see also* Rychorcewicz v. Welltec, Inc., 768 F. App’x 252, 256 (5th Cir. 2019) (recognizing that website links to GVWR were insufficient to prove weight of actual vehicles driven by plaintiffs); Martinez v. Environmental Oil Recovery, Inc., 2022 BL 8441, 2022 WL 98003 (E.D. Tex. Jan. 10, 2022) (accepting recommended grant of summary judgment in favor of defendant because plaintiff’s declaration in opposition lacked specificity such as VIN numbers or vehicles’ GVWR). *But see* Carlton v. JHook Invs., Inc., 2019 WL 4784801 (E.D. Ark. Sept. 30, 2019) (regardless of which party bears the burden of proof, plaintiff satisfied it by testifying that he drove vehicles with a GVWR of 10,000 pounds or less at various locations of defendant). [↑](#footnote-ref-482)
482. 890 F.3d at 582. [↑](#footnote-ref-483)
483. McCall v. Disabled Am. Veterans, 723 F.3d 962, 966 (8th Cir. 2013) (evolution of statute supports conclusion that GVWR is proper measure of weight). [↑](#footnote-ref-484)
484. Skidmore v. Swift & Co., 323 U.S. 134 (1944). [↑](#footnote-ref-485)
485. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2010-2 (Nov. 4, 2010). [↑](#footnote-ref-486)
486. 444 F. App’x 788 (5th Cir. 2011). [↑](#footnote-ref-487)
487. *Id.* at 799–800; *see also* Benavidez v. Oil Patch Grp., Inc., 2022 BL 195019, 2022 WL 2903119 (W.D. Tex. Apr. 14, 2022) (granting summary judgment in favor of defendant where plaintiff failed to establish workweeks during which he drove a vehicle without a trailer that would have weighed less than 10,001 pounds); Glanville v. Dupar, Inc., 2009 BL 204879, 2009 WL 3255292, at \*5 (S.D. Tex. Sept. 25, 2009). [↑](#footnote-ref-488)
488. Field Assistance Bull. No. 2010-2. [↑](#footnote-ref-489)
489. 856 F.3d 571 (8th Cir. 2017). [↑](#footnote-ref-490)
490. *Id*. *But see* Berry v. Best Transp., Inc., 2018 WL 6830097 (E.D. Mo. Dec. 27, 2018) (holding that alteration to vans (removing bench seat) was not so significant as to change “design” of vans, therefore drivers’ work was not covered by TCA exception to MCA exemption). [↑](#footnote-ref-491)
491. Avery v. Chariots for Hire, 748 F. Supp. 2d 492, 499 (D. Md. 2010); Hernandez v. Brink’s, Inc., 2009 WL 113406, at \*5–6 (S.D. Fla. Jan. 15, 2009). [↑](#footnote-ref-492)
492. Pub. L. No. 110-244, §306, 122 Stat. 1572 (2008). [↑](#footnote-ref-493)
493. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2010-2 (Nov. 4, 2010). The field assistance bulletin also addressed application of the “four-month” rule in any workweek an employee was covered by the TCA. [↑](#footnote-ref-494)
494. Bedoya v. Aventura Limousine & Transp. Serv., Inc.,2012 WL 3962935, at \*4 (S.D. Fla. Sept. 11, 2012) (TCA applies so long as plaintiff’s work on noncommercial vehicles is considered more than de minimis); Hernandez v. Alpine Logistics, LLC, 2011 WL 3800031, at \*14, 17–18 (W.D.N.Y. Aug. 29, 2011) (even if MCA exemption applied to certain drivers, those drivers would still be entitled to overtime compensation if they qualified as “covered employees” because §306 clearly and unmistakably provides that, notwithstanding existence of MCA exemption, “employees who work on exclusively or in part on [non-commercial vehicles] are entitled to overtime compensation”); Mayan v. Rydbom Express, Inc., 2009 WL 3152136, at \*4 (E.D. Pa. Sept. 30, 2009) (employee working on 10,001 pound vehicle two days per week and 5,000 pound vehicle remaining days of week appeared to satisfy TCA). [↑](#footnote-ref-495)
495. 780 F.3d 167 (3d Cir. 2015). [↑](#footnote-ref-496)
496. *Id.* at 170 (citing language of TCA). [↑](#footnote-ref-497)
497. *Id.* (citations omitted). [↑](#footnote-ref-498)
498. *Id*. at 170–71 (discussing Allen v. Coil Tubing Servs., LLC, 755 F.3d 279 (5th Cir. 2014); McCall v. Disabled Am. Veterans, 723 F.3d 962 (8th Cir. 2013)). [↑](#footnote-ref-499)
499. 589 F.3d 895 (7th Cir. 2009). [↑](#footnote-ref-500)
500. *Id*.at 901. [↑](#footnote-ref-501)
501. McMaster v. Eastern Armored Servs., Inc., 780 F.3d 167, 172 (3d Cir. 2015). [↑](#footnote-ref-502)
502. 755 F.3d 279 (5th Cir. 2014). [↑](#footnote-ref-503)
503. *Id*.at 705 (emphasis added). *See* Rychorcewicz v. Welltec, Inc., 768 F. App’x 252, 256 (5th Cir. 2019) (occasional use of personal and rental vehicles less than 10,001 pounds considered de minimis); Benavidez v. Oil Patch Grp., Inc., 2022 BL 195019, 2022 WL 2903119 (W.D. Tex. Apr. 14, 2022) (granting summary judgment in favor of defendant where plaintiff failed to establish workweeks during which he drove a vehicle weighing less than 10,001 pounds on more than a de minimis basis); Moore v. Performance Pressure Pumping Servs., LLC, 2017 WL 1501436 (W.D. Tex. Apr. 26, 2017) (citing *Allen*, holding that TCA applied so long as plaintiffs’ work on noncommercial vehicles was considered more than de minimis; denying summary judgment where record reflected disputed facts on whether plaintiffs’ use of smaller, TCA-covered vehicles rose above de minimisstandard). [↑](#footnote-ref-504)
504. 391 F. Supp. 3d 466 (E.D. Pa. 2019). [↑](#footnote-ref-505)
505. *Id.* at 472–74 (considering de minimis principles applied in *Resch v. Krapf’s Coaches, Inc.*, 785 F.3d 869 (3d Cir. 2015), which addressed the amount of qualifying work required by employees for application of the MCA exemption); *see also* Guy v. Absopure Water Co., LLC, 2023 WL 3361148 (E.D. Mich. May 10, 2023) (agreeing with interpretation of de minimis such that 9% of routes driven in small vehicles was considered beyond trivial or insignificant). [↑](#footnote-ref-506)
506. *See, e.g.*,Vanzzini v. Action Meat Distributors, Inc., 995 F. Supp. 2d 703 (S.D. Tex. 2014) (rejecting such requirement); Aikins v. Warrior Energy Servs. Corp., 2014 WL 1221255 (S.D. Tex. Mar. 17, 2015) (finding that “meaningful work standard” seemed to require no more than that covered employees’ work on vehicles weighing 10,000 pounds or less be more than de minimis). [↑](#footnote-ref-507)
507. 29 U.S.C. §213(b)(2). [↑](#footnote-ref-508)
508. In 1978, when the ICA was revised, Part I was subsumed in subtitle IV of Title 49 of the United States Code. Pub. L. No. 95-473, 92 Stat. 1337 (1978). Today, an employee is exempt from the overtime requirements of the FLSA under §213(b)(2) if the employer is engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49. *See* Cederblade v. Parmelee Transp. Co., 166 F.2d 554, 555 (7th Cir. 1948) (providing legislative history of §213(b)(2) exemption); *see also* Keele v. Union Pac. R.R. Co., 78 F. Supp. 678 (S.D. Cal. 1948) (same). [↑](#footnote-ref-509)
509. Tews v. Renzenberger, Inc., 592 F. Supp. 2d 1331, 1338 (D. Kan. 2009) (citing *Keele*, 78 F. Supp. at 682–83 (rail carrier exemption “means exactly what it says” and plaintiffs clearly exempt because defendant regulated under pt. I of ICA)). [↑](#footnote-ref-510)
510. 54 F. Supp. 342 (D.S.C. 1944). [↑](#footnote-ref-511)
511. *Id*. at 347; *accord* McComb v. Southern Weighing & Inspection Bureau, 170 F.2d 526, 529 (4th Cir. 1948) (“It was manifestly intended that exclusive power to regulate hours of labor for employees of railroads should rest with the Interstate Commerce Commission and that there should be no division of responsibility for supervising the operations of interstate carriers, a matter where unity of control was of the utmost importance and where it had been exercised by the commission for a long period to the entire satisfaction of the country at large.”). [↑](#footnote-ref-512)
512. FOH §24i01(b) provides context to the words “common control, management, or arrangement.” [↑](#footnote-ref-513)
513. *See* 49 U.S.C. §§101 *et seq*.; FOH §24i01(a). This “common control, management, or arrangement” requirement is met when there is a common understanding between carriers as to traffic policy, even where there are distinct and separate corporate identities. FOH §24i01(b). [↑](#footnote-ref-514)
514. FOH §24i01(a). [↑](#footnote-ref-515)
515. *Id.* §24i01(c). *See*

     *Second Circuit:* Brittan v. Hudson & Manhattan R.R., 50 F. Supp. 37, 38 (S.D.N.Y. 1943) (applying exemption to elevator operators, maintenance men, and watchmen employed in office building operated by railroad but not directly involved in operation of railroad).

     *Fourth Circuit:* *Southern Weighing & Inspection Bureau*, 170 F.2d at 530 (applying exemption to employees of bureau organized to inspect and supervise transportation of freight by rail).

     *Seventh Circuit:* Cederblade v. Parmelee Transp. Co., 166 F.2d 554, 556–57 (7th Cir. 1948) (applying exemption to bus and truck drivers transporting passengers and baggage for railroads); Walling v. Western Weighing & Inspection Bureau, 160 F.2d 47, 51 (7th Cir. 1946) (applying exemption to employees of weighing and inspection bureau); Williams v. Alex’s Transp., 969 F. Supp. 1142 (N.D. Ill. 1997) (applying exemption to employer who provided crew hauling services to railroads entitled to reply on exemption).

     *Eighth Circuit:* McComb v. McKay, 164 F.2d 40, 49 (8th Cir. 1947) (applying exemption to yard workers who manufactured, repaired, and stored temporary grain and coal doors for freight cars) [↑](#footnote-ref-516)
516. FOH §24i01(d). [↑](#footnote-ref-517)
517. *Id.* §24i01(e). [↑](#footnote-ref-518)
518. *Id.* §24i01(g). The fact that a railroad contractor may be subject to the Railway Labor Act is not a criterion for determining the application of the §213(b)(2) exemption. *Id.* [↑](#footnote-ref-519)
519. *Id.* §24i02(a). [↑](#footnote-ref-520)
520. *Id.* §24i02(b). [↑](#footnote-ref-521)
521. FOH §24i03(a)(4). [↑](#footnote-ref-522)
522. *Id.* §24i03(a)(5). [↑](#footnote-ref-523)
523. *Id.* §24i03(a)(6). [↑](#footnote-ref-524)
524. *Id.* §24i04. [↑](#footnote-ref-525)
525. FOH §24i03(a)(2). [↑](#footnote-ref-526)
526. *Id*. §24i03(a)(3). [↑](#footnote-ref-527)
527. Pub. L. No. 104–88, §702, 109 Stat. 803 (1995). [↑](#footnote-ref-528)
528. *Id*. §340. [↑](#footnote-ref-529)
529. 49 U.S.C. §10501(a) (STB has jurisdiction over transportation by rail carrier). [↑](#footnote-ref-530)
530. 49 U.S.C. §13503(b)(1) and (2) (transportation by motor vehicle in terminal area is subject to jurisdiction under ch. 105 when provided for rail carrier). [↑](#footnote-ref-531)
531. Tews v. Renzenberger, Inc., 592 F. Supp. 2d 1331, 1339 (D. Kan. 2009) (citing Town of Babylon & Pinelawn Cemetery, STB Fin. Dkt. No. 35057, 2008 WL 275697, at \*3 (Feb. 1, 2008)). [↑](#footnote-ref-532)
532. 49 U.S.C. §10102(9). [↑](#footnote-ref-533)
533. *Id.* §10102(5). [↑](#footnote-ref-534)
534. Association of P & C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 293–94 (1992). [↑](#footnote-ref-535)
535. H & M Int’l Transp., Inc., STB Fin. Dkt. No. 3427, 2003 WL 22674651, at \*3 (Nov. 10, 2003). [↑](#footnote-ref-536)
536. 592 F. Supp. 2d 1331 (D. Kan. 2009). [↑](#footnote-ref-537)
537. *Id.* at 1340 (citing *P & C Dock Longshoremen*., 8 I.C.C. 2d at 293–94, and acknowledging *H & M Int’l Transp., Inc.*, STB Fin. Dkt. No. 34277, 2003 WL 22674651, at \*3 (“To be considered a rail carrier under the statute, there must be a holding out to the public to provide common carrier service.”)). [↑](#footnote-ref-538)
538. *Id.* (quoting *P & C Dock Longshoremen*, 8 I.C.C. 2d at 294). [↑](#footnote-ref-539)
539. *Id.* at 1341 (citing Town of Milford, STB Fin. Dkt No. 34444, 2004 WL 1802301 (Aug. 12, 2004) (STB lacked jurisdiction over non-carrier operating rail yard where it transloaded steel pursuant to agreement with carrier but transloading services were not offered as part of common carrier services offered to public)). [↑](#footnote-ref-540)
540. 49 U.S.C. §13503(b). [↑](#footnote-ref-541)
541. 166 F.2d 554 (7th Cir. 1948). The historical background of the terminal area exception was set forth in this decision. [↑](#footnote-ref-542)
542. *Id.* at 556. [↑](#footnote-ref-543)
543. 969 F. Supp. 1142 (N.D. Ill. 1997). [↑](#footnote-ref-544)
544. *Id.* at 1143–46. [↑](#footnote-ref-545)
545. 592 F. Supp. 2d 1331 (D. Kan. 2009). [↑](#footnote-ref-546)
546. *Id*. at 1342. [↑](#footnote-ref-547)
547. *Id*. [↑](#footnote-ref-548)
548. *Id*. [↑](#footnote-ref-549)
549. Farley v. Metro-North Commuter R.R., 865 F.2d 33, 35 (2d Cir. 1989). [↑](#footnote-ref-550)
550. *Id.* [↑](#footnote-ref-551)
551. *Id*. [↑](#footnote-ref-552)
552. *Id*. [↑](#footnote-ref-553)
553. Farley v. Metro-North Commuter R.R., 865 F.2d 33, 36 (2d Cir. 1989). [↑](#footnote-ref-554)
554. *Id.* [↑](#footnote-ref-555)
555. *Id.* at n.2 (citing Metro-North Commuter R.R. Co.—Exemption From 49 U.S.C. Subtitle IV, I.C.C. Fin. Dkt. No. 30063 (Nov. 24, 1982)). [↑](#footnote-ref-556)
556. *Id*. at 34. [↑](#footnote-ref-557)
557. 865 F.2d 33 (2d Cir. 1989). [↑](#footnote-ref-558)
558. *Id.* at 36. [↑](#footnote-ref-559)
559. *Id.* (citing 49 U.S.C. §10505(d) (1982)). [↑](#footnote-ref-560)
560. 29 U.S.C. §213(b)(3). This provision was added to the FLSA in 1949, and its language has not changed since its enactment. Pub. L. No. 81-393, 63 Stat. 910 (1949). [↑](#footnote-ref-561)
561. FOH §24j01 (1974) (quoting Title II of the Railway Labor Act, 45 U.S.C. §181); *cf*. WH Op. FLSA2004-9NA (Aug. 17, 2004) (holding that employees of private employer that maintained several aircraft used in transporting company executives, senior managers, and occasionally customers, but not in business of providing air carrier service to public, were not subject to RLA, and therefore not exempt under §213(b)(3)). [↑](#footnote-ref-562)
562. FOH §24j02. [↑](#footnote-ref-563)
563. *Id.* §24j03. [↑](#footnote-ref-564)
564. *Id.* §24j04. *But see* Roca v. Alphatech Aviation Servs., Inc., 961 F. Supp. 2d 1234 (S.D. Fla. 2013) (court granted summary judgment to cleaning company employee, finding that §213(b)(3) exemption did not apply because defendants failed to produce evidence from which reasonable factfinder could conclude that air carriers exercised requisite control over cleaning company’s business). [↑](#footnote-ref-565)
565. 305 F.3d 1283 (11th Cir. 2002). [↑](#footnote-ref-566)
566. *Id.* at 1287. [↑](#footnote-ref-567)
567. *Id*. [↑](#footnote-ref-568)
568. 328 F.3d 742, 8 WH Cases2d 1063 (5th Cir. 2003). [↑](#footnote-ref-569)
569. 221 F.3d 1353 (10th Cir. 2000). [↑](#footnote-ref-570)
570. *Id*.; *see also* Riegelsberger v. Air Evac EMS, Inc., 970 F.3d 1061 (8th Cir. 2020) (affirming district court’s finding that air ambulance service was a common carrier by air under the exemption); Osbourne v. Enchantment Aviation, Inc., 2004 WL 2287765 (10th Cir. Oct. 12, 2004) (same). [↑](#footnote-ref-571)
571. The NMB is a federal agency in charge of labor–management relations under the RLA. Cunningham v. Electronic Data Sys. Corp., 2010 WL 1223084, at \*4 (S.D.N.Y. Mar. 30, 2010) (*Cunningham II*). Courts generally defer to the NMB’s construction of the law. *See* Cunningham v. Electronic Data Sys. Corp., 579 F. Supp. 2d 538, 542 (S.D.N.Y. 2008) (*Cunningham I*). [↑](#footnote-ref-572)
572. *In re* International Cargo Mktg. Consultants, 31 NMB 396, 406 (June 18, 2004). *But see* Roca v. Alphatech Aviation Servs., Inc., 960 F. Supp. 2d 1368, 1372 n.2 (S.D. Fla. 2013) (“While lower courts have adopted the NMB’s function-and-control test and treat NMB analyses of the test [as] persuasive in certain instances, courts are not bound by the categorical determinations made by the NMB under this test.”). [↑](#footnote-ref-573)
573. *Roca*, 960 F. Supp. 2d at 1372; *see also* Standard Office Bldg. Corp. v. United States, 819 F.2d 1371, 1373 (7th Cir. 1987). [↑](#footnote-ref-574)
574. *Cunningham II*, 2010 WL 1223084, at \*5 (quoting In re *International Cargo*, 31 NMB at 406). [↑](#footnote-ref-575)
575. *Id*. [↑](#footnote-ref-576)
576. *See* Verrett v. SABRE Grp., Inc., 70 F. Supp. 2d 1277 (N.D. Okla. 1999) (monitoring of computer operations critical to scheduling and related activities qualified for coverage under RLA). [↑](#footnote-ref-577)
577. *In re* International Total Servs./Servs. & Sys. Ltd., 9 NMB 392 (May 24, 1982). [↑](#footnote-ref-578)
578. *In re* Milepost Indus., 27 NMB 362 (May 9, 2000). [↑](#footnote-ref-579)
579. *In re* Dalfort Aerospace, LP., 27 NMB 196, 211 (Feb. 3, 2000). [↑](#footnote-ref-580)
580. *See* Horkan v. Command Sec. Corp., 728 N.Y.S.2d 495 (N.Y. App. Div. 2001) (NMB decisions are persuasive authority with respect to scope of §213(b)(3) exemption, citing with approval two NMB decisions on security officers––*Matter of Frain Services*, 19 NMB 161 (1992), and *Matter of Command Security Corp*., 27 NMB 581 (2000)). [↑](#footnote-ref-581)
581. Verrett v. SABRE Grp., Inc., 70 F. Supp. 2d 1277, 1282 (N.D. Okla. 1999) (“specialized information technology services for airline flight operations, airport passenger processing, crew scheduling, passenger reservations, accounting, and related functions for [the carrier] and other airlines were an integral part of the air carriers’ transportation function”). [↑](#footnote-ref-582)
582. *Cunningham II*, 2010 WL 1223084, at \*1 (S.D.N.Y. Mar. 30, 2010) (information technology services “touch[ed] upon virtually every area of [the carrier’s] business, including flight planning and operations, pilot communications, in-flight catering, airplane maintenance, [and] flight reservations”). [↑](#footnote-ref-583)
583. 2016 WL 5349723 (D. Me. Sept. 23, 2016). [↑](#footnote-ref-584)
584. *Id.* at \*9. [↑](#footnote-ref-585)
585. *See* *Cunningham II*, 2010 WL 1223084, at \*5 (“Electronic Data Systems does not claim to be owned by or under common ownership with a carrier, so it can only satisfy this prong of the test by showing that it is ‘controlled by’ American [Airlines]”). [↑](#footnote-ref-586)
586. *Cunningham I*, 579 F. Supp. 2d 538, 542 (S.D.N.Y. 2008). [↑](#footnote-ref-587)
587. *Cunningham II*, 2010 WL 1223084, at \*7 (applying last two factors, court concluded that there were significant gaps in evidence presented on those issues such that EDS did not meet its burden with respect to “control prong,” and thus it denied summary judgment). [↑](#footnote-ref-588)
588. 29 C.F.R. §786.1. [↑](#footnote-ref-589)
589. *Id*. [↑](#footnote-ref-590)
590. FOH §24j01(a). [↑](#footnote-ref-591)
591. 29 U.S.C. §213(b)(6). As originally enacted in 1938, §213(a)(3) exempted “any employee employed as a seaman” from both the minimum wage and overtime pay requirements. Act of June 25, 1938, ch. 676, 52 Stat. 1067. In 1949, the language of the exemption was not changed but it was renumbered as §213(a)(14). Pub. L. No. 81-393, 63 Stat. 910 (1949).

