

Chapter 11

INDIVIDUAL COVERAGE: FLSA

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Table of Contents

11a GENERAL

11a00	Regulations and use of chapter.
11a01	Summary statement of individual coverage.
11a02	Accounting.
11a03	Advertising.
11a04	Advertising display materials.
11a05	Advertising, manufacturers' samples, and telephone directories: distribution of.
11a06	Agricultural limestone.
11a07	Air-conditioning equipment.
11a08	Airline passengers and goods: ground transportation.
11a09	Alarm systems.
11a10	Auction houses.
11a11	Ambulance services.
11a12	Automobile licenses.

11b

11b00	Banks and financial institutions.
11b01	Blueprints and plans.
11b02	Bottled drinks.
11b03	Broadcasting.
11b04	Building maintenance and custodial employees.

11c

11c00	Clerical work.
11c01	Coal strip-mining.
11c02	Collection agencies.
11c03	Communication.
11c04	Concrete drainage pipe production.
11c05	Construction: materialmen.
11c06	Construction: new production facilities.
11c07	Construction: connection of water or sewer pipes.
11c08	Construction: city streets.
11c09	Construction: missile launching sites.
11c10	Construction: out-of-state materials.
11c11	Correspondence schools.
11c12	Cigarette stampers employed by intrastate distributors.

11d DOMESTIC SERVICE EMPLOYEES

- 11d00 Domestic service employees: general.
- 11d01 Private home.
- 11d02 Domestic service employees: babysitting in or about a private home.

11e

- 11e00 Electricity, fuel, gas, power, water, or other energy produced for instrumentalities of interstate commerce.
- 11e01 Electricity, fuel, gas, power, water, or other energy for producers of goods for interstate commerce.
- 11e02 Engineering field employees.
- 11e03 Experiments, surveys, and practice operations.
- 11e04 Employment agencies.

11f

- 11f00 Farming.
- 11f01 Farmers or farm groups: migrant labor camps.
- 11f02 Farm machinery and equipment manufacture and maintenance.
- 11f03 Farm tile.
- 11f04 Feed mills.
- 11f05 Finance companies.
- 11f06 Freight forwarders.

11g (RESERVED)

11h

- 11h00 Highway barrier production.
- 11h01 Horse racing.

11i

- 11i00 Ice companies.
- 11i01 Industrial restaurant and cafeteria employees.
- 11i02 Insecticide, chemical, and fertilizer producers.
- 11i03 Inspection of goods in interstate commerce.
- 11i04 Installation and service employees: individual coverage of employees installing equipment, machinery, or other apparatus distinguished from local activities such as construction.
- 11i05 Installation and service employees: illustrations of coverage.
- 11i06 Insurance: company office employees.
- 11i07 Insurance: adjusters and inspectors.
- 11i08 Insurance: agency or brokerage employees.
- 11i09 Insurance: intercompany organizations.
- 11i10 Insurance: rate-making bureaus.
- 11i11 Insurance: salvage companies.
- 11i12 Instrumentalities of interstate commerce.
- 11i13 Instrumentality or production facility: military bases.

- 11i14 Instrumentality of interstate commerce: Canal Zone.
- 11i15 Intrastate distribution of goods received from outside the state.
- 11i16 Investigating agencies.

11j- k (RESERVED)

11L

- 11L00 Local or collateral activities of an interstate producer.

11m

- 11m00 Machinery and equipment.
- 11m01 Magazine and newspaper wholesale distribution.
- 11m02 Magazine subscriptions.
- 11m03 Meat packing.
- 11m04 Medical care.
- 11m05 Mining, oil and gas wells.
- 11m06 Multi-branch enterprises.
- 11m07 Music service.

11n

- 11n00 Newspapers.
- 11n01 Nonprofit research and educational institutions.

11o

- 11o00 Oil wells.

11p

- 11p00 Personal loan companies.
- 11p01 Petroleum products bulk plants.
- 11p02 Post offices, mobile truck.
- 11p03 Printing establishments.
- 11p04 Printing ink supply establishments.
- 11p05 Processing: effect on interstate commerce.

11q (RESERVED)

11r

- 11r00 Refrigerator equipment servicemen.
- 11r01 Retail and service.

11s

- 11s00 Sand and gravel.
- 11s01 Savings and loan associations.
- 11s02 Shopping analysts.
- 11s03 Sign installation or painting.

CHAPTER 11 TABLE OF CONTENTS

- 11s04 Stock brokerage houses.
- 11s05 Students and instructors repairing planes.

11t

- 11t00 Telephone answering service.
- 11t01 Telephone solicitors.
- 11t02 Telephone and telegraph pole production.
- 11t03 Test pilots.
- 11t04 Theatrical booking agencies.
- 11t05 Theatricals.
- 11t06 Toll road employees.
- 11t07 Trailers.
- 11t08 Trainees.
- 11t09 Transportation.
- 11t10 Transportation terminals.
- 11t11 Travel.
- 11t12 Truck renting companies.

11u (RESERVED)

11v

- 11v00 Vending machines.

11w

- 11w00 Warehousing: controlling principles.
- 11w01 Warehousing: chain store.
- 11w02 Washers, car or bus.
- 11w03 Waste material, scrap metal, and junk.
- 11w04 Watching and guarding.
- 11w05 Wholesaling: general considerations.
- 11w06 Wholesaling: receipt of out-of-state goods.
- 11w07 Wholesaling: where out-of-state goods come to rest.
- 11w08 Wholesaling: prior orders, pre-existent understandings, and anticipation of needs.
- 11w09 Wholesaling: chain store distribution.
- 11w10 Wholesaling: interstate shipment by wholesaler.
- 11w11 Wholesaling: second wholesalers.
- 11w12 Woods and mine crew auxiliary employees.
- 11w13 Wrecking contractor.

11a GENERAL

11a00 Regulations and use of chapter.

- (a) 29 CFR 776, subparts A and B, together with releases issued to the general public, contain the official Wage and Hour (WH), or the Wage and Hour Division (WHD), position regarding coverage under Fair Labor Standards Act (FLSA or Act), which is based on the individual employee's engagement in or production for interstate or foreign commerce or in a closely

related process or occupation directly related to such production. FOH 11 supplements these documents with respect to such individual coverage.

- (b) The examples of specific occupations contained in this chapter are designed to illustrate only the application of individual coverage principles. The possibility of coverage based on the particular employee's employment in an enterprise described in section 3(s) must not be overlooked where individual coverage does not exist.

11a01 Summary statement of individual coverage.

- (a) Individual coverage depends on the nature of the particular employee's work. An employee is covered on an individual basis in each workweek in which he or she performs any work constituting engagement in interstate or foreign commerce, or the production of goods for interstate or foreign commerce, including any closely related process or occupation directly essential to such production. As a practical matter, WH does not assert individual coverage over an employee who is ordinarily engaged in employment which is not so covered but who may on isolated occasions spend an insubstantial amount of time performing individually covered work. However, this rule is not applicable in any workweek in which an employee spends a substantial amount of time doing individually covered work. If, in viewing the employment over a more extended period, it is apparent that the pattern of individual coverage is regular and recurrent, the employee involved is so covered in each workweek in which he does such work, regardless of whether the amount of time spent in this work is substantial or insubstantial. In situations where an employer, for compliance purposes, seeks to segregate individual coverage from other employment, the employer must be prepared to demonstrate the basis of this segregation from his or her records.
- (b) It is not possible to establish precise guidelines to be followed in determining whether an employee who is not otherwise covered on an individual basis spends an insubstantial amount of time on isolated occasions in the performance of individually covered work. In view of the remedial purposes of the Act, the application of this rule is limited to circumstances where the time consumed by an employee in doing such covered work is obviously trivial, and the incidence of this covered work is so infrequent and out-of-pattern that it would be unrealistic to assert individual coverage solely on such grounds. This must be decided on the facts in a particular case.