     In 1961, §213(a)(14) was amended by adding the words “on a vessel other than an American vessel,” Pub. L. No. 87-30, §9, 75 Stat. 72, and an overtime exemption was provided for seamen working on an American vessel. The enactment of  
     §213(b)(6) meant that those employed as seamen on American vessels were brought within the minimum wage provisions of the FLSA. *See* 29 C.F.R. §783.28. [↑](#footnote-ref-592)
592. FOH §24k00–05. [↑](#footnote-ref-593)
593. *See* 29 C.F.R. §283.24–.51. [↑](#footnote-ref-594)
594. *Id*. §783.28. [↑](#footnote-ref-595)
595. *Id*. §783.27. Although the term “vessel” does not appear in §213(b)(6), the regulations make clear that the exemption is to be interpreted together with Section 206(a)(4), which extends the minimum wage provisions of the FLSA to employees “employed as a seaman on an American vessel.” 29 U.S.C. §206(a)(4); 29 C.F.R. §783.26 & .27. [↑](#footnote-ref-596)
596. *Id*. [↑](#footnote-ref-597)
597. *Id*. §783.32. [↑](#footnote-ref-598)
598. Martin v. Bedell, 955 F.2d 1029, 1035 (5th Cir. 1992) (“[E]mployment on seagoing vessels does not necessarily make one a ‘seaman.’ ”). [↑](#footnote-ref-599)
599. Walling v. W.D. Haden Co., 153 F.2d 196, 199 (5th Cir. 1946) (holding that employee working on vessel in job titled “seaman” did not qualify for exemption because dominant portion of work was mining and handling of shells as distinguished from maritime work). [↑](#footnote-ref-600)
600. McLaughlin v. King Welding, Inc., 1988 WL 81539, 28 WH Cases 1054, 1056 (C.D. Cal. 1988) (finding that workers licensed as seamen by U.S. Coast Guard did not qualify for exemption because their work was primarily and substantially industrial rather than maritime in nature). [↑](#footnote-ref-601)
601. Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346, 349 (1st Cir. 1945) (deeming that merely performing limited maritime duties on vessel was insufficient to qualify for exemption); Anderson v. Manhattan Lighterage Corp., 148 F.2d 971, 972 (2d Cir. 1945) (holding that lighter captains who performed few strictly nautical duties and for most part loaded and unloaded cargo did not qualify as FLSA-exempt seamen). [↑](#footnote-ref-602)
602. 29 C.F.R. §783.33, .48 (“Whether a particular employee is exempt depends on what he does.”); *see also Bedell*, 955 F.2d at 1035 (“[W]hether an employee is ‘employed as a seaman,’ within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place it is performed.”); *W.D. Haden Co*., 153 F.2d at 199 (holding that shell miners engaged principally in industrial rather than ship work did not qualify as seamen, explaining that exemption requires court “to look to what employees do, and not to rest on a mere matter of a name or the place of their work”). [↑](#footnote-ref-603)
603. The Jones Act is a maritime statute that provides a negligence cause of action for any seaman injured in the course of employment. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995); *see also* 46 U.S.C. §30104. [↑](#footnote-ref-604)
604. Martin v. Bedell, 955 F.2d 1029, 1035 (5th Cir. 1992) (remanding for determination of whether cooks aboard boats servicing offshore oil rigs fell within “narrow” seaman exemption). [↑](#footnote-ref-605)
605. *Id.* (“When a worker performs both seaman’s work and nonseaman’s work, he is a seaman unless his nonseaman’s work is substantial in amount; we remand so that the district court may determine if the cooks spend more than 20% of their time preparing food for non-crew members. If they do, they are not seamen under the FLSA.”). *See also* Adams v. All Coast, LLC, 15 F.4th 365, 376–77 (5th Cir. 2021) (finding genuine issue of material fact existed regarding the amount of time lifeboat cooks spent preparing food for crew when they were not performing seamen’s work, and how much time they spent preparing food for non-crew members). [↑](#footnote-ref-606)
606. 29 C.F.R. §783.31–.37, .51; Halle v. Galliano Marine Servs., LLC, 855 F.3d 290, 293 (5th Cir. 2017) (definition of “seaman” in Jones Act is not equivalent to that in FLSA); Dole v. Petroleum Treaters, Inc., 876 F.2d 518, 524 (5th Cir. 1989) (explaining that “seaman” for purposes of FLSA has narrower meaning than for purposes of Jones Act, 45 U.S.C. §688); Worthington v. Icicle Seafoods, 749 F.2d 1409, 1411–12 (9th Cir. 1984) (construing “seaman” narrowly to include only employees primarily aiding in vessel navigation). For a discussion on the textual interpretation of FLSA exemptions, and particularly the rule of narrow construction in light of *Encino Motorcars, LLC v. Navarro* (*Encino II*), 138 S. Ct. 1134 (2018), see §IV.F [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Certain Employees of Automobile, Truck, or Farm Implement Dealers; Salespersons of Trailers, Boats, and Aircraft] of this chapter. [↑](#footnote-ref-607)
607. 29 C.F.R. §783.32; McLaughlin v. Boston Harbor Cruise Lines, LLC, 419 F.3d 47 (1st Cir. 2005); *see also Petroleum Treaters*, 876 F.2d 518 (explaining that “seaman” for purposes of FLSA has narrower meaning than it does for purposes of Jones Act, 46 U.S.C. §688). [↑](#footnote-ref-608)
608. 29 C.F.R. §783.32–.33; *see also*

     *Second Circuit:* Levesque v. F.H. McGraw & Co., 165 F.2d 585, 586 (2d Cir. 1948) (barge navigators).

     *Third Circuit:* Bailey v. Pilots’ Ass’n, 406 F. Supp. 1302, 1307 (E.D. Pa. 1976) (finding that pilot apprentice who ran motor launches to and from vessels, performed general maintenance, and stood watch in navigable waters was exempt “seaman”).

     *Fifth Circuit:* Louviere v. Standard Dredging Corp., 239 F.2d 164, 165 (5th Cir. 1956) (holding that tug deckhand assisting in vessel operation qualified as “seaman”).

     *Sixth Circuit:* Weaver v. Pittsburgh S.S. Co., 153 F.2d 597, 600–601 (6th Cir. 1946) (steamship firefighter).

     *Seventh Circuit:* Harkins v. Riverboat Serv., Inc., 385 F.3d 109 (7th Cir. 2004) (ruling that crewmembers of stationary casino boat moored in Mississippi River who primarily performed cleaning duties met criteria for seaman exemption).

     *But see* Adams v. All Coast, LLC, 15 F.4th 365 (5th Cir. 2021) (denying en banc review and reversing summary judgment on the status of cooks as seamen; directing district court on remand to determine how much time cooks spend preparing food for liftboat operators not engaged in seaman’s work and how much time cooks spend preparing food for non-crew members); Godard v. Alabama Pilot, Inc., 485 F. Supp. 2d 1284 (S.D. Ala. 2007) (denying summary judgment due to questions regarding whether time spent by launch operators doing work not related to navigation exceeded 20% of their total work time). [↑](#footnote-ref-609)
609. 29 C.F.R. §783.35. [↑](#footnote-ref-610)
610. *Id*. §783.36; Martin v. McAllister Lighterage Line, 205 F.2d 623, 624–25 (2d Cir. 1953) (holding that deck scow captains principally engaged in attending to vessel welfare qualified as seamen); Gale v. Union Bag & Paper Corp., 116 F.2d 27, 28 (5th Cir. 1940) (finding that crew members of towed barges responsible for barge welfare qualified as seamen). [↑](#footnote-ref-611)
611. *See* 29 C.F.R. §783.33–.36. [↑](#footnote-ref-612)
612. Harkins v. Riverboat Servs., Inc., 385 F.3d 1099, 1103 (7th Cir. 2004); *see also* McLaughlin v. Boston Harbor Cruise Lines, LLC, 419 F.3d 47, 58 (1st Cir. 2005) (Lipez, J., concurring). [↑](#footnote-ref-613)
613. 2009 WL 650734 (C.D. Cal. Mar. 11, 2009). [↑](#footnote-ref-614)
614. *Id.* at \*7; *see* *Harkins*, 385 F.3d at 1104 (“We can ask the question this way: do the plaintiffs spend their time performing duties that are necessary to the operation of the Showboat because it is a ship or because it is a casino?”). [↑](#footnote-ref-615)
615. 29 C.F.R. §783.32. *See, e.g.*, Owens v. SeaRiver Maritime, Inc., 272 F.3d 698, 700 (5th Cir. 2001) (holding that member of land-based team responsible for loading and unloading barges was not seaman where he was not crewmember of tow and not tied to particular vessel for voyage, but rather worked on “unattended or ‘tramp’ barges that were neither towed by SeaRiver boats nor attended by SeaRiver crews”); Coffin v. Blessey Marine Servs., Inc., 771 F.3d 276 (5th Cir. 2014) (distinguishing *Owens* and finding that vessel-based tankermen were seamen while loading and unloading vessel because, as vessel-based, their loading and unloading duties were integrated within their many other duties); Adams v. All Coast, LLC, 15 F.4th 365 (5th Cir. 2021) (rehearing en banc denied; distinguishing *Coffin* and finding that liftboat operator was not engaged in seaman’s work while operating hydraulic crane when the liftboat was jacked up out of the water, which was discrete from the nautical tasks performed while the liftboat was underway). [↑](#footnote-ref-616)
616. 29 C.F.R. §783.35. [↑](#footnote-ref-617)
617. *Id*. §783.51. [↑](#footnote-ref-618)
618. *Id*. §783.31; *see also* Martin v. Bedell, 955 F.2d 1029, 1035 (5th Cir. 1992) (holding that employees spending more than 20% of time preparing food for non-crew members would not qualify as “seamen”), *on remand sub nom*. Reich v. Bedell, 1 WH Cases2d 691 (E.D. La. 1993); Worthington v. Icicle Seafoods, 749 F.2d 1409, 1412 (9th Cir. 1984) (deeming occasional maritime duties insufficient when dominant employment was industrial maintenance); Donovan v. Nekton, Inc., 703 F.2d 1148, 1151–52 (9th Cir. 1983) (holding that marine and electronic technicians primarily operating and caring for research vessels’ electronic and seismic gear did not qualify as seamen even though they performed duties in connection with vessel transportation operations); Priyanto v. M/S Amsterdam, 2009 WL 650734, at \*7 (C.D. Cal. Mar. 11, 2009) (holding that stateroom cleaner on cruise ship did not perform “service which is rendered primarily as an aid in the operation” of vessels on which he worked and therefore did not fall under FLSA’s seamen exemption). [↑](#footnote-ref-619)
619. 29 C.F.R. §783.37, .49; *see also* WH Op. FLSA2006-44, 2006 WL 3832995 (Nov. 30, 2006) (opining that boat captain would be exempt under §213(b)(6) during workweeks where at least 80% of duties performed were those of seaman under 29 C.F.R. §783.31). *See* Godard v. Alabama Pilot, Inc., 485 F. Supp. 2d 1284, 1292 (S.D. Ala. 2007). [↑](#footnote-ref-620)
620. *See* Harkins v. Riverboat Servs., Inc., 385 F.2d 1099 (7th Cir. 2004); *see also* Tate v. Showboat Marina Casino P’ship, 431 F.3d 580 (7th Cir. 2005) (applying *Harkins* presumption). [↑](#footnote-ref-621)
621. *See*

     *Fourth Circuit:* McMahan v. Adept Process Servs., Inc., 786 F. Supp. 2d 1128, 1137 (E.D. Va. 2011) (applying 20% test under 29 C.F.R. §783.37 but rejecting plaintiffs’ argument that time waiting to perform seamen’s duties constituted non-seamen work exceeding 20% threshold).