11a02 Accounting.

- (a) Accounting service rendered for, or on behalf of instrumentalities of interstate commerce, or organizations which are engaged in interstate commerce, is so closely related to that commerce as to be a part thereof.
- (b) The preparation of reports for direct or indirect interstate transmission is also individually covered.
- (c) Accounting service rendered exclusively within the state for an interstate producer is a closely related process or occupation directly essential to the production of goods by the interstate producer.

11a03 Advertising.

Employees engaged in making local surveys in accordance with a questionnaire prepared by an advertising agency, which information is transmitted to other states in the form of publications, pamphlets, or other written material, are actually producing goods for interstate commerce. Even where the information or material prepared merely serves as a basis for other printed matter which is shipped directly or indirectly out of the state, the employees preparing the information or material are engaged in a process or occupation closely related and directly essential to the production of the goods for interstate commerce.

11a04 Advertising display materials.

Where advertising display materials are shipped across state lines, all employees who in any manner work on such goods are engaged in interstate commerce. Individual coverage thus extends to those employees who order, receive, handle, or unpack the materials which come from outside the state, to employees who transport the display materials across state lines, and to employees whose movements across state lines are regular and recurring and are made in the performance of their duties. In addition, display materials received from out of state sources and earmarked for particular sites remain in interstate commerce until final installation is effected; and, the employees installing such material (for example, window trimmers and billboard posters) are individually covered. This is not temporary storage until the site of installation is ready for the display to be installed, since the interstate movement of the display materials is not terminated by such storage.

11a05 Advertising, manufacturers' samples, and telephone directories: distribution of.

- (a) Employees of an agency engaged in the intrastate distribution of out-of-state advertising, manufacturers' samples, and telephone directories by hand to local individuals and businesses may be subject to the FLSA as engaged in interstate commerce. Where the items distributed are received from out-of-state sources, they remain in the stream of interstate commerce until they reach the destination intended for them by the importer. Thus, they remain in interstate commerce while they are being distributed from door to door. With respect to telephone books, for example, there is a pre-existing contract or understanding with the subscribers for their delivery. The door-to-door delivery is not any more of an interruption in the interstate journey than the drop-shipment delivery to a customer of out-of-state goods by any local transportation company. The distributing companies are merely agents for their principals, their only function being to make deliveries of the advertising matter, manufacturers' samples, or telephone directories in accordance with previous understandings or instructions.
- (b) Employees engaged in the collection and shipment of old telephone directories across state lines are engaged in interstate commerce and in the production of goods for interstate commerce.

11a06 Agricultural limestone.

Individual coverage shall not be asserted for employees engaged in the intrastate production and distribution of agricultural limestone, which like fertilizer is used in raising agricultural products for shipment in interstate commerce. *See* 29 CFR 776.19(b)(4).

11a07 Air-conditioning equipment.

- (a) Employees engaged in the sale, installation, and servicing of air-conditioning systems in establishments engaged in the production of goods for interstate commerce are engaged in

activities which are both closely related and directly essential to production of the goods, since these activities are directed to the improvement of the facilities of production. This is true whether the work in connection with air-conditioning is performed in the manufacturing portion of the factory or in the administrative offices of the factory or building in which the goods are produced.

- (b) Individual coverage shall not be asserted, however, on the basis of the intrastate sale of window or room type cooling equipment merely because it is sold to producers of goods for interstate commerce.

11a08 Airline passengers and goods: ground transportation.

Employees engaged in transporting passengers and freight to and from an airport in connection with interstate trips are engaged in interstate commerce, although all the operations of the transit service may be wholly within the borders of the state.

11a09 Alarm systems.

- (a) The installation, servicing and repair of burglar or fire alarm systems in establishments engaged in the production of goods for commerce, and the receipt and relay of alarms from such establishments, are activities closely related and directly essential to the production of goods for interstate commerce. Individual coverage on these grounds also exists for maintenance, custodial, clerical and all other employees of an alarm service whose work is a part their employer's integrated effort to meet the needs of production establishments for protection of the establishment and finished or unfinished goods.
- (b) Employees who install or service alarms in warehouse buildings, freight and passenger terminals, radio and telegraph stations, and telephone exchanges are performing work so closely related to the interstate commerce flowing through such facilities as to be regarded as engaged in interstate commerce.

11a10 Auction houses.

- (a) Employees of auction houses may be subject to the FLSA, *i.e.*, engaged in interstate commerce or in the production of goods for interstate commerce, or both. Auctioneers and catalogue and appraisal clerks who are regularly engaged in traveling across state lines in the performance of their duties are engaged in interstate commerce.
- (b) Clerical employees, whose work involves the continued use of the interstate mails or telephone or telegraph for communication across state lines are likewise engaged in interstate commerce. On the other hand, employees who merely receive goods delivered by local prospective vender-customers of the auction house, and shipping employees who merely prepare and release items purchased by a local high bidder are not engaged in interstate commerce, assuming that none of the goods when received are still in interstate commerce and that they are not to be shipped out of the state.
- (c) Auctioneers, callers, catalogue, deposit, and appraisal clerks, who are engaged in preparation and sale of industrial machinery and equipment for use by producers of goods for interstate commerce, are engaged in closely related processes or occupations directly essential to the production of the goods. In addition, all the employees of the auction house, including maintenance, custodial, and clerical employees, whose work is part of the employer's

integrated effort to supply the needs of producers of goods for interstate commerce with such industrial machinery and equipment, are subject to the FLSA for the same reason.

11a11 **Ambulance services.**

- (a) Ambulance drivers and attendants who transport persons on part of an interstate trip (as to or from an airport or railway terminal) or who travel across state lines in performing ambulance services are engaged in covered activities.

- (b) Ambulance crews engaged in making intrastate trips to pick up dead or injured victims of motor vehicle accidents from the scenes of such accidents on city streets, county roads or state or federal highways are also engaged in individually covered activities. It is well established that vehicle accidents which interfere with the interstate movement of goods and persons on the highways require prompt action to remove the stopped and disabled vehicles which constitute a costly and dangerous impediment to the free movement of such commerce. The vehicles blocking the traffic cannot in most instances be permitted to be moved from their post-accident positions on the roadway until such persons as may have been injured or killed in the accident have been attended to. Ordinarily, this requires ambulance service whenever a highway accident involves deaths or personal injuries of a serious nature. To appreciate the serious effect on traffic of any delay in the arrival of ambulances and removal of damaged vehicles by tow trucks in such cases, it is only necessary to listen to the aerial police reports on traffic during the rush hours in any sizable city. Detours, delay, and congestion of traffic on any interstate route in which one or more lanes become blocked by such accidents are the rule until the vehicles are removed, which police ordinarily do not permit pending necessary attention to any victims of the accident. Such ambulance service is not isolated local activity, but rather so closely related to the movement of commerce and the functioning of its instrumentalities as to be a part thereof. *See* FOH 24c08 and 29 CFR 779.369(e).

11a12 **Automobile licenses.**

Automobile license bureaus or tag agencies may be operated as a separate business by private employers under contract with the state, or in conjunction with some other business, such as insurance or accounting. Employees of such establishments who handle applications for automotive licenses and deliver such licenses to users, collecting the authorized fees therefor, are individually covered by the Act. The relationship of the employee's work to interstate commerce stems from the fact that registrations and registration plates are issued to provide identification of the vehicle in controlling the flow of traffic and the movement of persons and goods over the highways which carry interstate traffic, and that the revenues from such sources are customarily used to build and maintain these arteries of commerce.