     *Fifth Circuit:* Owens v. SeaRiver Maritime, Inc., 272 F.3d 698 n.5 (5th Cir. 2001) (holding that crewmembers did not lose seaman status for weeks in which they spent more than 20% of time performing non-seaman work, so long as basic assignments or positions did not change).

     *Sixth Circuit:* Curran v. Wepfer Marine Servs., Inc., 2023 BL 40109, 2023 WL 1790075 (W.D. Tenn. Jan. 9, 2023) (holding that occasional performance of non-seaman activities could not overcome great weight of seaman duties occurring daily).

     *Eleventh Circuit:* Selby v. Yacht Starship, Inc., 624 F. Supp. 2d 1367 (M.D. Fla. 2008) (applying 20% test under 29 C.F.R. §783.37 but rejecting plaintiffs’ argument that time waiting to perform seamen’s duties constituted non-seamen work exceeding 20% threshold); Godard v. Alabama Pilot, Inc., 485 F. Supp. 2d at 1292 (same). [↑](#footnote-ref-622)
622. 29 C.F.R. §783.33, .36; *see also* Knudsen v. Lee & Simmons, Inc., 163 F.2d 95, 96 (2d Cir. 1947) (finding that lighter bargee performing stevedoring services did not qualify); McCarthy v. Wright & Cobb Lighterage Co., 163 F.2d 92, 94 (2d Cir. 1947) (holding that barge employees principally performing loading, unloading, and custodial duties did not qualify as “seamen”); Anderson v. Manhattan Lighterage Corp., 148 F.2d 971, 973 (2d Cir. 1945) (reversing and remanding for trial on exemption issue where lighter captains performed longshoreman duties 95% of time); McLaughlin v. King Welding, Inc., 28 WH Cases 1054, 1056 (C.D. Cal. 1988) (finding that oil barge tankermen and deck hands primarily engaged in barge loading and unloading did not qualify as “seamen”). [↑](#footnote-ref-623)
623. Desper v. Starved Rock Ferry Co., 342 U.S. 187, 191 (1952) (holding that workers who repaired vessels between trips did not qualify as seamen). *But see* Walling v. Keansburg Steamboat Co., 162 F.2d 405, 407 (3d Cir. 1947) (holding that employee who repaired vessel at dock and was employed during ensuing navigation period qualified as “seaman”). [↑](#footnote-ref-624)
624. 29 C.F.R. §783.35; *see also Starved Rock Ferry Co*., 342 U.S. at 191 (holding that employee who rendered watchman services during lengthy port stop did not qualify as FLSA-exempt seaman). [↑](#footnote-ref-625)
625. Dole v. Petroleum Treaters, Inc., 876 F.2d 518, 521 (5th Cir. 1989) (finding that oil well service employees who spent at least half time maintaining and servicing wells did not qualify for seaman exemption). [↑](#footnote-ref-626)
626. Sternberg Dredging Co. v. Walling, 158 F.2d 678, 681 (8th Cir. 1946) (holding that dredge workers principally engaged in industrial, as distinguished from maritime, work did not qualify for seaman exemption); Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, 11 (7th Cir. 1945) (finding that dredge workers primarily engaged in industrial work did not qualify for exemption). [↑](#footnote-ref-627)
627. Woods Lumber Co. v. Tobin, 199 F.2d 455, 456 (6th Cir. 1952) (holding that workers primarily engaged in lumbering and foresting duties did not qualify for seaman exemption). [↑](#footnote-ref-628)
628. Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346, 352 (1st Cir. 1945); *Great Lakes Dredge & Dock Co*., 149 F.2d at 10–11 (holding that dredge workers primarily engaged in construction-related work did not qualify as FLSA-exempt seamen). [↑](#footnote-ref-629)
629. 29 C.F.R. §783.34; *see also* Knudsen v. Lee & Simmons, Inc., 163 F.2d 95, 98 (2d Cir. 1947) (holding that barge worker who spent most of time loading and unloading cargo did not qualify as seaman); Walling v. W.D. Haden Co., 153 F.2d 196, 199 (5th Cir. 1946) (determining that miners principally engaged in industrial work did not qualify for seaman exemption). [↑](#footnote-ref-630)
630. Helena Glendale Ferry Co. v. Walling, 132 F.2d 616, 619 (8th Cir. 1942) (finding that cashiers on barge connected with shore principally engaged to sell tickets, issue receipts, and collect charges did not qualify for exemption as seamen). [↑](#footnote-ref-631)
631. 855 F.3d 290 (5th Cir. 2017). [↑](#footnote-ref-632)
632. *Id*. at 293 (citing Coffin v. Blessey Marine Servs., Inc., 771 F.3d 276, 281 (5th Cir. 2014)). [↑](#footnote-ref-633)
633. *Id*. at 296. [↑](#footnote-ref-634)
634. 1 U.S.C. §3 (definition of “vessel”); 29 C.F.R. §783.39. [↑](#footnote-ref-635)
635. *Id*. The Fifth Circuit in *Halle v. Galliano Marine Services, LLC*, 855 F.3d 290 (5th Cir. 2017), held that the defendants provided no evidence to suggest that ROVs were “vessels.” [↑](#footnote-ref-636)
636. Gale v. Union Bag & Paper Corp., 116 F.2d 27, 28, 1 WH Cases 97, 98 (5th Cir. 1940) (holding that powerless barge towed and steered by tug qualified as “vessel”); *cf*. Owens v. SeaRiver Maritime, Inc., 272 F.3d 698 (5th Cir. 2001) (finding that member of shore-based strike-team assigned to stationary landing barge to do loading and unloading work was not seaman). [↑](#footnote-ref-637)
637. Tate v. Showboat Marina Casino P’ship, 431 F.3d 580, 584 (7th Cir. 2005) (finding present case materially identical to *Harkins*—it involved same boat, same job titles, overlapping time period, and same plaintiff’s lawyer—court found stare decisis applicable; holding as exempt operating crew of “gambling boat that is not permanently moored”); Harkins v. Riverboat Servs., Inc., 385 F.3d 1099 (7th Cir. 2004) (members of operating crew of gambling boat that is most of the time moored rather than sailing found to be “seamen” because they were responsible for operation of ship and safety of passengers). [↑](#footnote-ref-638)
638. FOH §24k05. *See* Halle v. Galliano Marine Services, LLC, 855 F.3d 290, 293 (5th Cir. 2017) (finding no evidence to suggest that ROVs were vessels). [↑](#footnote-ref-639)
639. 29 C.F.R. §783.38. [↑](#footnote-ref-640)
640. 29 U.S.C. §203(p); 29 C.F.R. §783.17, .38. [↑](#footnote-ref-641)
641. 29 C.F.R. §783.40. [↑](#footnote-ref-642)
642. *Id*. §783.41. *See* Pub. L. No. 85-911, 72 Stat. 1754 (Sept. 2, 1958). [↑](#footnote-ref-643)
643. 29 C.F.R. §783.42. [↑](#footnote-ref-644)
644. *Id*. §783.38–.42. [↑](#footnote-ref-645)
645. 29 U.S.C. §213(b)(9). [↑](#footnote-ref-646)
646. 29 C.F.R. §793.4. [↑](#footnote-ref-647)
647. *Id*. §793.4(a), .10. [↑](#footnote-ref-648)
648. *Id*. §793.7. [↑](#footnote-ref-649)
649. *Id*. §793.8; *see also* FOH §23d04 (defining “news editor” classification). [↑](#footnote-ref-650)
650. *Id*. §793.9; *see also* FOH §23d05 (defining “chief engineer” classification). [↑](#footnote-ref-651)
651. 29 C.F.R. §793.10. [↑](#footnote-ref-652)
652. *Id*. §793.11. [↑](#footnote-ref-653)
653. *Id*. §793.4(b), .14. [↑](#footnote-ref-654)
654. *Id*. §793.16. A cable television system qualifies for the exemption only if it is licensed by the FCC as a television broadcasting station. *See* FOH §23d03. [↑](#footnote-ref-655)
655. 29 C.F.R. §793.4(c), .17, & .18. [↑](#footnote-ref-656)
656. *Id*. §793.17. [↑](#footnote-ref-657)
657. 29 U.S.C. §213(b)(9); 29 C.F.R. §793.18(a). [↑](#footnote-ref-658)
658. 29 C.F.R. §793.18(b); *see also* Kollmeyter v. WTVA, Inc., 2004 WL 1254313 (5th Cir. June 8, 2004) (holding that television station qualified for “small market” exemption where town had population of 34,211 residents and was not part of any standard metropolitan statistical area), *aff’g* 297 F. Supp. 2d 894 (N.D. Miss. 2003). [↑](#footnote-ref-659)
659. 29 C.F.R. §793.18(c). [↑](#footnote-ref-660)
660. *Id*. §793.18(d), (e) (listing sources, including booklet published by Bureau of the Budget entitled “Standard Metropolitan Statistical Areas,” and statistical information provided by Census Bureau). [↑](#footnote-ref-661)
661. *Id*. §793.18(f). [↑](#footnote-ref-662)
662. 29 U.S.C. §213(b)(10). In 1961, Section 213(a)(19) exempted from minimum wage and overtime “any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements.” Pub. L. No. 87-30, §9 (1961). This exemption was repealed in 1966 and its subject matter was moved to Section 213(b)(10). Pub. L. No. 89-601, §§209(b), 212(a) (1966). At that time, only a Part A existed, which included the terms “trailers” and “aircraft.” Part B was added to the FLSA in 1974, which now includes salesmen selling trailers, boats, and aircraft. Pub. L. No. 93-259, §14 (1974). [↑](#footnote-ref-663)
663. Pub. L. No. 89-601, §209, 80 Stat. 836. The 1966 legislation repealed the blanket exemption from the FLSA’s minimum wage and overtime provisions for all automobile dealership employees. Pub. L. No. 87-30, §9, 75 Stat. 73. The 1966 amendments “narrowed” the exemption to cover only “any salesman, partsman, or mechanic.” [↑](#footnote-ref-664)
664. Pub. L. No. 93-259, §14, 88 Stat. 65. [↑](#footnote-ref-665)
665. Encino Motorcars, LLC v. Navarro (*Encino I*), 136 S. Ct. 2117, 2123 (2016). [↑](#footnote-ref-666)
666. 35 Fed. Reg. 5,855 (1970) (codified at 29 C.F.R. §779.372(c)). “The Department intended its regulation as a mere interpretive rule explaining its views, rather than as a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act.” *Encino I*, 136 S. Ct. at 2122. [↑](#footnote-ref-667)
667. 35 Fed. Reg. at 5,878 (amended in 1974 to include “trailers” and “aircraft”). [↑](#footnote-ref-668)
668. 29 C.F.R. §779.372(c)(1). [↑](#footnote-ref-669)
669. *Id.* §779.372(c)(2). [↑](#footnote-ref-670)
670. *Id.* §779.372(c)(3). [↑](#footnote-ref-671)
671. *Id.* §779.372(d). [↑](#footnote-ref-672)
672. FOH §24L03(a). [↑](#footnote-ref-673)
673. 29 C.F.R. §779.372(c)(4). This section was deleted in 76 Fed. Reg. 18,832–33 (Apr. 5, 2011). [↑](#footnote-ref-674)
674. Brennan v. Deel Motors, Inc.,475 F.2d 1095 (5th Cir. 1973); Yenney v. Cass Cnty.Motors, 1977 WL 1678 (D. Neb. 1977); Brennan v. North Bros. Ford, Inc*.*, 1975 WL 1074 (E.D. Mich. 1975), *aff’d sub nom.* Dunlop v. North Bros. Ford, Inc., 529 F.2d 524 (6th Cir. 1976) (table); Brennan v. Import Volkswagen, Inc*.*, 1975 WL 1248 (D. Kan. 1975). [↑](#footnote-ref-675)
675. WH Op. No. 1520 (WH-467, 1978). [↑](#footnote-ref-676)
676. *Id*. [↑](#footnote-ref-677)
677. FOH §24L04-4(k) (Oct. 20, 1987). [↑](#footnote-ref-678)
678. *Id.* [↑](#footnote-ref-679)
679. *Id.* [↑](#footnote-ref-680)
680. 73 Fed. Reg. 43,654 (July 28, 2008). [↑](#footnote-ref-681)
681. 76 Fed. Reg. 18,832, 18,833 (Apr. 5, 2011). [↑](#footnote-ref-682)
682. *Id.* at 18,859. [↑](#footnote-ref-683)
683. *Id*. at 18,838. [↑](#footnote-ref-684)
684. 136 S. Ct. 2117 (2016). [↑](#footnote-ref-685)
685. Navarro v. Encino Motorcars, LLC, 780 F.3d 1267 (9th Cir. 2015). [↑](#footnote-ref-686)
686. *Id*. at 1274 (citing, inter alia, Walton v. Greenbrier Ford, Inc., 370 F.3d 446 (4th Cir. 2004); Brennan v. Deel Motors, Inc., 475 F.2d 1095 (5th Cir. 1973); Thompson v. J.C. Billion, Inc., 368 Mont. 299, 294 P.3d 397 (2013)). [↑](#footnote-ref-687)
687. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). [↑](#footnote-ref-688)
688. 780 F.3d at 1277. [↑](#footnote-ref-689)
689. Encino Motorcars, LLC v. Navarro (*Encino I*), 136 S. Ct. 2117 (2016). [↑](#footnote-ref-690)
690. *Id*.at 2126. [↑](#footnote-ref-691)
691. *Id.* at 2125–26 (quoting National Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)). [↑](#footnote-ref-692)
692. *Id.* at 2126. [↑](#footnote-ref-693)
693. Encino Motorcars, LLC v. Navarro, 845 F.3d 925 (9th Cir. 2017). [↑](#footnote-ref-694)
694. Encino Motorcars, LLC v. Navarro (*Encino II*), 138 S. Ct. 1134 (2018). [↑](#footnote-ref-695)
695. *Id*. at 1140. [↑](#footnote-ref-696)
696. *Id.* at 1141. *Cf.* Spikes v. Schumacher Auto Grp., Inc., 2022 BL 474775, 2022 WL 18402565 (S.D. Fla. Dec. 20, 2022) (holding call center workers of automobile dealership were not salespeople within the exemption because they made appointments for customers to meet with a manager, who then assigned customers to salespeople, whose job was to sell automobiles). [↑](#footnote-ref-697)
697. *Id.* at 1140–41. [↑](#footnote-ref-698)
698. *Id.* at 1141. [↑](#footnote-ref-699)
699. *Id*. at 1142 (citation omitted). In dissent, Justice Ginsburg, along with Justices Breyer, Sotomayor, and Kagan, criticized the majority for rejecting the theory of narrowly construing exemptions. *Id.* at 1148 n.7 (“In a single paragraph, the Court ‘reject[s]’ this longstanding principle as applied to the FLSA, without even acknowledging that it unsettles more than half a century of our precedent.”). [↑](#footnote-ref-700)
700. 29 U.S.C. §213(b)(11). This exemption was introduced into the FLSA in 1961. Pub. L. No. 87-30, §9. There have been no changes to the language of the exemption since its enactment. [↑](#footnote-ref-701)
701. 29 C.F.R. §551.2–.5. [↑](#footnote-ref-702)
702. *Id*. §516.15. [↑](#footnote-ref-703)
703. *Id*. §551.8(d). To qualify as a driver or driver’s helper for purposes of the §213(b)(11) exemption, an employee must be engaged in making local deliveries for at least 80% of his or her work hours in a workweek. *Id*. §551.8(e). [↑](#footnote-ref-704)
704. *Id*. §551.8(d). [↑](#footnote-ref-705)
705. *Id.* §551.8(f). [↑](#footnote-ref-706)
706. 29 C.F.R. §551.3. [↑](#footnote-ref-707)
707. *See* *id*. §551.5 for a description of the information that must be included in the petition. [↑](#footnote-ref-708)
708. *Id*. §551.6(a). [↑](#footnote-ref-709)
709. *Id*. [↑](#footnote-ref-710)
710. *Id*. [↑](#footnote-ref-711)
711. 29 C.F.R. §551.6(b). [↑](#footnote-ref-712)
712. *Id.* §551.7(a). “The finding shall include such terms and conditions and such limitations with respect to its application as the Administrator shall deem necessary to ensure that no exemption will be based thereon in the event of any significant change in any of the essential supporting facts.” *Id*. [↑](#footnote-ref-713)
713. *Id*. §551.7(b). [↑](#footnote-ref-714)
714. 29 U.S.C. §213(b)(17). This exemption was first introduced into the Act in 1949 as §213(a)(12). Pub. L. No. 81-393, §11. In 1966, the subject matter of the exemption was moved to §213(b)(27), applying solely to overtime requirements. Pub. L. 89-601, §206. [↑](#footnote-ref-715)
715. FOH §24h01*.* [↑](#footnote-ref-716)
716. *Id.* §24h02. [↑](#footnote-ref-717)
717. *Id.* §24h03. [↑](#footnote-ref-718)
718. *Id.* §24h06(b)(1). [↑](#footnote-ref-719)
719. *Id.* §24h04; 29 C.F.R. §786.200. [↑](#footnote-ref-720)
720. Mascol v. E & L Transp., Inc., 2005 WL 1123936 (E.D.N.Y. May 9, 2005) (determining ambulettes and taxicabs to be different because (1) ambulettes were used specifically to transport mobility-limited passengers; (2) ambulettes were not licensed as taxicabs; (3) 95% of ambulette business was subsidized by the New York State Department of Health through its Medicaid program; (4) ambulettes were not metered; and (5) ambulette per-trip flat rates were predetermined); *accord* Herman v. Brewah Cab, Inc., 992 F. Supp. 1054 (E.D. Wis. 1998) (finding that company that provided transportation to elderly and disabled individuals did not fall within taxicab exemption). [↑](#footnote-ref-721)
721. *See* Wirtz v. Cincinnati, Newport & Covington Transp. Co., 375 F.2d 513, 515, 17 WH Cases 657, 658 (6th Cir. 1967) (deeming that limousine service drivers were not exempt where service functioned under contract with air carriers, trips were unmetered, vehicles did not have vacancy signs and were not advertised as taxicabs, and drivers did not operate freely and with initiative); *accord* Abel v. Southern Shuttle Serv., Inc., 301 F. App’x 856, 861 (11th Cir. 2008) (holding that drivers of airport shuttle services did not fall under taxicab exemption); Schulman v. Southern Shuttle Serv., Inc., 2009 WL 331550, at \*2 (S.D. Fla. Feb. 10, 2009) (same); Rossi v. Associated Limousine Servs., Inc., 438 F. Supp. 2d 1354 (S.D. Fla. 2006) (finding that limousine company did not operate taxicabs within plain meaning of statute and exemption did not apply). [↑](#footnote-ref-722)
722. 904 F.3d 208 (2d Cir. 2018). [↑](#footnote-ref-723)
723. *Id*. at 216; John v. All Star Limousine Serv., Ltd., 2022 BL 1615, 2022 WL 36219 (E.D.N.Y. Jan. 4, 2022) (notwithstanding 40 to 43% of defendant’s business resulting from recurrent transportation, exemption still applicable where service remains available for hire by general public). *But see* Blan v. Classic Limousine Transp., LLC, 2021 BL 113422, 2021 WL 1176063 (W.D. Pa. Mar. 29, 2021) (distinguishing facts of *Munoz-Gonzalez* and finding taxicab exemption did not apply because substantial portion of defendant’s business came from recurrent contracts, non-negligible portion of business followed fixed routes, vehicles were unmetered and did not have vacancy signs, and passengers typically reserved rides in advance). [↑](#footnote-ref-724)
724. 29 U.S.C. §213(b)(21). Section 213(b)(21) was added to the FLSA in 1974. Pub. L. No. 93-259, §7(b)(4). Although there has been no change to the statutory language since its enactment in 1975, the DOL promulgated both “General Regulations,” 29 C.F.R. §552.1–.6, and “Interpretations,” 29 C.F.R. §552.99–.110, to describe its view of how the exemptions under §213(a)(15) and §213(b)(21) should be interpreted. For historical background on the 1975 regulations, including the 2013 final rule, see §III.F.2 [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Casual-Basis Babysitters and Domestic Companionship Service Providers; Companionship Services] of this chapter. [↑](#footnote-ref-725)
725. 29 C.F.R. §552.102. *See also* 78 Fed. Reg. 60,454, 60,557 (Oct. 1, 2013). [↑](#footnote-ref-726)
726. *See* 78 Fed. Reg. at 60,474. [↑](#footnote-ref-727)
727. *Id.*; *see also* 29 C.F.R. §785.23; FOH §31b20; WH Op. FLSA2004-7, 2004 WL 2146927 (July 27, 2004). [↑](#footnote-ref-728)
728. 78 Fed. Reg. at 60,474 (citation omitted). [↑](#footnote-ref-729)
729. *Id.* *See* Blanco v. Samuel, 91 F.4th 1061, 1077 (11th Cir. 2024) (extended period of time not found where nanny did not remain at the house during daytime hours between consecutive nights on duty);Romero v. Diaz-Fox, 2021 BL 308527, 2021 WL 3619677 (S.D. Fla. Aug. 16, 2021) (because it was undisputed that plaintiff worked from 5:00 p.m. to 8:30 a.m. Monday to Friday, and only slept at the employer’s home when she worked a double shift on Saturdays and Sundays, holding that sleeping in the employer’s home two nights a week did not qualify as an extended period of time). *See also* 29 C.F.R. §785.23. [↑](#footnote-ref-730)
730. 29 C.F.R. §552.110. *See* U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1 (Dec. 17, 2015), for DOL guidance regarding recordkeeping requirements for employers claiming a §203(m) credit for lodging provided to employees. [↑](#footnote-ref-731)
731. 29 C.F.R. §552.109(c). [↑](#footnote-ref-732)
732. *Id*. [↑](#footnote-ref-733)
733. 29 U.S.C. §213(b)(24); Pub. L. No. 93-259, §17. Although the statutory language uses the disjunctive term “or” rather than the conjunctive term “and” between elements (A) and (B), the legislative history indicates that “and” was intended, requiring satisfaction of both elements. *See* 120 Cong. Rec. H8600 (daily ed. Mar. 28, 1974) (statement of Rep. Dent). The FOH acknowledges this distinction by italicizing term. *See* FOH §25p00. [↑](#footnote-ref-734)
734. FOH §25p02. [↑](#footnote-ref-735)
735. WH Op. FLSA2005-52, 2005 WL 3308623 (Nov. 14, 2005). The issue of individual coverage of house parents is addressed in Chapter 4, Employer Coverage, §II.B.2 [Individual Coverage; “Engaged in Commerce”; Regular Use of the Channels of Commerce]. [↑](#footnote-ref-736)
736. 29 U.S.C. §213(b)(27). This exemption was enacted in 1966, as §213(a)(9). Pub. L. No. 89-601, §207 (1966). In 1977, the subject matter of the exemption was moved to §213(b)(27), limiting the exemption to the overtime requirements only. Although 29 C.F.R. §779.384 interprets the exemption for motion picture theater employees, it inaccurately refers to the 1966 version of §213(a)(9) as providing an exemption from the FLSA’s minimum wage and overtime requirements for employees of motion picture theaters. In 1974, Congress amended the FLSA to, inter alia, convert the §213(a)(9) exemption into §213(b)(27), which provides an exemption only from overtime requirements. *See* Pub. L. No. 93-259 (1974). The language of the exemption has not changed since its enactment. For a discussion of the term “establishment,” see §II [The Establishment Requirement] of this chapter. [↑](#footnote-ref-737)
737. 29 C.F.R. §779.384. [↑](#footnote-ref-738)
738. *Id*. [↑](#footnote-ref-739)
739. *Id*. [↑](#footnote-ref-740)
740. *Id*. [↑](#footnote-ref-741)
741. FOH §21i01. [↑](#footnote-ref-742)
742. *See* WH Op. FLSA2018-23, 2018 WL 4562933 (Aug. 28. 2018) (citing WH Op. FLSA2003-1, 2003 WL 23374597, at \*3 (Mar. 17, 2003)). [↑](#footnote-ref-743)
743. *Id*. [↑](#footnote-ref-744)
744. On some occasions, this requirement was waived. *Id.* [↑](#footnote-ref-745)
745. *Id.* at \*1. [↑](#footnote-ref-746)
746. *Id.* at \*2 (citing 29 C.F.R. §779.305). [↑](#footnote-ref-747)
747. *Id.* at \*3. The same employees who provided food services also worked as ushers and cashiers. [↑](#footnote-ref-748)
748. *Id*. [↑](#footnote-ref-749)
749. 29 U.S.C. §213(b)(29). This exemption was added to the statute in 1977. Pub. L. No. 95-151, §4, 91 Stat. 1245 (1977). The term “establishment” is discussed in §II [The Establishment Requirement] of this chapter. The term “amusement or recreational establishment” is discussed in §III.A [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Employees Employed by Amusement or Recreational Establishments, Organized Camps, or Religious or Nonprofit Educational Conferences] of this chapter. [↑](#footnote-ref-750)
750. Chessin v. Keystone Resort Mgmt.,184 F.3d 1188, 1195 (10th Cir. 1999) (“Section 213(b)(29)—which consists of two conditions joined by the word ‘and’—is meaningless if an employer does not have to satisfy both conditions.”). [↑](#footnote-ref-751)
751. *Id.* at 1193 (recognizing that “our inquiry centers on whether lodging and other services like restaurants and retail shops, viewed in the context of Keystone’s operations on or near national forest land, have a recreational nature”). *See also* Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 287 (10th Cir. 1973) (where parties stipulated that if various establishments in Yellowstone National Park were “separate,” seasonal recreational exemption 29 U.S.C. §213(a)(3) would apply). [↑](#footnote-ref-752)
752. 29 U.S.C. §213(b)(29). [↑](#footnote-ref-753)
753. H.R. Rep. No. 95-521, at 34 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3201, 3235. [↑](#footnote-ref-754)
754. 184 F.3d 1188, 5 WH Cases2d 739 (10th Cir. 1999). [↑](#footnote-ref-755)
755. 184 F.3d at 1194. [↑](#footnote-ref-756)
756. *Id*. at 1194–95. [↑](#footnote-ref-757)
757. For a discussion of §207(j), see Chapter 10, Overtime Compensation, §VIII.B [Special Overtime Provisions; Hospital and Residential Care Establishments]. [↑](#footnote-ref-758)
758. For a discussion of §207(k) and (p), see Chapter 11, Government Employment, §§III.C–E [Public Sector Exemptions From FLSA Overtime Requirements; Section 207(p)(1): Special Detail Work by Fire Protection and Law Enforcement Personnel; Section 207(p)(2): Occasional or Sporadic Employment; Section 207(p)(3): Voluntary Substitution], and V [Special Provisions That Apply to Fire Protection and Law Enforcement Employees]. [↑](#footnote-ref-759)
759. Section 207(l) of the FLSA applies the overtime requirements of the Act to domestic service employees, except for those specifically exempted under   
     §213(a)(15), 213(b)(21), and 213(b)(24). For a discussion of these exemptions, see §§III.F [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Casual-Basis Babysitters and Domestic Companionship Service Providers], IV.I [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Domestic Servants Who Reside in a Household], and IV.J [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Husbands and Wives Who Serve as House Parents] of this chapter. [↑](#footnote-ref-760)
760. For a discussion of §207(m), see Chapter 7, Agricultural Exemptions, §VI.D [Partial Overtime Exemptions Regarding Cotton, Sugar, and Tobacco; Activities Exempt Under Section 207(m): Employees Providing Services for Tobacco Auctions]. [↑](#footnote-ref-761)
761. For a discussion of §207(o), see Chapter 11, Government Employment, §III.A [Public Sector Exemptions From FLSA Overtime Requirements; Section 207(o): Compensatory Time]. [↑](#footnote-ref-762)
762. For a discussion of §207(q), see Chapter 10, Overtime Compensation, §VIII.C [Special Overtime Provisions; Employees Receiving Remedial Education]. [↑](#footnote-ref-763)
763. 29 U.S.C. §207(s). [↑](#footnote-ref-764)
764. 29 U.S.C. §207(b)(1), (2). [↑](#footnote-ref-765)
765. 29 C.F.R. §778.602(a) (emphasis added). [↑](#footnote-ref-766)
766. *Id*. §778.602(b). [↑](#footnote-ref-767)
767. *See id.* [↑](#footnote-ref-768)
768. *See id*. (providing example under $5.20/hour minimum wage). [↑](#footnote-ref-769)
769. 139 F.2d 853, 4 WH Cases 156 (7th Cir. 1944). [↑](#footnote-ref-770)
770. *Id*. [↑](#footnote-ref-771)
771. 29 U.S.C. §207(b)(1), (2). Note that this certification is not the same as the NLRB’s certification of exclusive representative under §9 of the National Labor Relations Act. [↑](#footnote-ref-772)
772. FOH §32L00. [↑](#footnote-ref-773)
773. WH Op. FLSA2004-9 (Sept. 9, 2004). [↑](#footnote-ref-774)
774. *Id.* at 1. [↑](#footnote-ref-775)
775. *Id*. [↑](#footnote-ref-776)
776. 29 C.F.R. §516.20. [↑](#footnote-ref-777)
777. 29 U.S.C. §207(b)(3). [↑](#footnote-ref-778)
778. 29 C.F.R. §794.2. [↑](#footnote-ref-779)
779. 29 U.S.C. §207(b)(3); 29 C.F.R. §794.100. [↑](#footnote-ref-780)
780. *Id*. [↑](#footnote-ref-781)
781. 29 C.F.R. §794.101. [↑](#footnote-ref-782)
782. *Id*. §794.103 (internal citations and emphasis omitted). [↑](#footnote-ref-783)
783. *Id*. §794.132. [↑](#footnote-ref-784)
784. *Id.* §794.133. [↑](#footnote-ref-785)
785. 29 C.F.R. §794.104. [↑](#footnote-ref-786)
786. *Id*. [↑](#footnote-ref-787)
787. *Id*. [↑](#footnote-ref-788)
788. *Id.* §794.136. [↑](#footnote-ref-789)
789. 29 C.F.R. §794.108. See Chapter 4, Employer Coverage, §III.C.2 [Enterprise Coverage; Requirements of Section 203(s); Section 203(s)(1)(A)(ii): The Business Dollar Volume Test] for a discussion of the dollar volume of sales of an enterprise. [↑](#footnote-ref-790)
790. 29 C.F.R. §794.109. [↑](#footnote-ref-791)
791. WH Op. (May 22, 1964). [↑](#footnote-ref-792)
792. *Id*. [↑](#footnote-ref-793)
793. *Id*. [↑](#footnote-ref-794)
794. WH Op. (Sept. 9, 1969). [↑](#footnote-ref-795)
795. 29 C.F.R. §794.111. [↑](#footnote-ref-796)
796. *Id*. [↑](#footnote-ref-797)
797. *Id*. §794.113. [↑](#footnote-ref-798)
798. *Id*. §794.114 (quoting Senate Hearings on amendments to the Fair Labor Standards Act, 87th Cong., 411 (1961)). [↑](#footnote-ref-799)
799. 404 F.2d 693 (6th Cir. 1968). [↑](#footnote-ref-800)
800. *Id*. at 697. [↑](#footnote-ref-801)
801. *Id*.; *see also* Burris v. Texaco, Inc., 361 F.2d 169, 174 (4th Cir. 1966); 29 C.F.R. §794.115, .116. [↑](#footnote-ref-802)
802. 29 C.F.R. §794.117. [↑](#footnote-ref-803)
803. 29 U.S.C. §207(b)(3). [↑](#footnote-ref-804)
804. 29 C.F.R. §794.128. [↑](#footnote-ref-805)
805. *Id*. [↑](#footnote-ref-806)
806. *Id*. [↑](#footnote-ref-807)
807. 29 U.S.C. §207(b)(3); 29 C.F.R. §794.130. [↑](#footnote-ref-808)
808. 29 C.F.R. §794.131. [↑](#footnote-ref-809)
809. *Id*. §794.132. [↑](#footnote-ref-810)
810. *Id*. §794.133. [↑](#footnote-ref-811)
811. *Id*. §794.134. [↑](#footnote-ref-812)
812. 29 U.S.C. §207(i). Section 207(i) continues: “In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.” *Id*. [↑](#footnote-ref-813)
813. 407 F.3d 1038 (9th Cir. 2005). [↑](#footnote-ref-814)
814. *Id.* at 1046 (citing Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983)). *See also*

     *Second Circuit:* Kelly v. A1Tech., 2010 WL 1541585, at \*14 (S.D.N.Y. Apr. 12, 2010) (no discussion of term “exception,” but applied narrowly construed language set forth above).

     *Third Circuit:* Perez v. Davison Design & Dev., Inc., 2014 WL 4113136, at \*3 (W.D. Pa. Aug. 20, 2014) (court used terms “exception” and “exemption” interchangeably, but adopted “narrowly construed” language referenced above).