11b

11b00 **Banks and financial institutions.**

- (a) Employees of banks and financial institutions, including mutual savings banks and savings and loan associations, may be subject to the FLSA as either engaged in interstate commerce or in the production of goods for interstate commerce, or both. Employees engaged in the interstate transmittal, directly or indirectly, of money, drafts, travelers' checks, and letters of credit, the making of loans to persons residing in other states, and the taking as security for loans property located in other states are actually engaged in interstate commerce.

- (b) Employees who engage in the preparation, execution, and liquidation of bonds, shares of stock, commercial paper, bills of lading, and the like are producing goods, even though the activity may be no more than registering one of a series of bonds. Where such instruments are transmitted directly or indirectly out of the state, the employees so engaged are engaged in the production of goods for interstate commerce.
- (c) Those whose clerical activities directly relate to the preparation, execution, and validation of the instruments mentioned above, and those who prepare letters, documents, pamphlets, papers, and other records pertaining to the interstate activity of the institution are subject to the FLSA because they are producing goods for interstate commerce. They may also be individually covered because their activities are so closely related to the interstate movement of the instruments as to be regarded as interstate commerce. They also are engaged in processes or occupations closely related and directly essential to the production of goods for interstate commerce by other employees of the bank.
- (d) Watchmen, maintenance and custodial employees, and guards may be subject to the FLSA for the same reasons as clerical employees.
- (e) However, individual coverage shall not be asserted for bank employees who operate an adjacent parking lot for the convenience of bank customers. They cannot be said to be either engaged in activities closely related to the movement of the interstate commerce, nor are they engaged in processes or occupations closely related and directly essential to the production of goods for interstate commerce by other employees of the bank.
- (f) Employees regulating and operating the space devoted to a drive-in bank are engaged in work closely related and directly essential to the bank's production for interstate commerce.

11b01 Blueprints and plans.

Employees engaged in the preparation of blueprints, sketches, plans, and the like, are covered on an individual basis if, the blueprints, etc., move either directly or indirectly in interstate commerce. The preparation of the blueprints, etc., constitutes production of goods for interstate commerce.

11b02 Bottled drinks.

- (a) Employees of a bottler of drinks engaged in the ordering, buying, and receiving of barrels and bottles from out-of-state sources, or re-shipping or returning them after their contents have been removed, are engaged in interstate commerce. The fact that the bottled drink is produced for intrastate commerce and intrastate consumption only is not material.
- (b) Employees engaged in operations connected with the making ready of barrels and bottles for the return interstate transit after their contents have been removed are also individually covered.
- (c) Whether the employees of an intrastate wholesale distributor of bottled drinks are covered on an individual basis depends upon the application of the principles of the *Jacksonville Paper* case. See FOH 11w08.

- (d) Employees engaged in collecting, loading, returning, and unloading empty bottles for return to a local bottler for refilling purposes are individually covered if their employer believes, or has reason to believe, that the bottles will enter interstate commerce after being refilled.

11b03 Broadcasting.

Employees of a radio or TV station which broadcasts news, advertising copy, and other program material received from outside the state are engaged in interstate commerce. This is so even though all the station's listeners and advertisers are located within the state.

11b04 Building maintenance and custodial employees.

- (a) Individual coverage of building maintenance and custodial employees (boiler firemen, building engineers, electricians, painters, janitors, elevator operators, and the like), is to be determined in accordance with the principles stated in (b) through (d) below.
- (b) A maintenance or custodial employee serving the building or any part of it is individually covered if he or she is regularly and recurrently engaged in such activities as ordering or receiving goods from outside the state, handling or otherwise producing goods for shipment to other states, keeping records relative to interstate transactions, or using the telephone or the mails for interstate communication. Individual coverage on this basis may arise from a variety of activities. For example, a building switchboard operator would be individually covered if he or she regularly and recurrently handles interstate telephone calls for tenants. Likewise, a porter or elevator operator who regularly and recurrently handles interstate freight and packages for tenants would be individually covered. Moreover, an elevator operator is individually covered if letter carriers and parcel post conveyers regularly and recurrently ride the elevator he or she operates to make deliveries of letters and parcels which have moved in interstate commerce.
- (c) A building maintenance or custodial employee will be considered to be individually covered if as a regular and recurring part of their duties they serve those portions of the building occupied by a tenant engaged in that location in interstate commerce or the production of goods for interstate commerce. Such an employee will be individually covered, as if he or she were employed by the tenant himself to perform the covered work. For example, a janitor would be covered if as a part of their duties they regularly and recurrently clean those portions of the building occupied by an interstate insurance firm or a bank (thereby being engaged in the insurance firm's or bank's production of goods for interstate commerce). Likewise, a janitor would be covered if as a part of their duties they regularly and recurrently clean those portions of a building occupied by a radio or TV station engaged in interstate communications. In applying these principles to any employee the element of substantiality must be taken into consideration. For example, a janitor would not be considered covered solely on the basis of taking a few minutes each day to empty waste baskets in an "interstate" insurance office, or because, on occasion, called upon outside their regular duties to perform some incidental cleaning task in a bank. Nor would the performance of maintenance or custodial services in those portions of the building occupied by an essentially local business provide a basis of coverage, if the same work would not provide a basis of coverage for a worker employed by such a tenant. Cases where coverage is questionable will be submitted through channels to the regional solicitor (RSOL) for opinion, including all cases where compliance depends on the application of these principles to custodial employees who clean only the halls and corridors outside the portions of the building occupied by "interstate"

tenants, or building engineers whose duties relate to the building in general (heating, air-conditioning, etc.).

- (d) Without regard to any other basis of coverage, maintenance and custodial employees are covered on an individual basis if the building for which they perform these functions is devoted to interstate commerce or to the production of goods for interstate commerce to such a substantial extent that there may be said to be a “close and immediate tie” between the activities of such employees and the interstate commerce or production involved. On this basis the Act has been held to cover all building maintenance and custodial employees in loft buildings where goods are physically produced for interstate commerce, in headquarters buildings of companies engaged elsewhere in producing goods for interstate commerce, in buildings substantially devoted to interstate operations of insurance companies or government agencies, and in multi-tenant office or other buildings in which occupants engaged in actual production of goods for commerce on the premises utilize a substantial portion of the rentable areas for their operations. Building maintenance and custodial employees are not individually covered by the Act solely by reason of the fact that they service buildings operated as a local activity not dedicated in any way to interstate commerce or to the production of goods for such commerce, which are held out for tenancy by and are in fact tenanted by the “usual miscellany” of offices, in which no manufacturing is carried on. In determining whether or not the building as a whole is so maintained and operated as to have a “close and immediate tie” to interstate commerce or the production of goods for interstate commerce, it is not possible to establish precise mathematical formulas based either on the percentage of rentable space occupied by specific types of tenants or the extent of commerce or production conducted on the premises. It is necessary to look at the building as a whole and at the business operations conducted on the premises by its tenants. Where compliance depends upon such a determination, the following procedure shall be followed:
- (1) If at least half of the rentable area of the building is occupied by tenants substantially engaged on the premises in interstate commerce or the production of goods for interstate commerce, the building as a whole shall be considered as maintained and operated as an instrumentality of interstate commerce or an interstate production facility (*i.e.*, there is the “close and immediate tie”) and *all* maintenance and custodial employees shall be considered to be individually covered. (This would clearly apply, for example, where at least half of the rentable area is occupied by such tenants as an interstate insurance company or a bank, or some combination of such tenants.)
 - (2) If less than half of the rentable area is occupied by such tenants, the facts shall be obtained and the matter shall be referred through channels to the RSOL for opinion. In developing the necessary information, the approximate rentable area of the building, the types of tenants, and the business operations conducted by the tenants with particular reference to whether or not the Wage and Hour Investigator (WHI) considers them to fall into the “interstate” or the “usual miscellany” category shall be included. This information can be shown by chart or in any appropriate manner with such explanations as are required. For example, the percentage of rentable area occupied by “interstate” tenants such as banks, insurance firms, federal agencies, manufacturers, and radio and TV stations can be shown in one column; the percentage of rentable area occupied by the “usual miscellany” of local tenants such as lawyers, doctors, and real estate agents in another column.
- (e) The principles stated above do not apply to building maintenance and custodial employees employed by a shopping center which is composed of individual buildings contiguously