     *Seventh Circuit:* Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365, 366 (7th Cir. 2015) (no discussion of term “exception”).

     *Ninth Circuit:* Burden v. SelectQuote Ins. Servs., 848 F. Supp. 2d 1075, 1084 (N.D. Cal. 2012) (court used terms “exception” and “exemption” interchangeably, but adopted the “narrowly construed” language referenced above) [↑](#footnote-ref-815)
815. Walton v. United Consumers Club, Inc., 786 F.2d 303, 307 (7th Cir. 1986) (“Section 207(i) is not an affirmative defense that should have been raised in the pleadings. It is a method of complying with the Act, part of § 7 that states the Act’s general rules, and the general denial of liability therefore put this (and all other methods of compliance) in play.”). [↑](#footnote-ref-816)
816. Encino Motorcars, LLC v. Navarro *(Encino I),* 136 S. Ct. 2117 (2016). [↑](#footnote-ref-817)
817. *See, e.g.,* Johnson v. Mattress Warehouse, Inc., 2021 BL 351238, 2021 WL 4206722 (E.D. Pa. Sept. 16, 2021), and cases cited therein. [↑](#footnote-ref-818)
818. 29 C.F.R. §§516.16, 779.420. [↑](#footnote-ref-819)
819. *See, e.g.*, Kelly v. A1Tech., 2010 WL 1541585, at \*14 (S.D.N.Y. Apr. 12, 2010); English v. Ecolab, Inc., 2008 WL 878456, at \*3 (S.D.N.Y. Mar. 31, 2008). [↑](#footnote-ref-820)
820. *See* 29 U.S.C. §207(i). [↑](#footnote-ref-821)
821. *See id.* [↑](#footnote-ref-822)
822. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §13, 52 Stat. 1060, 67 (repealed by Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157,   
     §3(c)(1), 103 Stat. 938, 939). [↑](#footnote-ref-823)
823. 29 C.F.R. §779.411 (explaining that, for purposes of §207(i) exemption, “retail or service establishment” is defined in §213(a)(2) of FLSA); *see also* Reich v. Delcorp, Inc., 3 F.3d 1181, 1183 (8th Cir. 1993) (citing 29 C.F.R. §779.411 and stating that when Congress passed §207(i) it specifically stated that term “retail or service establishment” was to have same meaning in that section as it did in §213(a)(2)); English v. Ecolab, Inc., 2008 WL 878456, at \*2 (S.D.N.Y. Mar. 31, 2008) (citing 29 U.S.C. §213(a)(2), *repealed by* Pub. L. No. 101-157, §3(c)(1), 103 Stat. at 938, 939); Schwind v. E.W. & Assocs., Inc., 371 F. Supp. 2d 560, 564 n.4 (S.D.N.Y. 2005) (explaining that definition of “retail or service establishment” in §213(a)(2) remains in effect for purposes of §207(i)). [↑](#footnote-ref-824)
824. 29 C.F.R. pt. 779. [↑](#footnote-ref-825)
825. *Id.* §779.318. [↑](#footnote-ref-826)
826. *Id.* §779.316. [↑](#footnote-ref-827)
827. *Id.* §779.319 [↑](#footnote-ref-828)
828. *Id.* §779.321. [↑](#footnote-ref-829)
829. 29 C.F.R. §779.317. [↑](#footnote-ref-830)
830. *Id*. §779.320. [↑](#footnote-ref-831)
831. 85 Fed. Reg. 29,867 (May 19, 2020). [↑](#footnote-ref-832)
832. *Id*. In §II, Explanations for Withdrawal of Section 779.317, and §III, Explanations for Withdrawal of Section 779.320, of the final rule, the DOL acknowledged judicial criticism of each regulation. A district court in Kansas has opined that the DOL’s withdrawal of 29 C.F.R. §779.317 was not a “true change in the law” governing the §207(i) exemption. Charbonneau. v. Mortgage Lenders of Am., LLC, 2020 BL 281512, 2020 WL 4334981 (D. Kan. July 28, 2020) (denying defendants’ motion to add §207(i) affirmative defense to their Answer due to rule revision). See also Section V.B.1.b. *infra* regarding subsequent DOL opinion letters discussing several industries that had previously appeared on those lists.

     Although the DOL withdrew its regulations regarding partial list of establishments, it has not withdrawn the contents of FOH Chapter 21c, “Specific Applications: Retail Concept and Sales Criteria.” According to the FOH, “The interpretations contained in FOH 21c illustrate the application of the principles set out in 29 CFR 779 to specific situations involving the retail concept, sales for resale, and the making of sales of good or services recognized as retail.” [↑](#footnote-ref-833)
833. *See, e.g.,*

     *Second Circuit*: English v. Ecolab, Inc., 2008 WL 878456, at \*6–7 (S.D.N.Y. Mar. 31, 2008) (finding that regulations were of limited persuasive power as they “interpret a statute which has been repealed” and “the § 7(i) and § 13(a)(2) exemptions, despite their shared definition of ‘retail or service establishment,’ address fundamentally different concerns. Therefore, regulations promulgated with § 13(a)(2) in mind do not necessarily apply with the same force to the employers claiming the § 7(i) exemption.”).

     *Fifth Circuit:* Rachal v. Allen, 376 F.2d 999, 1004 (5th Cir. 1967) (rejecting DOL’s position that fixed base aeronautics operator’s business had no retail concept merely because it was part of air transportation industry that regulations listed as lacking retail concept); Wells v. TaxMasters, Inc., 2012 WL 4214712, at \*5–6 (S.D. Tex. Sept. 18, 2012) (rejecting regulations that listed tax services as lacking retail concept).

     *Ninth Circuit:* Martin v. Refrigeration Sch., Inc., 968 F.2d 3, 7 n.2 (9th Cir. 1992) (finding that lists in 29 C.F.R. §779.317 and .320 did “not appear to flow from any cohesive criteria,” and list of non-retail establishments seemed “entirely unrelated” to characteristics of “retail establishments” in §779.318(a)).

     *Tenth Circuit:* Selz v. Investools, Inc., 2011 WL 285801, at \*3 (D. Utah Jan. 27, 2011) (explaining that persuasive value of 29 C.F.R. §779.315 was minimal because it was not drafted for §207(i) but for now-repealed §213(a)(2)).

     *Eleventh Circuit:* Reich v. Cruises Only, Inc., 1997 WL 1507504, at \*5 (M.D. Fla. June 5, 1997) (rejecting non-retail classification in regulations for travel agencies as it was “arbitrary and without any rational basis”). [↑](#footnote-ref-834)
834. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-835)
835. *Id*. at 371. The Seventh Circuit would also classify Corporate Cleaning Services, Inc. (CCS) as a “retailer” because it sold “its service to building owners and managers by the building; it doesn’t make a new contract for each window on each building. Judged by the unit of sale recognized in the industry, then CCS is a retailer.” *Id.* at 370. [↑](#footnote-ref-836)
836. *Id.* at 369. [↑](#footnote-ref-837)
837. Alston v. DirecTV, Inc., 254 F. Supp. 3d 765, 777 (D.S.C. 2017) (“The second test [to determine retail or service establishment] [was] developed by the Seventh Circuit in *Alvarado*. It defines a “service establishment” (as opposed to a “retail establishment”) by reference to the establishment’s production’s sensitivity to demand.”); Blahnik v. Box Office Ticket Sales, LLC, 2017 WL 1150914 (N.D. Ill. Mar. 28, 2017) (*Alvarado* court focused on distinction between retailers and wholesalers to define what constitutes “retail establishment” for purposes of §207(i)); Bitner v. Wyndham Vacation Resorts, 2016 WL 7480428 (W.D. Wis. Dec. 2, 2016) (“While the *Alvarado* opinion is helpful in describing what courts should *not r*ely on in determining whether the section 7(i) exemption applies, the opinion falls short of providing guidance as to what district courts should rely on in determining whether a business qualifies as a retail or service establishment.”); Matrai v. DirecTV, LLC., 168 F. Supp. 3d 1347, 1360 (D. Kan. 2016) (“Not only is the reasoning in *Alvarado* persuasive, but it upholds and furthers the distinct purpose of the commission exemption. It also avoids the legal gymnastics of finding some defensibly analogous or comparable match with the retail establishment listings in the regulations applying §13(a)(2).”). [↑](#footnote-ref-838)
838. Diggs v. Ovation Credit Servs., Inc., 449 F. Supp. 3d 1280, 1294 n.7(M.D. Fla. 2020) (“Given the overwhelming authority cited above reaching the opposite conclusion, the Court does not find *Alvarado* to be persuasive.”); Dyal v. PirTano Constrs., Inc., 2018 WL 1508487, at \*3 (N.D. Ill. Mar. 27, 2018) (“If the discussion in *Alvarado* is taken at face value, the alternative language in the statute is to be read literally and nothing more than being a service establishment, retail or wholesale.”); Amponsah v. DirecTV, LLC., 278 F. Supp. 3d 1352, 1367 n.10 (N.D. Ga. 2017) (“The parties note that the Seventh Circuit recently reached a different definition of ‘retail or service establishment’. However, the parties agree that the district courts in this circuit [Eleventh] apply the definition from the DOL’s regulations, and that it should control here.”); Roeder v. DirecTV, Inc., 2017 WL 151401, at \*27 (N.D. Iowa Jan. 1, 2017) (“Both parties acknowledge that I am bound by the Eighth Circuit’s definition of ‘retail or service establishment’ which is based on 29 U.S.C. §213(a)(2).”). [↑](#footnote-ref-839)
839. 29 C.F.R. §779.313. These requirements are further discussed *id*. §779.314–.341. [↑](#footnote-ref-840)
840. For a discussion of the term “establishment” under the FLSA, see Section II [The Establishment Requirement] of this chapter. [↑](#footnote-ref-841)
841. 2008 WL 878456 (S.D.N.Y. Mar. 31, 2008). [↑](#footnote-ref-842)
842. *Id.* at \*10 (citing Stevens v. Welcome Wagon Int’l, Inc., 261 F. Supp. 227, 231 (E.D. Pa. 1966)) (holding that home office of local saleswoman affiliated with nationwide advertising/promotional firm qualified as establishment for §207(i) exemption; plaintiff maintained telephone listing in name of employer). [↑](#footnote-ref-843)
843. 29 C.F.R. §779.319; *see also English*, 2008 WL 878456, at \*9 (citing Wirtz v. Keystone Readers Serv., Inc., 418 F.2d 249, 257 (5th Cir. 1969)). [↑](#footnote-ref-844)
844. WH Op. FLSA2018-21, 2018 WL 4562931 (Aug. 28, 2018) (citing Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190, 200–03 (1965), and finding that sales to merchants for technology platform had retail concept even though sales were made exclusively to businesses for whom platform was designed); Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365, 369–71 (7th Cir. 2015) (window-cleaning business that provided services to various businesses constituted retail or service establishment for purposes of §207(i) exemption); Charlot v. Ecolab, Inc., 136 F. Supp. 3d 433, 468–69 (E.D.N.Y. 2015) (business that sold cleaning supplies and related products to other businesses qualified as retail or service establishment for purposes of §207(i) exemption) (citing 29 C.F.R. §779.318(b)); Schwind v. EW & Assocs., Inc., 371 F. Supp. 2d 560, 565–67 (S.D.N.Y. 2005) (business that provided computer training to commercial businesses constituted “retail or service establishment” for purposes of §207(i) exemption). [↑](#footnote-ref-845)
845. *See,* *e.g.*, Gatto v. Mortgage Specialists of Ill., Inc., 442 F. Supp. 2d 529, 541 (N.D. Ill. 2006) (explaining that regulation cannot be interpreted to mean consumer must use establishment every day as it would be inconsistent with DOL’s listing in §779.320 as “retail” automobile dealerships and other establishments are not used daily). [↑](#footnote-ref-846)
846. 29 C.F.R.§779.319; *see also* English v. Ecolab, Inc., 2008 WL 878456, at \*9 (S.D.N.Y. Mar. 31, 2008) (citing Morales v. Senior Officers’ Open Mess, 1974 WL 1337, at \*2 (D.P.R. Nov. 11, 1974) (finding that private club was not open to public and therefore not retail establishment under FLSA)). [↑](#footnote-ref-847)
847. 383 U.S. 190 (1966). [↑](#footnote-ref-848)
848. *Id.* at 203–04 (internal citations omitted) (emphasis added). [↑](#footnote-ref-849)
849. *See* 29 C.F.R. §779.316–.321. [↑](#footnote-ref-850)
850. *Id.* §779.318(a). [↑](#footnote-ref-851)
851. 85 Fed. Reg. 29,867 (May 19, 2020). [↑](#footnote-ref-852)
852. Merritt v. Tex. Farm Bureau, 673 F. Supp. 3d 859 (W.D. Tex. 2023). [↑](#footnote-ref-853)
853. *Id.* at 866. [↑](#footnote-ref-854)
854. WH Op. FLSA2020-11, 2020 WL 5367068, at \*3(Aug. 31, 2020). [↑](#footnote-ref-855)
855. *Id.* at \*3–4 (citing WH Op. FLSA2006-22 (June 23, 2006)). [↑](#footnote-ref-856)
856. WH Op. FLSA2021-6, 2021 WL 240827, at \*3 (Jan. 19, 2021) (citing court cases that followed the DOL mandate with respect to staffing firms). [↑](#footnote-ref-857)
857. *Id.* at \*4. [↑](#footnote-ref-858)
858. *Id.* [↑](#footnote-ref-859)
859. FOH §21c00. That section includes subsection 21ct04—Temporary Help Firms—which provides: “The retail concept does not apply to establishments that specialize in supplying a part-time or full-time employees who perform nursing care and domestic work in private homes and health care institutions.” [↑](#footnote-ref-860)
860. 359 U.S. 290, 14 WH Cases 125 (1959). [↑](#footnote-ref-861)
861. 359 U.S. at 296. [↑](#footnote-ref-862)
862. *See, e.g.*, Takacs v. A.G. Edwards & Sons, Inc., 444 F. Supp. 2d 1100, 1115–16 (S.D. Cal. 2006) (applying reasoning from *Mitchell* when finding that financial consulting was not retail in nature and explaining, “[s]ince the DOL in its 1938 interpretation letter established that stock brokers and investment counseling industries are not retail or service establishments, and that interpretation was not dependent upon the business use test, it appears that, in accordance with Congress’ intentions when amending the FLSA, Defendant’s business is not exempt under 29 U.S.C. § 207(i)”). [↑](#footnote-ref-863)
863. *See, e.g.,*

     *Third Circuit:* Pontius v. Delta Fin. Corp., 2007 WL 1496692, at \*6 (W.D. Pa. Mar. 20, 2007) (“As Defendant is ‘undeniably a financial company’ in the business of making and selling loans, it ‘falls squarely’ within *Mitchell*, and exclusion from a § 7(i) exemption is in accordance with applicable Congressional and agency history, as well as Supreme Court precedent.”), *adopted by* 2007 WL 1412034 (W.D. Pa. May 10, 2007).

     *Eighth Circuit:* Saunders v. Ace Mortg. Funding, Inc., 2007 WL 1190985, at \*7 (D. Minn. Apr. 16, 2007) (finding defendant more akin to financial company than retail or service establishment because it engaged in some direct lending and was licensed to lend mortgage funds in 13 states); Casas v. Conseco Fin. Corp, 2002 WL 507059 (D. Minn. Mar. 31, 2002) (finance company selling lending products, such as home equity and home improvement loans, was not retail; court stated that defendant’s argument—thatchanges in nature and operation of financial industry required reconsideration of *Mitchell* decision—best directed to Congress or DOL).

     *Ninth Circuit:* *In re* Wells Fargo Home Mortg. Overtime Pay Litig., 2008 WL 2441930, at \*1, 6 (N.D. Cal. June 13, 2008) (concluding that “diversified financial services company, providing banking, insurance, investments, mortgage and consumer finance,” did not qualify as “retail or service establishment”); Wong v. HSBC, 2008 WL 753889, at \*8 (N.D. Cal. Mar. 19, 2008) (finding that “finance company” or “loan office” did not qualify as “retail or service establishment”); Barnett v. Washington Mut. Bank, 2004 WL 1753400, at \*6 (N.D. Cal. Aug. 5, 2004) (finding that mortgage lender was not eligible for §207(i) exemption).