located for convenience, having only party walls as a common ground between tenants. However, such employees may otherwise be individually covered.

- (f) In some cases, employees may be engaged to perform only activities such as cleaning, waxing, and buffing floors, as opposed to general janitorial services work. For purposes of individual coverage, such employees are held in the same light as employees performing general janitorial service work notwithstanding that their work contributes to the operations of the customers' buildings only from an aesthetic point of view and that the finish on the floor has little preservative effect and does not add significantly to the wearability of the floor. Thus, such employees are considered to be individually covered in any workweek in which they perform such duties in truck terminals, banks, factories producing goods for commerce, etc. The activities of these employees are distinguished from the activities of window washers, landscapers, or exterminators. *See* 29 CFR 776.19(b)(5).

11c

11c00 Clerical work.

- (a) Office and clerical employees who are engaged in the sending and receiving of out-of-state remittances, letters, bills, contracts, etc., or whose work involves the regular and recurrent use of the interstate mails, telephone, telegraph, and similar agencies for communication across state lines, are engaged in interstate commerce. Recordkeeping activities, incident to the sending and receiving of such subjects of interstate commerce, performed by office and clerical employees are so closely related to the interstate movement that the recordkeeping employees too are regarded as engaged in interstate commerce.
- (b) Office and clerical employees whose work is performed in connection with the production of goods or any part or ingredient thereof for interstate commerce are subject to the FLSA as engaged in the production of goods for interstate commerce. Those who not only transmit, but also prepare letters, bills, contracts, and other papers which are sent out of the state, are actually engaged in the production of goods for interstate commerce.

11c01 Coal strip-mining.

The replacement of soil performed in connection with the strip-mining of coal, which coal moves in interstate commerce, is not a process or occupation directly essential to the production of the coal. Employees engaged only in such activities are therefore not covered on an individual basis.

11c02 Collection agencies.

Employees of collection agencies or collection departments of credit bureaus engaged in the collection and remittance of funds and negotiable instruments for transmittal across state lines are engaged in interstate commerce, as are employees engaged in the preparation of financial reports, statements, correspondence, or other written material for transmittal across state lines.

11c03 Communication.

- (a) Employees who are engaged in communicating messages, information, and reports to points outside the state or in receiving such matter directly from other states, are engaged in

interstate commerce. The employees included are of two classes, namely those who operate the instrumentalities by which the interstate communication is effected (telephone, telegraph, and radio operations), and those who regularly and consistently make use of such facilities for the interstate sending or receiving of messages pertaining to their employer's business.

- (b) Employees such as news-gatherers, reporters, and clerical employees are engaged in activities closely related and directly essential to the production of the news, etc., being transmitted.

11c04 Concrete drainage pipe production.

Employees engaged in the production of concrete drainage pipe for use or consumption in the maintenance, repair, or reconstruction of highways, over which interstate commerce regularly travels, are covered on an individual basis.

11c05 Construction: materialmen.

29 CFR 776.21(b)(2) and (3), and 29 CFR 776.27(d), contain the official WH position regarding individual coverage of employees of producers of concrete ready-mixed and other materialmen.

11c06 Construction: new production facilities.

- (a) Under 29 CFR 776.26 and .27, the construction of a new factory building or other production facility designed as a replacement, enlargement, extension, or improvement of an existing covered production facility will be individually covered. 29 CFR 776.26 points out that “[c]overage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is ‘new construction’ nor the fact that it is physically separated from an existing covered plant, is determinative.” Thus the fact that the new plant is located at a considerable distance from the existing facility will not preclude individual coverage. If such coverage is present, certain preparatory operations would likewise be covered under the principles set forth in 29 CFR 776.28(a)(3).
- (b) The following examples, *while not intended to be restrictive in any way*, are illustrative of some types of construction over which individual coverage has been asserted under the position set forth in FOH 11c06(a) above:
 - (1) The construction of a new building in an adjacent town to expand the operations of an existing plant which will continue to produce goods for commerce.
 - (2) The construction of a suburban drive-in branch for an existing downtown bank. Also, the construction of a building for an existing bank to serve as a replacement of the bank notwithstanding that the predominant use of the new structure may be devoted to uses other than banking.
 - (3) The construction of a new factory at a new location to replace the existing plant of a firm manufacturing goods for commerce although the new factory is at a substantial distance from the manufacturer's present plant.
 - (4) The construction of a new factory outside of the city limits designed specifically for the purpose of housing a garment factory now operating in the same town, in rented

quarters. The building is being financed by local subscription under a state program of inducing new industries to move into or remain in the state. The building when constructed will be leased to the manufacturer.

- (c) If the WHI can make a clear determination that the construction is individually covered because it falls within any of the four examples described in FOH 11c06(b) above, the investigation may proceed. If not, the following facts should be developed and the case referred to the RSOL:
- (1) Is the new plant to be coordinated in any way with production at the existing plant, and if so, how (*i.e.*, will it be used to produce the complete ultimate product, or will it be used for partial processing or assembling of products begun, finished, or otherwise processed at an existing plant)?
 - (2) Does the new plant include features (in design, materials or equipment, or otherwise) specifically adapted to the particular kind of production?
 - (3) Will there be any transfer of employees or equipment from the existing plant to the new plant, or will there be any interchange of employees between the existing and the new plant?
 - (4) Will there be joint management and operation of the new and the existing plant, giving any available information on plans for a joint or segregated management and operation?
 - (5) Will production start at the new plant before completion of the construction, and if so, when and to what extent; or how soon after completion is production at the new plant to start?
 - (6) Is the new plant being constructed to produce products for an entirely new set of customers, or is it to meet the needs of the present source of customers because their current or imminent needs have expanded beyond the capacity of the existing plant?
 - (7) Are there outstanding any specific orders or contracts which the new plant will be used to fill?

11c07 Construction: connection of water or sewer pipe.

Activities such as excavating, backfilling, and resurfacing of interstate streets and highways are not considered individually covered where the only purpose of this construction work is to connect water or sewer pipes leading from private dwellings or other nonproduction facilities with a main line.

11c08 Construction: city streets.

- (a) 29 CFR 776.29(f)(3) states in part as follows: “[t]he construction, reconstruction or repair of a city street, whether residential or not, which is part of an interstate highway or which directly connects with any interstate highway is so closely related to the interstate commerce moving on the existing highway as to be a part of it.” Therefore, employees performing activities in connection with such construction are individually covered. The term “directly

connected” would apply in all situations where the streets, city or otherwise, are constructed as a part of a network of interstate use or travel.