     *Tenth Circuit:* Underwood v. NMC Mortg. Corp., 2009 WL 1269465, at \*5, 7 (D. Kan. May 6, 2009) (concluding that business of assisting consumers in completing mortgage applications and finding lenders that matched customers’ criteria for loan funding lacked retail concept because it was not at very end of distribution stream). [↑](#footnote-ref-864)
864. 442 F. Supp. 2d 529 (N.D. Ill. 2006). [↑](#footnote-ref-865)
865. *Id*. at 541–42. [↑](#footnote-ref-866)
866. 2008 WL 190440 (D. Ariz. Jan. 18, 2008). [↑](#footnote-ref-867)
867. *Id.* at \*4; *see also* Russell v. Promove, LLC, 2009 WL 1285885 (N.D. Ga. May 5, 2009) (finding that employer’s business of acting as middleman of bringing landlords and tenants together did not have “retail concept”). [↑](#footnote-ref-868)
868. 2007 WL 1190985 (D. Minn. Apr. 16, 2007). [↑](#footnote-ref-869)
869. *Id*. at \*6. [↑](#footnote-ref-870)
870. *Id*. [↑](#footnote-ref-871)
871. 407 F.3d 1038 (9th Cir. 2005). [↑](#footnote-ref-872)
872. *Id.* at 1053. [↑](#footnote-ref-873)
873. 2013 WL 371573 (N.D. Tex. Jan. 28, 2013). *See also* Diggs v. Ovation Credit Servs., Inc., 449 F. Supp. 3d 1280 (M.D. Fla. 2020) (finding that company providing services to consumers to help them resolve inaccuracies on their credit reports was not a retail or service establishment). [↑](#footnote-ref-874)
874. *Id.* at \*10 (citing 29 C.F.R. §779.317). On May 19, 2020, DOL withdrew 29 C.F.R. §779.317. *See* 85 Fed. Reg. 29,867 (May 19, 2020). In *Burden v. SelectQuote Ins. Servs*., 848 F. Supp. 2d 1075 (N.D. Cal. 2012), SelectQuote acknowledged that “[i]nsurance” and “insurance brokers” were expressly identified in §779.317 as not having a retail concept, but nonetheless asserted that §779.317 was inapposite because it was operating a “new type of business” that was not covered by the insurance industry exclusion. According to SelectQuote, its direct marketing approach “turned the life insurance industry on its head” by having its agents contact prospective customers by telephone instead of in person. The federal court found that although SelectQuote had changed the method by which an agent sells life insurance, the fact remained that SelectQuote was still selling life insurance, which was a non-retail business in concept. [↑](#footnote-ref-875)
875. 3 F.3d 1181, 1 WH Cases2d 940 (8th Cir. 1993). [↑](#footnote-ref-876)
876. 3 F.3d at 1184–85 (explaining that “while Congress clearly manifested an intent in 1966 to prevent laundries from qualifying for the § 213(a)(2) exemption, it did not demonstrate an intent to prevent laundries from qualifying under § 207(i)” and providing reasons for reaching this conclusion). [↑](#footnote-ref-877)
877. WH Op. FLSA2005-44, 2005 WL 3308615 (Oct. 24, 2005). [↑](#footnote-ref-878)
878. *See* 29 C.F.R. §779.318–.320. [↑](#footnote-ref-879)
879. *See* WH Op. FLSA2006-22, 2006 WL 2067713 (June 23, 2006);*see also* WH Op. FLSA2018-2, 2018 WL 5393301 (Jan. 5, 2018) (retail concept applies to establishments that provide drain cleaning, minor plumbing repair, and replacement services involving such items as water heaters, disposals, and toilets (citing WH Op. FLSA2006-22)); Rodriguez v. Home Heroes, LLC, 2015 WL 668009 (M.D. Fla. Feb. 17, 2015) (finding that plumbing company was not plumbing contractor for purposes of §779.317 and therefore was “retail or service establishment” for purposes of §207(i) exemption). [↑](#footnote-ref-880)
880. WH Op. FLSA2006-22. [↑](#footnote-ref-881)
881. *Id*. [↑](#footnote-ref-882)
882. English v. Ecolab, Inc., 2008 WL 878456, at \*15 (S.D.N.Y. Mar. 31, 2008). [↑](#footnote-ref-883)
883. *Id.* at \*2. [↑](#footnote-ref-884)
884. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-885)
885. *Id.* at 369; *see also* Yi v. Sterling Collision Ctrs., Inc., 2006 WL 1444897, at \*1 (N.D. Ill. May 17, 2006), *aff’d*, 480 F.3d 505 (7th Cir. 2007) (circuit court did not address “retail concept” of business, but affirmed decision of district court, which had applied §207(i) exemption to chain of auto body repair shops). [↑](#footnote-ref-886)
886. 968 F.2d 3, 30 WH Cases 1580 (9th Cir. 1992). [↑](#footnote-ref-887)
887. 968 F.2d at 9. [↑](#footnote-ref-888)
888. 246 F. Supp. 2d 886 (S.D. Ohio 2003). [↑](#footnote-ref-889)
889. *Id*. at 893. [↑](#footnote-ref-890)
890. *Id.* at 893–94; *see also* Collins v. Horizon Training Ctrs., 2003 WL 22388448, at \*6 (N.D. Tex. Sept. 30, 2003) (citing *Viciedo* for support in finding that computer training company fell within “retail or service establishment” exemption). [↑](#footnote-ref-891)
891. 2011 WL 285801 (D. Utah Jan. 27, 2011). [↑](#footnote-ref-892)
892. *Id*. at \*3–4, 7. [↑](#footnote-ref-893)
893. *Id.* at \*6–9. [↑](#footnote-ref-894)
894. 2011 WL 4433159 (D. Vt. Sept. 21, 2011). [↑](#footnote-ref-895)
895. *Id.* at \*4. [↑](#footnote-ref-896)
896. *Id*. at \*6–7. [↑](#footnote-ref-897)
897. 2013 WL 6072966 (M.D. Ga. Nov. 18, 2013). [↑](#footnote-ref-898)
898. *Id.* at \*8 (citations omitted). [↑](#footnote-ref-899)
899. *Id*. at \*7. *See also*

     *First Circuit:* Gruchy v. DirectTech Del., Inc., 2010 WL 3835007, at \*2 (D. Mass. Sept. 30, 2010).

     *Second Circuit:* Owopetu v. Nationwide CATV Auditing Servs., Inc*.*, 2011 WL 4433159, at \*4 (D. Vt. Sept. 21, 2011).

     *Sixth Circuit:* Horn v. Digital Cable & Commc’ns, Inc., 2009 WL 4042407, at \*4 (N.D. Ohio Feb. 11, 2009). [↑](#footnote-ref-900)
900. Johnson v. Wave Comm GR, LLC, 4 F. Supp. 3d 423 (N.D.N.Y. Mar. 14, 2014) (finding that cable installation services had retail concept required to be recognized as retail in industry, however, defendant failed to meet its burden of proving requirement that employees must earn at least 1.5 times minimum wage); Roeder v. DirecTV, Inc., 2017 WL 151401 (N.D. Iowa Jan. 13, 2017) (finding that cable provider that supplied ultimate product being purchased just like cable installer had “retail concept” because it “sells goods or services to the general public” and “serves the everyday needs of the community in which it is located”). [↑](#footnote-ref-901)
901. *First Circuit:* *Gruchy*, 2010 WL 3835007, at \*2 (explaining that it was undisputed that defendant qualified as retail or service establishment).

     *Sixth Circuit:* *Horn*, 2009 WL 4042407, at \*4 (noting that defendant cable installation company put forth undisputed evidence that it qualified as retail or service establishment).

     *Eleventh Circuit:* Moore v. Advanced Cable Contractors, Inc., 2013 WL 3991966, at \*3 (N.D. Ga. Aug. 1, 2013) (“Defendants assert, and Plaintiffs do not dispute, that Advanced Cable is a retail and service establishment for purposes of the FLSA.”). [↑](#footnote-ref-902)
902. 2007 WL 2429149 (D. Nev. Aug. 20, 2007). [↑](#footnote-ref-903)
903. *Id*. at \*9. [↑](#footnote-ref-904)
904. *Id*. [↑](#footnote-ref-905)
905. 2008 WL 254136 (M.D. Fla. Jan. 29, 2008). [↑](#footnote-ref-906)
906. *Id*. at \*6. On May 19, 2020, the DOL withdrew 29 C.F.R. §779.317. *See* 85 Fed. Reg. 29,867 (May 19, 2020). [↑](#footnote-ref-907)
907. 2009 WL 1285885 (N.D. Ga. May 5, 2009). [↑](#footnote-ref-908)
908. *Id.* at \*5. [↑](#footnote-ref-909)
909. 1997 WL 1507504 (M.D. Fla. June 5, 1997). [↑](#footnote-ref-910)
910. *Id*. at \*4–5 (finding exclusion of travel agencies from DOL’s list of establishments possessing retail concept to be “arbitrary and without any rational basis”). However, on May 19, 2020, the DOL withdrew that regulation without notice or comment. *See* 85 Fed. Reg. 29,867 (May 19, 2020). [↑](#footnote-ref-911)
911. 2012 WL 4214712 (S.D. Tex. Sept. 18, 2012). [↑](#footnote-ref-912)
912. *See* Rachal v. Allen, 376 F.2d 999 (5th Cir. 1967). Note that 29 C.F.R. §779.317 had listed “tax services” as an example of a business that lacked the retail concept; this list was withdrawn by the DOL on May 19, 2020. *See* 85 Fed. Reg. 29,867 (May 19, 2020). [↑](#footnote-ref-913)
913. 29 C.F.R. §779.318. [↑](#footnote-ref-914)
914. *Wells*,2012 WL 4214712, at \*6 (“[Company] provided not only tax preparation services that each member of the community may well utilize, but also tax dispute services to address issues that may, in some instances, arise in the course of filing taxes.”). [↑](#footnote-ref-915)
915. *Id*. [↑](#footnote-ref-916)
916. *Id*. [↑](#footnote-ref-917)
917. *Id.* (citing 29 C.F.R. §779.318). [↑](#footnote-ref-918)
918. 2010 WL 3938255 (W.D. Pa. Oct. 5, 2010). [↑](#footnote-ref-919)
919. *Id*. at \*2–3. [↑](#footnote-ref-920)
920. WH Op. FLSA2018-21, 2018 WL 4562931 (Aug. 28, 2018). In *Diggs v. Ovation Credit Services, Inc*., 449 F. Supp. 3d 1280 (M.D. Fla. 2020), the court was not persuaded by this opinion letter to find a credit repair company to have a retail concept: “It appears that Ovation has little in common with the company described in the Opinion Letter, a company that would appear to provide a service of use to every online purchaser and seller.” *Id*. at 1291. [↑](#footnote-ref-921)
921. Ebersole v. American Bancard, LLC, 2009 WL 2524618, at \*3 (S.D. Fla. Aug. 17, 2009). [↑](#footnote-ref-922)
922. 714 F. Supp. 2d 1035 (C.D. Cal. 2010). [↑](#footnote-ref-923)
923. *Id.* at 1044. [↑](#footnote-ref-924)
924. *Id.* at 1040–44. [↑](#footnote-ref-925)
925. *Id*. at 1044. [↑](#footnote-ref-926)
926. 2009 WL 2524618 (S.D. Fla. Aug. 17, 2009). [↑](#footnote-ref-927)
927. Blahnik v. Box Office Ticket Sales, LLC, 2017 WL 1150914 (N.D. Ill. Mar. 28, 2017) (citing Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365 (7th Cir. 2015)). [↑](#footnote-ref-928)
928. 2019 WL 4784801 (E.D. Ark. Sept. 30, 2019). [↑](#footnote-ref-929)
929. *Id.* at \*13. [↑](#footnote-ref-930)
930. *Id.* [↑](#footnote-ref-931)
931. Simmon’s v. Futo’s, Inc., 2022 BL 432131, 2022 WL 17407975 (N.D. Ga. Dec. 2, 2022). [↑](#footnote-ref-932)
932. *Id.* at \*5. [↑](#footnote-ref-933)
933. *See* 29 C.F.R. §779.322–.329. [↑](#footnote-ref-934)
934. *Id.* §779.322. [↑](#footnote-ref-935)
935. *Id.* §779.323 (emphasis added). [↑](#footnote-ref-936)
936. *Id.* §779.324 (emphasis added). [↑](#footnote-ref-937)
937. *Id.* §779.326. [↑](#footnote-ref-938)
938. *Second Circuit*: Johnson v. Wave Comm GR, LLC, 4 F. Supp. 3d 423 (N.D.N.Y. 2014) (although defendant did not provide any testimony as to how people in the industry viewed its business, court took judicial notice of evidence provided in *Jones v. Tucker Communications, Inc.*, 2013 WL 6072966, at \*8 (M.D. Ga. Nov. 18, 2013), and *Owopetu v. Nationwide CATV Auditing Services, Inc.*, 2011 WL 4433159, at \*6 (D. Vt. Sept. 21, 2011), businesses that provided similar services as defendant, and found that defendant had satisfied its burden to show that its business was recognized as retail within its industry); Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL 4433159, at \*6 (D. Vt. Sept. 21, 2011) (finding affidavits of defendant’s corporate office manager and professional vocational rehabilitation consultant persuasive to meeting requirement of establishing “retail or service establishment” where plaintiff failed to produce evidence otherwise).

     *Fifth Circuit:* Collins v. Horizon Training Ctrs., L.P., 2003 WL 22388448, at \*8 (N.D. Tex. Sept. 30, 2003) (considering affidavit from company’s president).

     *Ninth Circuit:* La Parne v. Monex Deposit Co., 714 F. Supp. 2d 1035, 1042 (C.D. Cal. 2010) (considering affidavits from former employees as well as expert).

     *Eleventh Circuit:* Jones v. Tucker Commc’ns, Inc., 2013 WL 6072966, at \*8 (M.D. Ga. Nov. 18, 2013) (finding affidavit of executive director of chamber of commerce and former vice president and general manager of Cox Communications evidence of retail nature of business). [↑](#footnote-ref-939)
939. *See* *Johnson*, 4 F. Supp. 3d at 440–41. [↑](#footnote-ref-940)
940. *See, e.g.,*

     *Second Circuit:* *Owopetu*, 2011 WL 4433159, at \*6 (“Nationwide’s relationship [as subcontractor for] TWC does not preclude a finding that Nationwide’s services are retail.”).

     *Fifth Circuit:* Schultz v. Crotty Bros. Dall., Inc., 304 F. Supp. 191, 192, 195–96 (W.D. Tex. 1969) (finding that food service operation contracting with school to provide meals for students was retail establishment).