- (b) 29 CFR 776.29(f)(3) further states, “[c]onstruction of other streets, which are not a part of a public road building program and are constructed on private property as a part of a new residential development, will not be considered covered until further clarification from the courts.” This statement refers exclusively to the construction of such streets. However, the repair of them is individually covered work if the streets are being regularly used and are open to interstate commerce even though there has not yet been state acceptance or dedication.

11c09 **Construction: missile launching sites.**

The construction of ballistic missile launching sites, sometimes referred to as “complexes” or pads, constitutes an improvement or extension of existing facilities of interstate commerce and is thus individually covered.

11c10 **Construction: out-of-state materials.**

Construction materials received from outside the state are deemed to come to rest when delivered to the construction site and commerce shall not be considered as continuing during the actual construction process even though, as is sometimes the case, particular materials may be so designed or formed that their place in the finished structure is designated at the time of delivery. Thus, for example, employees engaged in installing porcelain enamel paneling (such as is used on gasoline service stations or store fronts) or in erecting prefabricated houses or other structures are not thereby individually covered where the sole basis for such coverage would be that the materials have been shipped from out-of-state. Of course, employees engaged at the construction site in receiving materials which are still moving interstate commerce would be individually covered under the Act. *See* FOH 11i04 and 05.

11c11 **Correspondence schools.**

Employees engaged in the collection of information which is transmitted to other states in the form of publications, pamphlets, or any other written materials are subject to the FLSA because they are producing goods for interstate commerce. Those disseminating information or receiving material from out of the state are engaged in interstate commerce.

11c12 **Cigarette stampers employed by intrastate distributors.**

Whether cigarette stampers employed by intrastate distributors are covered on an individual basis depends upon whether they are still in the channels of commerce. It has been determined that goods come to rest when they are placed in storage in the warehouse pending the affixing of stamps. However, the goods could not be said to have come to rest if they had been purchased and stored in the warehouse pursuant to prior orders or in anticipation of filling specific orders of specific customers.

11d **DOMESTIC SERVICE EMPLOYEES**

11d00 **Domestic service employees: general.**

- (a) Domestic service employees are covered under the FLSA because “employment of persons in domestic service in households affects commerce.” *See* 29 USC 202(a) and 29 CFR 552.99.
- (b) Domestic service employment means services of a household nature performed by an employee in or about a private home (permanent or temporary). *See* 29 CFR 552.3. Domestic service employees may include, but are not limited to, the following occupations:
- companions
 - babysitters
 - cooks
 - waiters
 - butlers
 - valets
 - maids
 - housekeepers
 - nannies
 - nurses
 - janitors
 - laundresses
 - caretakers
 - handymen
 - gardeners
 - home health aides
 - personal care aides
 - chauffeurs of automobiles for family use

Scenario:

Maids, housekeepers, and cleaning personnel employed by businesses furnishing cleaning services to residential customers may be considered domestic service employees since such employees provide services of a household nature in or about a private home. The fact that these workers may not be employed by the owner of the home they are sent to clean does not change the fact that they are providing services of a household nature in or about a private home. Also, the fact that the employer may be a small home cleaning company that is not a

covered enterprise under the FLSA does not change the coverage for these workers, since they have a basis for coverage under section 202(a) of the act. The relevant factors to consider are that the employees' duties are "of a household nature" and that such duties are performed "in or about the private home." Therefore, if maids, housekeepers, and cleaning personnel employed by businesses furnishing cleaning services to residential customers meet either criteria in FOH 11d00(c)(1) or (2), the FLSA's minimum wage, overtime, and recordkeeping requirements would apply.

- (c) Domestic service employees are entitled to minimum wage protections under the FLSA if:
- (1) their cash wages from one employer in calendar year 2016 are at least \$2,000.00 (the calendar year threshold is adjusted by the Social Security Administration each year) (2015: \$1,900.00) (2014: \$1,900.00) (2013: \$1,800.00) (<http://www.ssa.gov/OACT/COLA/CovThresh.html>), or
 - (2) they work a total of more than 8 hours in a workweek in one or more households.
- See 29 USC 206(f) and 29 CFR 552.2(b).*
- (d) Domestic service employees are entitled to overtime protections under the FLSA if they work more than 40 hours in a workweek. *See 29 USC 207(l) and 29 CFR 552.2(b).*

[01/13/2017]

11d01 **Private home.**

- (a) In order to qualify as a domestic service employee, the employee's duties must be of a "household nature" (*see* FOH 11d00(b)) and the work must be performed in or about a "private home."
- (b) A private home may be a fixed place of abode or a temporary dwelling; a separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium, or hotel may constitute a private home. *See 29 CFR 552.3 and 29 CFR 552.101(a).* However, dwelling places that are primarily rooming or boarding houses are not private homes; rather, they are commercial or business establishments. *See 29 CFR 552.101(b).* Furthermore, the fact that the home is the sole residence of the individual is not necessarily enough to make it a private home under the FLSA.

WHD Opinion Letter FLSA 2006-13NA and WHD Non-Administrator Opinion Letter FLSA (May 14, 2001)

- (c) A determination of whether domestic services are provided in a private home is fact-specific and is to be made on a case-by-case basis. Six factors to consider, determined by the court in *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004), are:
- (1) Whether the client lived in the living unit before he or she received any services:
 - a. If so, the residence is likely a private home
 - b. If not, and if the client would not live in the home if he or she were not receiving services, then it would likely not be considered a private home

- (2) Who owns or rents the living unit:
 - a. If the unit is owned or leased by the client or the client's family, this is an indication that the services are performed in a private home
 - b. If the service provider owns or leases the unit, this is a strong indication that it is not a private home
- (3) Who manages and maintains the residence (*i.e.*, who provides the essentials that the client needs to live there, such as paying the mortgage or rent, utilities, food, and house wares):
 - a. If the essentials of daily living are provided for by the client or the client's family, this is an indication that the residence is a private home
 - b. If many of the essentials of daily living are provided for by the service provider, this is an indication that the residence is not a private home
- (4) Whether the client would be allowed to live in the unit if the client were not receiving services from the service provider:
 - a. If yes, this weighs in favor of the residence being a private home
 - b. If no, this weighs in favor of it not being a private home
- (5) The relative difference in the cost/value of the services provided and the total cost of maintaining the living unit:
 - a. If the cost/value of the services is incidental to the other living expenses, this weighs in favor of the residence being a private home
 - b. If the cost/value of the services is a substantial portion of the total cost of maintaining the living unit, this weighs in favor of it not being a private home
- (6) Whether the service provider uses any part of the residence for the provider's own business purposes:
 - a. If the service provider does not use any part of the residence for its own business purpose, this weighs in favor of it being a private home
 - b. If the service provider uses any part of the residence for its own business purpose (*e.g.*, an office in the home for employees), this weighs in favor of it not being a private home

Additional factors to consider are: whether significant public funding is involved, who determines who lives together in the homes, whether residents live together for treatment purposes as part of an overall care program, the number of residents, whether the clients can come and go freely, whether the employer or the client acquires the furniture, and who has keys and access to the home.

WHD Opinion Letter FLSA 2006-13NA (June 23, 2006)

Scenario 1:

Adult homes (*i.e.*, assisted living facilities) designed for individuals who are in need of assistance with day-to-day functions, such as meal preparation, housekeeping, and taking medications, are not private homes. *See* WHD Opinion Letter FLSA 2001-14.

Scenario 2:

Employees providing supported living services to individuals with disabilities may not be performing work in a private home when the private agency obtains the housing, houses several clients together, pays the rent, etc., and provides the assisted living services to the clients. *See* WHD Opinion Letter FLSA (June 18, 1999).

Scenario 3:

WHD concluded that supported living services provided to consumers were performed in a private home, because neither the public agency nor the private agency that provides the services determines where a client will live or with whom. Rather, the client or the client's guardian makes these decisions, and they are responsible for leasing the residence, paying the rent, and furnishing the residence. Also, the client typically lives alone or with only one roommate, and the private agency has no financial interest in the client's housing as does not own or lease any of the housing. *See* WHD Opinion Letter FLSA (April 8, 1999).

[01/13/2017]

11d02 Domestic service employees: babysitters in or about a private home.

Nannies and many other babysitters who provide services in the private homes of the families by whom they are employed are entitled to the act's minimum wage and overtime provisions; a limited exemption for casual babysitters is described in FOH 25k. Persons who care for children in their own homes, however, are not employed in domestic service. *See* FOH 12g03 and FOH 12g16 regarding possible employment in a day-care center.

[01/13/2017]

11e

11e00 Electricity, fuel, gas, power, water, or other energy produced for instrumentalities of interstate commerce.

- (a) Employees engaged in the production and delivery of electricity, fuel, gas, power, water, or other energy for use and consumption by instrumentalities of interstate commerce to aid the movement of the commerce carried on by the instrumentalities are individually covered. This is so even though the production, sale, distribution, and consumption is wholly intrastate.
- (b) Employees engaged in the production of energy to operate the movable facilities of interstate commerce, such as interstate trucks or railroad rolling stock; or to propel oil through an interstate pipeline; or to send telephone, telegraph, and radio impulses across state lines; are individually covered. They are similarly covered by the FLSA where the energy operates the channels of interstate commerce, such as a drawbridge which carries an interstate highway, the signal equipment of a railroad along its road-bed, or the beacon lights at an airport. The

same is true when the energy is used to operate fixed facilities of interstate commerce, such as freight and passenger terminals, pipeline and electric transmission power stations, telephone exchanges, and radio and telegraph stations.

11e01 Electricity, fuel, gas, power, water, or other energy for producers of goods for interstate commerce.

- (a) Employees engaged in the production or supply of electricity, fuel, gas, power, water, or other energy for use or consumption in the production of goods for interstate commerce are engaged in processes or occupations closely related and directly essential to the production of the goods.
- (b) Where the energy is used not as power, but merely to heat a building which houses establishments producing goods for interstate commerce the employees are not individually covered by the FLSA. It should be noted, however, that where the maintenance of temperature control within the building is required by special circumstance of production, then the use of the energy is directly essential to the production.
- (c) In establishments whose employees are subject to the FLSA for the reasons set forth above, all the employees (maintenance, custodial, and clerical, as well as operational personnel) of the energy-producing employer whose work is part of his integrated effort to meet the power or heating needs of producers of goods for interstate commerce are individually covered by the FLSA.
- (d) Employees engaged in the production or supply of water to farmers within the same state to irrigate their crops or for other use in production of agricultural goods for out-of-state shipment are individually covered.

11e02 Engineering field employees.

Field employees of an engineering company operating solely on an intrastate basis are engaged in the production of goods for interstate commerce in any workweek in which, at the time they perform surveys, it can be reasonably anticipated that the information secured as a result of the survey will leave the state in the form of plans or other documents.

11e03 Experiments, surveys, and practice operations.

- (a) Employees engaged in activities such as research, experiments, surveys, and practice operations, which are performed in contemplation of, and for the purpose of facilitating, expediting, or improving, the production of goods for interstate commerce, are engaged in processes or occupations which are closely related and directly essential to the production of goods for interstate commerce. This is so, even though it is contemplated that production shall be undertaken only if the experiments or explorations shall prove successful.
- (b) Employees engaged in research, experiments, surveys, practice operations, and like activities are also subject to the FLSA, in that their activities are in closely related processes or occupations directly essential to the production of goods for interstate commerce where the reports, tables, and maps which incorporate the information obtained from such activities are intended to be shipped in interstate commerce.

11e04 Employment agencies.

- (a) Where an employment agency regularly performs placement services out-of-state or has a recruiting affiliation with other such employment agencies, various resumes, reports, or other employment data are sent across state lines. Those employees using the mails and other means of interstate communication are engaged in commerce.
- (b) If an employment agency merely screens and refers applicants to the usual miscellany of local customers, some of whom are engaged in the production of goods for commerce, the employees who handle the producers' accounts are not engaged in an occupation closely related and directly essential to the production of goods for commerce and thus are not individually covered by the FLSA.
- (c) However, if any employment agency engages in recruitment or renders specialized services for producers of goods for commerce, and thus acts as a substitute for the employment or personnel office of the producer, employees whose work is clearly connected with a particular employer or industry or whose activities are specifically directed to meet the special personnel needs of producers are individually covered as engaged in an occupation closely related and directly essential to the production of goods for commerce. In determining whether the activities of an employment agency are closer to the substitute function than to the typical agency FOH 11e04(b) above, the following factors should be considered:
 - (1) Who pays the agency fees?
 - (2) Is there a continuing contractual relationship between the employer and the agency?
 - (3) Is it a large scale recruitment program for particular producers?
 - (4) Does the agency actually take part in the selection of employees or does it merely refer an applicant to possible employers?
 - (5) Does the agency check references?
 - (6) Does the producer of goods also advertise and solicit help directly or does he depend primarily on the agency for his employment supply?
 - (7) Are the efforts of the agency directed primarily to servicing the job applicant or the employer?

Where a determination cannot be made based upon the factors noted above, the matter should be referred through channels to the RSOL for an opinion.

11f

11f00 **Farming.**

Employees engaged in farming, the production, cultivation, and harvest of vegetables, livestock, cotton, or dairy products for shipment in interstate commerce are engaged in production for such commerce.

11f01 **Farmers or farm groups: migrant labor camps.**

Farmers and certain farm groups (such as cooperatives or associations of various types) operate or contract for the operation of camp facilities where migrant farm laborers are housed or fed, or both, while working on growers' farms in the area. If the growers' farm commodities are produced for interstate commerce, the employees engaged in the maintenance and operation of the migrant camps may be performing work which is closely related and directly essential to such production. The facts are very important to such a determination, however. Such employees in camps maintained to satisfy a legal obligation under the Bracero program (Mexican contract labor) are considered individually covered. On the other hand, where a camp is operated merely as a convenience available to migrant workers and not as an integral and indispensable part of the agricultural operations, WH would not assert individual coverage with respect to camp employees based solely on their relationships to the agricultural production. Where questionable coverage exists, the facts should be submitted to the RSOL.

11f02 Farm machinery and equipment manufacture and maintenance.

Employees of an establishment manufacturing farm machinery and equipment who engage in the intrastate sale or rental of the machinery and equipment to farmers for use in the production of goods for interstate commerce as well as those employees engaged in the maintenance and repair of the machinery and equipment, are engaged in activities closely related and directly essential to the production of goods for interstate commerce. This is true also if a piece of the manufactured machinery is used only for the purpose of clearing a field of stalks, preparatory to plowing for the next crop. The preparatory clearing of a field is as compelling a necessity to the planting or seeding operations as would be the turning of the soil.

11f03 Farm tile.

Concrete irrigation pipe is a specialized product designed and produced specifically for irrigation purposes. Its manufacture, like that of the mine props in 29 CFR 776.19(b)(3), is closely related and directly essential to the production of goods for interstate commerce. Drainage tile, however, is not so specialized and individual coverage should not be asserted on the basis of its production for intrastate sale to or for use by farmers.