     *Eleventh Circuit: Jones*, 2013 WL 6072966, at \*8 (finding that even though Tucker contracted with Charter Communications, it provided its repair and installation services to end users—cable and Internet service consumers); Wirtz v. Campus Chefs, Inc., 303 F. Supp. 1112, 1118–19 (N.D. Ga. 1968) (finding food service business exempt) [↑](#footnote-ref-941)
941. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-942)
942. *Id.* at 369. [↑](#footnote-ref-943)
943. 29 C.F.R. §779.327. [↑](#footnote-ref-944)
944. 29 C.F.R. §779.328. *See* WH Op. FLSA2018-21, 2018 WL 4562931 (Aug. 28, 2018) (citing 29 C.F.R. §779.328 and finding that sales of technology platforms were retail, not wholesale, because company did not sell large quantities of platform to individual purchasers). [↑](#footnote-ref-945)
945. *Alvarado*, 719 F. Supp. 2d at 945 (quoting English v. Ecolab, Inc., 2008 WL 878456, at \*13 (S.D.N.Y. Mar. 31, 2008)); *see also* Jones v. Tucker Commc’ns, Inc., 2013 WL 6072966, at \*9 (M.D. Ga. Nov. 18, 2013); Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL4433159, at \*6 (D. Vt. Sept. 21, 2011). [↑](#footnote-ref-946)
946. *Owopetu*, 2011 WL4433159. [↑](#footnote-ref-947)
947. *Id.* at \*6. [↑](#footnote-ref-948)
948. 29 C.F.R. §779.330. [↑](#footnote-ref-949)
949. *Id*. §779.331; Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL 883703, at \*6 (D. Vt. Mar. 11, 2011) (citing 29 C.F.R. §779.331); *see also* English v. Ecolab, Inc., 2008 WL 878456, at \*11 n.15 (S.D.N.Y. Mar. 31, 2008); Schwind v. E.W. & Assocs., Inc., 371 F. Supp. 2d 560, 566 (S.D.N.Y. 2005). [↑](#footnote-ref-950)
950. 29 C.F.R. §779.331. *See* WH Op. FLSA2018-21, 2018 WL 4562931 (Aug. 28, 2018) (“As you have indicated, your client’s platforms ‘cannot be resold’ because they are ‘designed for each specific merchant.’”). [↑](#footnote-ref-951)
951. 29 C.F.R. §779.333. [↑](#footnote-ref-952)
952. *English*, 2008 WL 878456. [↑](#footnote-ref-953)
953. *Id.* at \*11 (citing 29 C.F.R. §779.333). [↑](#footnote-ref-954)
954. *Id*. [↑](#footnote-ref-955)
955. *Id*. [↑](#footnote-ref-956)
956. 29 C.F.R. §779.334. [↑](#footnote-ref-957)
957. English v. Ecolab, Inc., 2008 WL 878456, at \*11 (S.D.N.Y. Mar. 31, 2008). [↑](#footnote-ref-958)
958. 2008 WL 878456 (S.D.N.Y. Mar. 31, 2008). [↑](#footnote-ref-959)
959. *Id*. at \*10–11. [↑](#footnote-ref-960)
960. *Id*. at \*12. [↑](#footnote-ref-961)
961. 29 C.F.R. §779.334 (emphasis added). [↑](#footnote-ref-962)
962. English v. Ecolab, Inc., 2008 WL 878456, at \*12 (S.D.N.Y. Mar. 31, 2008).The Seventh Circuit made the same basic point in concluding that window-washing services were not for resale: “No doubt the building owners and managers pass on (so far as market conditions allow) the cost of window cleaning to the occupants of the building. But this is not resale.” Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365, 369 (7th Cir. 2015). [↑](#footnote-ref-963)
963. *English*, 2008 WL 878456, at \*12. [↑](#footnote-ref-964)
964. Jones v. Tucker Commc’ns, Inc., 2013 WL 6072966, at \*6 (M.D. Ga. Nov. 18, 2013) (reasoning that cable installation was discrete and necessary component that was but-for requirement antecedent to provision of cable services, not just service enhancement; and further finding that services that cable installer provided were not analogous to other examples of services for resale found in §779.334). [↑](#footnote-ref-965)
965. Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL 883703, at \*6 (D. Vt. Mar. 11, 2011) (finding that provision of cable installation and repair services to customers did not constitute “sales for resale” because there was no subsequent sale, that is, no “selling again,” after services were provided; customers were “at the very end of the stream of distribution,” and therefore repair services were provided “for the comfort and convenience of [the general] public in the course of its daily living,” as opposed to providing them for redistribution). [↑](#footnote-ref-966)
966. 371 F. Supp. 2d 560 (S.D.N.Y. 2005). [↑](#footnote-ref-967)
967. *Id.* at 566. [↑](#footnote-ref-968)
968. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-969)
969. *Id.* at 369. [↑](#footnote-ref-970)
970. Brief for Sec’y of Labor as Amicus CuriaeSupporting Plaintiffs-Appellants, at 26–27, Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365 (7th Cir. 2015) (No. 13-3818). The brief then added three more examples to this list: *Mitchell v. Sherry Corine Corp*., 264 F.2d 831, 835 (4th Cir. 1959) (finding that company that sold meals to airlines, which then served meals to passengers on flights, was engaged in sales for resale because cost of meals was “an operating expense taken into account in computing the rates of transportation”); *Goldberg v. Furman Beauty Supply, Inc*., 300 F.2d 16, 18–19 (3d Cir. 1962) (beauty supply company that sold products to salons that used products while providing services to customers was engaged in sales for resale because prices charged by beauty parlor covered cost of purchasing beauty supply products); and *Goldberg v. Kleban Eng’g Corp*., 303 F.2d 855, 858 (5th Cir. 1962) (subcontractor providing plumbing, heating, and air conditioning services for general contractor to “ultimate consumer” but receiving payment from general contractor was engaged in sales for resale). Brief for Sec’y of Labor, at 27–29. [↑](#footnote-ref-971)
971. *Alvarado*, 782 F.3d at 369–70. [↑](#footnote-ref-972)
972. 407 F.3d 1038 (9th Cir. 2005). [↑](#footnote-ref-973)
973. *Id.* at 1049; *see also* La Parne v. Monex Deposit Co., 714 F. Supp. 2d 1035, 1040–41 (C.D. Cal. 2010) (finding no reasonable cause to believe precious metals sold as investment were purchased for immediate resale). [↑](#footnote-ref-974)
974. 29 U.S.C. §207(i). [↑](#footnote-ref-975)
975. *Id*. [↑](#footnote-ref-976)
976. *See* Herman v. Suwannee Swifty Stores, Inc., 19 F. Supp. 2d 1365, 1369–72 (M.D. Ga. 1998). [↑](#footnote-ref-977)
977. *See* Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 508 (7th Cir. 2007). [↑](#footnote-ref-978)
978. Parker v. NutriSystem, Inc., 620 F.3d 274, 278 (3d Cir. 2010). [↑](#footnote-ref-979)
979. 29 C.F.R. §779.414. [↑](#footnote-ref-980)
980. *See* 35 Fed. Reg. 5,856 (Apr. 9, 1970). [↑](#footnote-ref-981)
981. 29 C.F.R. §779.413(a). [↑](#footnote-ref-982)
982. *See* 29 C.F.R. §779.413(b). [↑](#footnote-ref-983)
983. Viciedo v. New Horizons Computer Learning Ctr., 246 F. Supp. 2d 886, 896 (S.D. Ohio 2003). [↑](#footnote-ref-984)
984. 29 C.F.R. §779.413(a)(4). [↑](#footnote-ref-985)
985. Brief of the Secretary of Labor, at 21, filed in Parker v. NutriSystem, Inc., 620 F.3d 274 (3d Cir. 2010). [↑](#footnote-ref-986)
986. FOH §21h04(a). “Employees whose compensation (either in whole or in part) is frequently computed in this fashion are barbers, beauty shop operators, household appliance repairmen, and automobile mechanics.” *Id. See* WH Op. FLSA2018-2, 2018 WL 5393301 (Jan. 5, 2018) (commission plan that paid technicians 23% of revenue attributable to their labor on job and 5% of revenue attributable to their parts sales was “bona fide,” relying on FOH §21H04(a)). [↑](#footnote-ref-987)
987. FOH §21h04(c). [↑](#footnote-ref-988)
988. Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 508–09 (7th Cir. 2007). [↑](#footnote-ref-989)
989. 29 C.F.R. §778.111, .112. [↑](#footnote-ref-990)
990. 29 C.F.R. §778.111 (piece rates); 29 C.F.R. §778.112 (job and day rates). [↑](#footnote-ref-991)
991. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-992)
992. *Id*. at 367. [↑](#footnote-ref-993)
993. 29 C.F.R. §778.111. [↑](#footnote-ref-994)
994. FOH §21h04(c). *See* Casanova v. Gold’s Texas Holdings Grp., Inc., 2016 WL 1241548, at \*8 (W.D. Tex. Mar. 23, 2016) (finding that there was no way for trainers to work more effectively or efficiently because trainers were able to earn their percentage only by working an hour-long session with each client); Ealy-Simon v. Liberty Med. Supply, Inc., 2007 WL 1521628, at \*5–6 (S.D. Fla. May 23, 2007) (finding flat rate payments to salespersons of diabetes-related medicine and goods not commissions because they were tied to specific products the company wished to sell and not to value of products; no incentives through pay plan to work efficiently and effectively). [↑](#footnote-ref-995)
995. 480 F.3d 505 (7th Cir. 2007). [↑](#footnote-ref-996)
996. *Id.* at 509. [↑](#footnote-ref-997)
997. *Id.* at 508. [↑](#footnote-ref-998)
998. Taylor v. HD & Assocs., L.L.C., 45 F.4th 833 (5th Cir. 2022) (holding plaintiff cable technicians exempt under §207(i) where (1) their wages were paid as a percentage of the price that company charged customers; (2) plaintiffs’ work did not lend itself to a standard workday; (3) the payment system was used industry wide; and (4) plaintiffs’ wages were decoupled from time worked, which incentivized the technicians to work more efficiently). [↑](#footnote-ref-999)
999. 825 F.2d 1173, 28 WH Cases 441 (7th Cir. 1987). [↑](#footnote-ref-1000)
1000. 825 F.2d at 1174. [↑](#footnote-ref-1001)
1001. *Id*. at 1177. *See also* Cantu-Thacker v. Rover Oaks, Inc., 2009 WL 1883967, at \*3–4 (S.D. Tex. June 30, 2009) (concluding that dog groomer who received 50% of revenue generated from each dog she groomed was exempt under §207(i)). [↑](#footnote-ref-1002)
1002. FOH §21h07(a). [↑](#footnote-ref-1003)
1003. Brief of the Secretary of Labor, at 23, filed in Parker v. NutriSystem, Inc., 620 F.3d 274 (3d Cir. 2010). [↑](#footnote-ref-1004)
1004. WH Op., 1996 WL 1031770 (Apr. 3, 1996). [↑](#footnote-ref-1005)
1005. *Id.* Criticizing the results of this opinion letter, the Third Circuit wrote: “The Department’s letter does not elaborate on whether the installers who were paid a percentage of the sales price also had the ability to sell upgrades to alarm systems on site, thereby increasing their commissions by increasing the cost to the ­consumer … it is unclear from the letter whether these installers can be considered ‘in sales.’” Parker v. NutriSystem, Inc., 620 F.3d 274, 280 (3d Cir. 2010). [↑](#footnote-ref-1006)
1006. WH Op., 1996 WL 1031770. [↑](#footnote-ref-1007)
1007. WH Op. FLSA2005-53, 2005 WL 3308624 (Nov. 14, 2005). [↑](#footnote-ref-1008)
1008. *Id.* *See also* WH Op. FLSA2006-33, 2006 WL 3227788 (Sept. 14, 2006) (commissions usually denote percentage of money paid or received). [↑](#footnote-ref-1009)
1009. WH Op. FLSA2006-15NA, 2006 WL 4512957 (June 29, 2006). [↑](#footnote-ref-1010)
1010. *Id*. [↑](#footnote-ref-1011)
1011. *Id.* [↑](#footnote-ref-1012)
1012. Brief of the Secretary of Labor, at 25, filed in Parker v. NutriSystem, Inc., 620 F.3d 274 (3d Cir. 2010). [↑](#footnote-ref-1013)
1013. Brief of the Secretary of Labor, at 30, filed in *Parker*, 620 F.3d at 282. [↑](#footnote-ref-1014)
1014. 260 F.3d 1251, 7 WH Cases2d 279 (11th Cir. 2001). [↑](#footnote-ref-1015)
1015. 260 F.3d at 1254. [↑](#footnote-ref-1016)
1016. *Id.* at 1256. [↑](#footnote-ref-1017)
1017. *Id.* (citing FOH §21h04(d)). [↑](#footnote-ref-1018)
1018. *Id.* at 1256. [↑](#footnote-ref-1019)
1019. 480 F.3d 505 (7th Cir. 2007), *aff’g* Yi v. Sterling Collision Ctrs., Inc.,2006 WL 1444897 (N.D. Ill. May 17, 2006). [↑](#footnote-ref-1020)
1020. *Yi*, 2006 WL 1444897, at \*20. [↑](#footnote-ref-1021)
1021. 2003 WL 24133000 (W.D. Wash. Aug. 14, 2003). [↑](#footnote-ref-1022)
1022. *Id.* at \*2 (citing Klinedinst v. Swift Invs., Inc., 260 F.3d 1251, 1256, 7 WH Cases2d 279 (11th Cir. 2001)). [↑](#footnote-ref-1023)
1023. *Id.* at \*3. [↑](#footnote-ref-1024)
1024. *Id*. [↑](#footnote-ref-1025)
1025. 278 F. App’x 488 (6th Cir. 2008), *aff’g* 2006 WL 2821700 (M.D. Tenn. Sept. 26, 2006). [↑](#footnote-ref-1026)
1026. 2006 WL 2821700, at \*14. [↑](#footnote-ref-1027)
1027. *Id*. [↑](#footnote-ref-1028)
1028. *Id*. at \*15. [↑](#footnote-ref-1029)
1029. 278 F. App’x at 489–90 (citations omitted). [↑](#footnote-ref-1030)
1030. 620 F.3d 274 (3d Cir. 2010), *aff’g* No. 08-1508, slip op. at 15 (E.D. Pa. July 30, 2009). [↑](#footnote-ref-1031)
1031. 620 F.3d at 282–83. [↑](#footnote-ref-1032)
1032. No. 08-1508, slip op. at 21–23. [↑](#footnote-ref-1033)
1033. *Id.*, slip op. at 15–16. [↑](#footnote-ref-1034)
1034. Brief of the Secretary of Labor, at 30, filed in Parker v. NutriSystem, Inc., 620 F.3d 274 (3d Cir. 2010). [↑](#footnote-ref-1035)
1035. *Parker*, 620 F.3d at 283 (citing WH Op. FLSA2005-53, 2005 WL 3308624 (Nov. 14, 2005) (recognizing that “[c]ommissions, for purposes of Section 7(i), *usually* denote a percentage”) (emphasis added); Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 509 (7th Cir. 2007)). [↑](#footnote-ref-1036)
1036. *Parker*, 620 F.3d at 283–84. [↑](#footnote-ref-1037)
1037. *Id*. at 283. [↑](#footnote-ref-1038)
1038. 782 F.3d 365 (7th Cir. 2015). [↑](#footnote-ref-1039)
1039. *Id.* at 367. [↑](#footnote-ref-1040)
1040. *Id.* at 368. [↑](#footnote-ref-1041)
1041. *Id*. [↑](#footnote-ref-1042)
1042. *Id*. at 369. [↑](#footnote-ref-1043)
1043. *Second Circuit*: Johnson v. Wave Comm GR, LLC, 4 F. Supp. 3d 423, 442–43 (N.D.N.Y. 2014) (finding all three factors met by Wave Comm’s pay and incentives it provided cable installers—(1) wages were connected to customer demand, (2) wage plan provided performance-based incentives for installers to increase their income, and (3) members of class were compensated in proportion to value that Wave Comm received from Time Warner for each service—and holding that fact that Wave Comm was compensated by Time Warner and not by individual end-user customer did not change proportionality finding); Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL 4433159, at \*5 (D. Vt. Sept. 21, 2011) (proportionality was not disturbed by fact that cable subcontractor revenues that it split with its employees came from cable company and not from consumers).

      *Third Circuit:* Adami v. Cardo Windows, Inc., 2014 WL 2586933 (D.N.J. June 10, 2014) (“the present case is distinguishable from [*Parker*] because on the record before the court there is no way to determine whether the flat-rate payments made to Plaintiffs were proportional to the charges passed on to Cardo’s customers”).

      *Fourth Circuit:* Herrera v. TBC Corp.,18 F. Supp. 3d 739 (E.D. Va. 2014) (proportionality need not be as formal or mathematically precise as plaintiffs contended; although flat rate compensation formula has variable and fixed-rate components, ultimately employee’s salary is equivalent of portion of customer’s bill; employee’s compensation is linked to cost passed on to customer; because record evidence revealed that more than one half of each named plaintiff’s salary, during representative period, consisted of commissions on goods and services, their method of compensation was bona fide commission scheme).

      *Sixth Circuit:* Horn v. Digital Cable & Commc’ns, Inc., 2009 WL 4042407, at \*4–6 (N.D. Ohio Feb. 11, 2009) (holding that installers were paid commission and not piece rate because pay was based on direct percentage of what cable subcontractor earned for services provided and was proportional to amount subcontractor charged cable provider for particular service).