11f04 Feed mills.

- (a) For the present and until further notice, do not assert individual coverage in any situation in which the sole basis therefor is the production, sale, and distribution of feed or feed ingredients for use within the state in the raising of poultry or livestock, even though the poultry and livestock are raised for commerce. Thus, employees exclusively engaged in such activities will not be considered as individually covered. *See* 29 CFR 776.19(b)(4).
- (b) Employees in this category who inquire as to their status under the FLSA shall be advised that the court's decision in the *Garrard Mills* case casts doubt on the interpretative position heretofore held, and the WH will await further court clarification. Such employees shall be advised of section 16(b).
- (c) Employers shall be informed that although WH is awaiting court clarification with respect to employees in this category, such employees may sue under section 16(b).

11f05 Finance companies.

- (a) Specialized financial institutions extend installment credit to dealers. Such companies usually engage in wholesale financing by means of which a retail dealer is supplied with the funds needed for the purchase of consumer's goods at wholesale from the manufacturer. The employees of such a finance company, whether national or local in scope, are individually covered when their activities contribute to the financing of goods which move in interstate commerce from the out-of-state producer to the dealer.
- (b) Those employees who are engaged in making remittances in interstate commerce, or who regularly travel between states in the performance of their duties, are engaged in interstate commerce. In addition, employees engaged in the compilation and preparation of reports to be sent in interstate commerce are so closely related to interstate commerce as to be engaged in interstate commerce, and they are also engaged in the production of goods for interstate commerce. *See* FOH 11p00 regarding personal loan companies.

11f06 **Freight forwarders.**

Employees of establishments which consolidate for interstate shipment freight received from various other establishments are actually engaged in interstate commerce, or are so closely related to the transportation of freight in interstate commerce as to be in interstate commerce.

11g **(RESERVED)**

11h

11h00 **Highway barrier production.**

Employees engaged in the production of highway guard posts, jersey walls, and other barriers used to direct and control vehicular traffic through areas where highways on which interstate commerce regularly travels are undergoing maintenance, repair or reconstruction are covered on an individual basis.

11h01 **Horse racing.**

Employees training or handling race horses are engaged in the production of goods for interstate commerce in that the horses will be shipped across state lines.

11i

11i00 **Ice companies.**

Employees engaged in manufacturing, selling, transporting, and delivering ice used to refrigerate interstate shipments are subject to the FLSA. It is not material that the ice may be consumed before the interstate movement is accomplished.

11i01 **Industrial restaurant and cafeteria employees.**

- (a) Employees of an industrial restaurant or cafeteria engaged only in such activities as the preparation and serving of food, the cleaning of dishes and tables, and the like, ordinarily are not subject to the monetary provisions of the FLSA on individual coverage grounds, but the child labor (CL) provisions of section 12(a) apply. It is not material that the restaurant is operated by the producer of the goods for interstate commerce or by a concessionaire. The

activities of such employees are not directly essential to the production of the goods shipped in interstate commerce.

- (b) Where eating facilities are provided in an isolated location, such as a mining or a lumber camp, cooks and like personnel of the boarding house or dining hall are engaged in processes and occupations that are not only closely related but also directly essential to the production of the goods shipped in interstate commerce.

11i02 Insecticide, chemical, and fertilizer producers.

Employees of an establishment which produces insecticides, chemicals, or fertilizers for agricultural used solely within the state are not engaged in interstate commerce or in the production of goods for interstate commerce. Some concerns sell and actually apply insecticides, chemicals, or fertilizers on farms producing goods for interstate commerce. The employees of such concerns who handle, load, maintain records, etc., of such activities are individually covered by the Act.

11i03 Inspection of goods in interstate commerce.

Employees engaged in the inspection of goods during the time that they are moving in interstate commerce are engaged in interstate commerce. This applies not only to inspections that occur during the actual movement in interstate commerce, but also to those that are made in connection with the commencement or termination of the interstate movement. For example, inspections made by employees of a wholesaler receiving goods from outside the state who check the goods prior to the time they come to rest within the state are individually covered.

11i04 Installation and service employees: individual coverage of employees installing equipment, machinery, or other apparatus distinguished from local activities such as construction.

- (a) Employees who engage in the installation of apparatus, equipment, machinery, and similar goods which are still moving in interstate commerce are individually covered. Whether such goods remain in commerce during the installation process is determined by both the nature of

the contract of sale and by the character of the installation activities. If there is primarily a contract for work to be performed and the sale of the goods is incidental thereto, the installation is considered to be predominantly of a local nature and individual coverage will not apply. On the other hand, if the contract is primarily a sale of the goods, individual coverage will apply where it is determined that the installation activities are a necessary incident to the sale. In making the latter determination, consideration shall be given to:

- (1) whether the performance of the installation work is essential to the complete delivery in interstate commerce because of complexity inherent in the product, or
- (2) whether the installation work is inherently intrastate in character and reasonably separable from the interstate features of the sale.

If delivery to the customer and installation are accomplished in what practically amounts to a single operation, the goods would retain their character as goods in commerce until installation has been completed.

- (b) In applying the principles set out in (a) above, the installation of the goods considered therein shall be distinguished from the erection of construction materials. *See* FOH 11c10.
- (c) In addition to other bases of coverage, installation or service employees may likewise be individually covered where the installation or service is the repair, maintenance, extension, or reconstruction of movable or fixed facilities or channels of interstate commerce, or of machinery or premises used in the production of goods for interstate commerce.

11i05 Installation and service employees: illustrations of coverage.

(a) Bowling alley lanes

The installation of prefabricated bowling lanes received from out of the state and pursuant to a contract of sale is individually covered by the FLSA in that the services of specially-skilled mechanics at the site of installation are required to bring the bowling lanes into existence.

(b) Storm windows and awnings

The installation of custom-built storm windows and awnings received from out of the state and pursuant to contracts of sale is individually covered where no construction-type operations are involved. However, the installation of plate glass in hotels, apartment houses, private residences, and the like is not individually covered merely because the glass came directly from outside the state.

(c) Machinery

The erection, supervision, and testing of a machine and its component parts, which was constructed by an out-of-state manufacturer who also agreed in the contract of sale to send an engineer to the site of installation for supervisory and testing purposes, is individually covered work.

(d) Insulation

Employees installing rock wool insulation are not individually covered merely because the insulation is received from outside the state. However, individual coverage may result if the installation is in a building used for production of goods for interstate commerce or in an instrumentality of interstate commerce.

11i06 Insurance: company office employees.

- (a) Employees employed in the home office of an insurance company are covered on an individual basis if the company operates in more states than one, or if the activities of the employee involve the regular and continuous use of the mails and other channels and instrumentalities of interstate commerce and communication.
- (b) Employees of the home office of a national insurance company may also be considered as actually producing goods for interstate commerce. All activity at the home office which contributes to the acceptance and issuance of an insurance policy constitutes production of goods. This includes personnel of the underwriting department who determine whether the insurance application will be accepted and a policy issued, the typist who fills in the policy form, and those who photostat the application for attachment to the policy for delivery to the branch office for collection of the premium.
- (c) If the company operates a branch office, general agency in a foreign country or in a state other than that in which its home office is located, or if it reinsures its risks with a reinsurance company located in another state, it is operating in more than one state. Likewise, if it insures risks in states other than that in which its home office is located; or through its own employees, a general agency, or in any other manner, solicits or sells insurance in other states; collects premiums or assessments from other states; adjusts cases for loss in other states; sends notices, applications, policies, and the like in interstate commerce; or regularly and continuously uses the channels of interstate commerce in connection with the investment of surplus and reserve funds; it and its employees so engaged are engaged in interstate commerce.
- (d) Branch office employees of an insurance company are individually covered if the office at or out of which they work is located in a state other than that in which the home office of the company is located. Employees of a branch office located in the same state as the home office are likewise covered if the branch office is operating in more than one state, or is engaged in the regular and continuous use of the mails and other channels and instrumentalities of interstate commerce and communication, or if the risks it insures are reinsured by out-of-state companies.