      *Eleventh Circuit:* Jones v. Tucker Commc’ns, Inc., 2013 WL 6072966, at \*8 (M.D. Ga. Nov. 18, 2013) (“[P]roportionality does not seem to be required for a payment plan to constitute commissions in the Eleventh Circuit.”). *But see* Moore v. Advanced Cable Contractors, Inc., 2013 WL 3991966, at \*5 (N.D. Ga. Aug. 1, 2013) (explaining “[p]roportionality between an employees’ wages and an employers’ gains is an important part of a commission-based compensation system, but to say that any compensation system which does not pay an employee a direct percentage of their employers’ gain is not commission-based is too narrow of a construction”) [↑](#footnote-ref-1044)
1044. Reed v. Brex, Inc., 8 F.4th 569, 575 (7th Cir. 2021). [↑](#footnote-ref-1045)
1045. *Id*. at 574–75. [↑](#footnote-ref-1046)
1046. *Id.* at 575. [↑](#footnote-ref-1047)
1047. 480 F.3d 505, 509 (7th Cir. 2007). [↑](#footnote-ref-1048)
1048. *Reed*, 8 F.4th at 575 (citing Alvarado v. Corporate Cleaning Servs., Inc., 782 F.3d 365, 371 (7th Cir. 2015)). [↑](#footnote-ref-1049)
1049. *Id.* [↑](#footnote-ref-1050)
1050. *Id.* at 576. [↑](#footnote-ref-1051)
1051. 29 C.F.R. §779.416(a). [↑](#footnote-ref-1052)
1052. *Id*. §779.416(b). [↑](#footnote-ref-1053)
1053. 2009 WL 4110144 (S.D. Ohio Sept. 30, 2009), *report and recommendation adopted sub nom.* Keyes v. Car-X Auto Serv., 2009 WL 4136586 (S.D. Ohio Nov. 20, 2009). [↑](#footnote-ref-1054)
1054. 2009 WL 4110144, at \*3. [↑](#footnote-ref-1055)
1055. *Id*. [↑](#footnote-ref-1056)
1056. Donovan v. Highway Oil, Inc., 1986 WL 11266, at \*4 (D. Kan. July 18, 1986). [↑](#footnote-ref-1057)
1057. 873 F.3d 523 (6th Cir. 2017). [↑](#footnote-ref-1058)
1058. *Id*.at 533 (citing WH Op., 1981 WL 179034 (Mar. 3, 1981); WH Op., 1998 WL 852727 (Feb. 23, 1998); WH Op., 2001 WL 1558951 (Feb. 14, 2001)). [↑](#footnote-ref-1059)
1059. 651 F. Supp. 2d 1361 (N.D. Ga. 2009). [↑](#footnote-ref-1060)
1060. *But see* Kuntsmann v. Aaron Rents, Inc., 903 F. Supp. 2d 1258, 1271–72 (N.D. Ala. 2012) (distinguishing *Ethan Allen* finding that system used to compensate retail manager by paying predetermined monthly draw based on previous quarter’s store revenue did not qualify as a “bona fide commission plan” under §207(i): “a great difference exists between simply adding up total sales attributed to a salesperson each month and then giving the salesperson a certain percentage of those sales in compensation, and awarding a store manager a ‘bonus’ if his store’s profits exceeded the company’s predictions”). [↑](#footnote-ref-1061)
1061. 8 F.4th 569 (7th Cir. 2021). [↑](#footnote-ref-1062)
1062. *Id*. at 579. [↑](#footnote-ref-1063)
1063. *Id*. [↑](#footnote-ref-1064)
1064. *Id*. [↑](#footnote-ref-1065)
1065. *Id*. [↑](#footnote-ref-1066)
1066. 8 F.4th at 579–80. [↑](#footnote-ref-1067)
1067. *Id*. at 580. [↑](#footnote-ref-1068)
1068. 29 C.F.R*.* §779.416(c). *See* Cancilla v. Ecolab, Inc., 2013 WL 1365939, at \*2 (N.D. Cal. Apr. 3, 2013) (finding that fact question existed as to whether earnings paid to pest control service specialist were bona fide commissions where they came from regular, predictable services pursuant to long-term contracts over which plaintiff had no control). [↑](#footnote-ref-1069)
1069. 2010 WL 3835007 (D. Mass. Sept. 30, 2010). [↑](#footnote-ref-1070)
1070. *Id.* at \*3 (internal citations omitted) (citing *In re* DirecTech Southwest, Inc., Fair Labor Standards Act (FLSA) Litig., MDL No.1984, slip op. at 31 (J.P.M.L. Nov. 18, 2009); Erichs v. Venator Grp., Inc., 128 F. Supp. 2d 1255, 1260 (N.D. Cal. 2001)). [↑](#footnote-ref-1071)
1071. 128 F. Supp. 2d 1255 (N.D. Cal. 2001). [↑](#footnote-ref-1072)
1072. *Id.* at 1260. [↑](#footnote-ref-1073)
1073. *Id*. [↑](#footnote-ref-1074)
1074. 19 F. Supp. 2d 1365 (M.D. Ga. 1998). [↑](#footnote-ref-1075)
1075. *Id*. at 1370–72. *But see* Johnson v. Mattress Warehouse Inc., 2021 WL 4206722, at \*9, 2021 BL 351238 (E.D. Pa. Sept. 16, 2021) (relying on *Gordon v. TBC Retail Grp., Inc*. and finding that although plaintiff exceeded her guaranteed pay in only 11.5% of the pay periods, under a fair reading of *Encino Motorcars*, “if an employee exceeds the guarantee in wages more than 10% of the time, that employee has a wage that exceeds the amount of the draw or guarantee more often than seldom”). [↑](#footnote-ref-1076)
1076. 29 U.S.C. §207(i) (emphasis added). [↑](#footnote-ref-1077)
1077. WH Op. FLSA2019-13 (Sept. 10, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019\_09\_10\_13\_FLSA.pdf. [↑](#footnote-ref-1078)
1078. *Id.* at 1. [↑](#footnote-ref-1079)
1079. *Id.* at 2 (citing 29 C.F.R. §779.417(c)). [↑](#footnote-ref-1080)
1080. *Id.* (citations omitted). [↑](#footnote-ref-1081)
1081. *Id.* at 2 (citations omitted). [↑](#footnote-ref-1082)
1082. *Id.* at 3. [↑](#footnote-ref-1083)
1083. *Id.* [↑](#footnote-ref-1084)
1084. 29 C.F.R. §779.417(a). *See* Johnson v. Mattress Warehouse, Inc., 2021 BL 351238, 2021 WL 4206722, at \*7 (E.D. Pa. Sept. 16, 2021) (granting summary judgment to defendant, finding that one-year representative period was appropriate because it was “representative of the compensation aspects of the employee’s employment on which the exemption test depends”). [↑](#footnote-ref-1085)
1085. 29 C.F.R. §779.417(a). [↑](#footnote-ref-1086)
1086. *Id*. §779.417(b). [↑](#footnote-ref-1087)
1087. *Id*. §779.417(c). [↑](#footnote-ref-1088)
1088. 29 C.F.R. §779.417(d). [↑](#footnote-ref-1089)
1089. *Id*. [↑](#footnote-ref-1090)
1090. Viciedo v. New Horizons Computer Learning Ctr. of Columbus, Ltd., 246 F. Supp. 2d 886, 899–900 (S.D. Ohio 2003). [↑](#footnote-ref-1091)
1091. 29 C.F.R. §779.417(d). [↑](#footnote-ref-1092)
1092. FOH §21h02(a). [↑](#footnote-ref-1093)
1093. *Id*. §21h02(b). [↑](#footnote-ref-1094)
1094. 29 C.F.R. §779.418. [↑](#footnote-ref-1095)
1095. *Id*. [↑](#footnote-ref-1096)
1096. WH Op. FLSA2020-10, 2020 WL 3577829(June 25, 2020). [↑](#footnote-ref-1097)
1097. *Id*. at \*2. [↑](#footnote-ref-1098)
1098. WH Op. FLSA-897 (Apr. 16, 1981). [↑](#footnote-ref-1099)
1099. WH. Op. FLSA2020-10, at \*2 (citing WH Op. FLSA-897 (Apr. 16, 1981)). [↑](#footnote-ref-1100)
1100. WH Op. FLSA2020-10, at \*2 (citing WH Op. FLSA2005-53, 2005 WL 3308624, at \* 2 (Nov. 14, 2005)). [↑](#footnote-ref-1101)
1101. *Id.* at \*3. [↑](#footnote-ref-1102)
1102. 29 U.S.C. §207(i). [↑](#footnote-ref-1103)
1103. 29 C.F.R. §779.415(a). [↑](#footnote-ref-1104)
1104. 980 F.3d 1027 (4th Cir. 2020). [↑](#footnote-ref-1105)
1105. 29 U.S.C. §207(i). *See* Stein v. HHGREGG, Inc.,873 F.3d 523 (6th Cir. 2017) (§207(i) does not apply where regular rate of pay is *equal**to* 1.5 times FLSA’s minimum hourly rate; regular rate must be *in excess of* that number); Ealy-Simon v. Liberty Med. Supply, Inc., 2007 WL 1521628, at \*4 (S.D. Fla. May 23, 2007) (explaining that it is federal, rather than state, minimum wage that is used to determine whether regular rate of pay is more than 1.5 times applicable minimum hourly rate). [↑](#footnote-ref-1106)
1106. 29 C.F.R. §779.419(b). The term “regular rate of pay” is further discussed in Chapter 10, Overtime Compensation, §§IV [The “Regular Rate”], V [Special Problems Concerning the Regular Rate], and VI [Exceptions From the Regular Rate Principles]. [↑](#footnote-ref-1107)
1107. 260 F.3d 1251 (11th Cir. 2001). [↑](#footnote-ref-1108)
1108. *Id*. at 1257. *See also*

      *Second Circuit:* Johnson v. Wave Comm GR, LLC, 4 F. Supp. 3d 423, 445 (N.D.N.Y. 2014) (finding that employer failed to satisfy 1.5 times minimum wage requirement of exemption, explaining that plaintiff estimates of average weekly hours worked could not be used by defendants to satisfy their burden because regular rate must be calculated on weekly basis and average hours worked cannot be used); Owopetu v. Nationwide CATV Auditing Servs., Inc., 2011 WL 883703, at \*9–10 (D. Vt. Mar. 11, 2011) (rejecting that rate of pay should be calculated based on aggregate hours worked and aggregate compensation earned, explaining that it must be calculated for each workweek).

      *Sixth Circuit:* Viciedo v. New Horizons Computer Learning Ctr. of Columbus, Ltd., 246 F. Supp. 2d 886, 895–96 (S.D. Ohio 2013) (finding that plaintiffs’ compensation “exceeded one and one-half times the minimum wage based on their total hours worked and total compensation earned would be in derogation of the DOL’s specific finding that the regular rate of pay is to be calculated on the basis of hours worked and compensation earned in a particular workweek”).

      *Seventh Circuit:* Evans v. Distance Learning Sys. Ind., Inc., 2018 WL 63088189 (S.D. Ind. Aug. 15, 2018) (finding that defendant did not routinely keep time records of number of hours plaintiffs worked in any given week; holding that it was impossible to decide on record before court that plaintiffs were in fact paid at least 1.5 times minimum wage for all hours worked).

      *But see* Schwind v. E.W. & Assocs., Inc., 371 F. Supp. 2d 560, 568 (S.D.N.Y. 2005) (because plaintiff was paid solely on commissions and defendants had no records of hours worked by plaintiff, court permitted averaging commissions received by plaintiff in given year and allocating average to each workweek, recognizing   
      “[t]his is necessary because of the fluctuating and irregular schedule in which plaintiff was paid”). [↑](#footnote-ref-1109)
1109. 29 C.F.R.§778.120. [↑](#footnote-ref-1110)
1110. 371 F. Supp. 2d 560 (S.D.N.Y. 2005). [↑](#footnote-ref-1111)
1111. *Id.* at 568 n.6. [↑](#footnote-ref-1112)
1112. *Id.* at 568. [↑](#footnote-ref-1113)
1113. *Id. See also* Clyde v. My Buddy the Plumber Heating & Air, LLC, 2021 BL 72242, 2021 WL 778532 (D. Utah Mar. 1, 2021) (following *Schwind* approach and holding that annual commissions should be averaged and applied to each workweek, acknowledging that there was no controlling precedent on applying §207(i) to deferred commissions). [↑](#footnote-ref-1114)
1114. Pub. L. No. 93-259, sec. 6, §3(d), 88 Stat. 55, 58 (1974). [↑](#footnote-ref-1115)
1115. *Id*., sec. 6, §3(e)(2)(C), 88 Stat. at 59. [↑](#footnote-ref-1116)
1116. 29 C.F.R. §207(n). [↑](#footnote-ref-1117)
1117. 29 C.F.R. §553.32. [↑](#footnote-ref-1118)
1118. FOH §24g00(c). [↑](#footnote-ref-1119)
1119. Pub. L. No. 114-113 (2016). [↑](#footnote-ref-1120)
1120. *See* U.S. Dept’ of Labor, Wage & Hour Div., Fact Sheet #72A: Major Disaster Claims Adjusters Under the Fair Labor Standards Act (FLSA) (Nov. 2019), https://www.dol.gov/agencies/whd/fact-sheets/72a-flsa-major-disaster-claims-adjusters. [↑](#footnote-ref-1121)
1121. *Id*. [↑](#footnote-ref-1122)
1122. 29 U.S.C.§213(d). [↑](#footnote-ref-1123)
1123. *Id*.; *see also* Brannan v. Florida Publ’g Co., 1983 WL 2111, at \*1 (M.D. Fla. 1983) (depositions of plaintiffs established that they delivered newspapers solely to consumers). [↑](#footnote-ref-1124)
1124. WH Op., 1970 WL 26405 (June 4, 1970).distributors, and (2) distribution of the inserts is limited to those regular subscribers or customers to whom deliveries of the newspaper are normally made.#

      The DOL advised that where delivery or distribution of advertising material was to persons other than subscribers or regular customers, the exemption would not apply, as “no [↑](#footnote-ref-1125)
1125. *Id*. [↑](#footnote-ref-1126)
1126. WH Op., 1977 WL 53476 (Mar. 14, 1977). [↑](#footnote-ref-1127)
1127. *Id*. [↑](#footnote-ref-1128)
1128. 29 C.F.R. §570.124. [↑](#footnote-ref-1129)
1129. *Id.*; *see also* WH Op., 1974 WL 38670 (July 10, 1974). [↑](#footnote-ref-1130)
1130. WH Op., 1975 WL 40959 (Apr. 28, 1975). *See also* FOH §23b03(a). [↑](#footnote-ref-1131)
1131. FOH §23b02. [↑](#footnote-ref-1132)
1132. WH Op., 1975 WL 40959. [↑](#footnote-ref-1133)
1133. Pub. L. No. 85-231, 71 Stat. 514 (1957). [↑](#footnote-ref-1134)
1134. S. Rep. No. 85-987 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1756. [↑](#footnote-ref-1135)
1135. 335 U.S. 377 (1948). [↑](#footnote-ref-1136)
1136. *Id.* at 379. [↑](#footnote-ref-1137)
1137. *Id.* at 384–85. [↑](#footnote-ref-1138)
1138. *Id.* at 390. [↑](#footnote-ref-1139)
1139. S. Rep. No. 987, *reprinted in* 1957 U.S.C.C.A.N. 1756–57. [↑](#footnote-ref-1140)
1140. Hawaii Omnibus Act, Pub. L. No. 86-624, §21(b), 74 Stat. 411 (1960). [↑](#footnote-ref-1141)
1141. Pub. L. No. 89-601, §213 (1966); *see also* 29 C.F.R. §776.7(b). Full sovereignty was granted to the Republic of the Marshall Islands in 1986, when the Compact of Free Association with the United States became effective. The Compact provided for aid and U.S. defense of the islands in exchange for continued U.S. military use of the missile testing range at Kwajalein Atoll. Both Eniwetok Atoll (now spelled Enewetok Atoll) and Kwajalein Atoll are part of the Republic of the Marshall Islands. The independence procedure was formally completed under international law in 1990, when the United Nations officially ended the Trusteeship status pursuant to U.N. Security Council Resolution 683. [↑](#footnote-ref-1142)
1142. Panama Canal Act of 1979, Pub. L. No. 96-70, §1225(a), 93 Stat. 452 (1979). [↑](#footnote-ref-1143)
1143. 297 F. Supp. 2d 399 (D. Mass. 2004). [↑](#footnote-ref-1144)
1144. *Id.* at 400. “Pursuant to the Antarctic Program, the National Science Foundation annually deploys approximately 3,500 scientists and support personnel to Antarctica and its surrounding seas to facilitate research in a variety of disciplines, including atmospheric chemistry, biology, and glaciology.” *Id.* [↑](#footnote-ref-1145)
1145. *Id.* at 402 (citations omitted). *See also* Risinger v. SOC, LLC, 936 F. Supp. 2d 1235 (D. Nev. 2013) (dismissing complaint of private security officer who brought suit for unpaid overtime work performed in Iraq on basis of §213(f)). [↑](#footnote-ref-1146)
1146. 932 F.2d 218 (3d Cir. 1991). [↑](#footnote-ref-1147)
1147. *Id.* at 226. [↑](#footnote-ref-1148)
1148. *Id.* at 232. [↑](#footnote-ref-1149)
1149. *Id.* at 231. [↑](#footnote-ref-1150)
1150. 2009 WL 650734 (C.D. Cal. Mar. 11, 2009). [↑](#footnote-ref-1151)
1151. *Id*. at \*8 (citing Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 226 (3d Cir. 1991)). *See also* Kalumon v. Stolt Offshore, Inc., 474 F. Supp. 2d 866 (S.D. Tex. 2007) (denying defendant’s motion for summary judgment, holding that territorial boundaries did not apply to vessels working outside United States in Gulf of Mexico). [↑](#footnote-ref-1152)
1152. 671 F. Supp. 2d 1365 (S.D. Ga. 2009). [↑](#footnote-ref-1153)
1153. *Id*. at 1369. [↑](#footnote-ref-1154)