11i07 Insurance: adjusters and inspectors.

- (a) The adjusters do not go out-of-state to adjust claims. Where the policyholder lives outside of the state he or she is met at the site of burned property or nearby. The adjuster's report is mailed to his or her office within the state. The adjusters have nothing to do with handling reinsurance. Inspectors examine the properties insured and determine the maximum possible loss. Their duties do not take them out of the state, nor do they decide the amount of reinsurance that shall be carried or whether it shall be placed with out-of-state companies. Adjusters and inspectors are individually covered as employees of insurance companies which are considered as operating in more than one state and to the extent that they reinsure risks with reinsurance companies located outside of the state or reinsure risks for a company located outside of the state.

- (b) Insurance company employees who prepare or aid in the preparation of letters, reports, documents, and the like, that will leave the state, as well as those employees who gather the information used as their basis, are engaged in the production of goods for interstate commerce, regardless of the fact that they adjust losses or inspect properties where the owners and properties are located within the state.

11i08 Insurance: agency or brokerage employees.

The employees of an insurance agent or broker are individually covered if the agent or broker operates in more than one state and the activities of the employees contribute to the regular and continuous use of the mails and other channels and instrumentalities of interstate commerce and communication. In addition, where the functions performed by the agent or broker and his employees are so closely related to the business carried on by out-of-state insurance companies as to be deemed an integral part thereof, individual coverage exists. Thus, for example, where through the employees of a broker or agent, clients within the state purchase insurance policies from companies located throughout the United States (U.S.), such employees are engaged in interstate commerce.

11i09 Insurance: intercompany organizations.

The application of individual coverage to employees of bureaus performing functions which are indispensable to the general business of insuring risks, such as adjustment bureaus, and bureaus engaged in payroll auditing, safety inspections, and similar “outside” activities, is determined as if they were employees of the particular risk-bearing company to which their services are rendered rather than as employees of the bureau.

11i10 Insurance: rate-making bureaus.

The requirements of various state insurance laws for equitable rate-making has resulted in the formation of voluntary or compulsory rate-making bureaus or organizations, the function of which is to inspect properties, analyze fire hazards, prepare surveys, and arrive at a rate; or to compile the statistical data from which the proper schedule of rates for a particular group of insurance companies is derived. Where the data so collected is for transmittal in interstate commerce, the employees of such a bureau are individually covered. Even if it can definitely be established that such data are not being prepared for transmittal in interstate commerce, if the insurance companies use such data and are engaged in interstate commerce, the rate-making function is individually covered by the FLSA.

11i11 Insurance: salvage companies.

Some inter-company associations maintain inter-company salvage companies whose function it is to recondition and sell goods which have been damaged and taken by a member company at the appraised or agreed value. Such an organization, from the standpoint of determining the applicability of the FLSA, is in its nature somewhat of a hybrid, since it might be covered not only by reason of the principles of coverage peculiar to employees in the insurance business, but also by reason of the fact that employees of such an organization may be engaged in commerce or in the production of goods for interstate commerce under conditions which are in no way peculiar to the insurance industry.

11i12 Instrumentalities of interstate commerce.

- (a) Employees of contractors engaged in maintaining, repairing, reconstructing, replacing, or extending railroads, ships, highways, bridges, pipelines, navigable waters of the U.S., or other essential instrumentalities of interstate or foreign commerce are engaged in interstate commerce.
- (b) Employees engaged in the following operations performed on essential instrumentalities of interstate commerce are covered on an individual basis (regardless of whether the instrumentality is in operation at the time the construction is performed): repairing, maintaining, and reconstructing bridges; replacing existing bridges with new ones; widening, straightening, resurfacing, and relocating highways and city streets over which interstate commerce regularly travels; repaving, repairing, and replacing drainage facilities, curbs, and sidewalks appurtenant to such highways and streets; repairing and replacing railroad bridges, viaducts, and right-of-way maintenance shops; maintaining railroad tracks and roadbeds; repairing, relocating, and reconstructing telephone lines and other transmission facilities; repairing and maintaining pipelines; and repairing and maintaining dams, dikes, and revetments on navigable waters, where the effect of the work is to enhance and improve navigable waters as instrumentalities of interstate commerce. Individual coverage also applies to employees who maintain, repair, reconstruct, or replace radio broadcasting facilities, harbors and navigable waters, warehouses, airports, wharves and docks which directly facilitate the movement of goods in interstate commerce, telephone exchanges, telephone buildings, and post offices.
- (c) The planting and maintenance of grass, shrubs, trees, and similar items on highway shoulders; and the control of weeds along highways are activities directly and vitally connected with the proper maintenance of an instrumentality of commerce. Employees engaged in such work are individually covered under FLSA.

11i13 Instrumentality or production facility: military bases.

- (a) Military and defense installations such as air bases (including helicopter bases), communications centers, naval stations, supply depots, and the like typically function in their entirety as instrumentalities of interstate commerce. Employees of contractors engaged in the construction, reconstruction, operation, maintenance, and guarding of all buildings, areas, and facilities, which are provided so such installations may function according to plan, are thus generally covered on an individual basis.
- (b) Where a military installation as a whole (such as an ordinance plant) functions as a facility for the production of goods (including written materials) for interstate or foreign commerce, contractors' employees who work on all parts of the installation which are a part of the integrated effort for producing such goods are generally covered on an individual basis.
- (c) In applying FOH 11i13(a) and (b) above, no distinction is warranted (as a general rule) between employees whose work relates to the actual production facilities or to the facilities and areas through which the interstate or foreign commerce moves (or in which the production or movement is directed or assisted) and other employees whose work is confined to those supporting facilities or areas which are provided as integral parts of the installation in order that it may continue to function effectively as planned without interruption or impairment. The following are examples of such supporting facilities:
 - Barracks

- Hospital facilities
- Mess halls
- Recreation facilities, such as libraries, recreational service clubs, and gymnasiums
- Quarters for military and civilian personnel, including family housing units

Employees whose work relates to such facilities are engaged in interstate commerce or production for such commerce within the meaning of the Act equally with those whose work relates to the actual production facilities or areas through which the actual movement of commerce takes place. Employees engaged in the following are examples of such employees:

- Kitchen police duties
- Refuse and garbage collection
- Maintenance and repair of buildings (including interior and exterior painting of apartments and houses), roads, water systems, and gas systems
- Janitorial services for interior and exterior maintenance and cleanliness of buildings and grounds
- Pest control
- Snow and ice removal
- Vehicle repair and maintenance
- Fire prevention and fire-fighting services

- (d) Situations may be encountered where the work performed by certain employees is so remote from commerce or the production of goods for commerce, and too insignificant as a factor contributing to the functioning of the installation as an instrumentality of commerce or interstate production facility, that WH would not at this time assert individual coverage on the basis of FOH 11i13(a) and (b) above. Employees whose duties have been found to consist of such a remote or insignificant nature in particular cases include employees of the following:

Concessionaires engaged in operating barber shops; photographic studios; NCO or Officers' Clubs and shops repairing shoes, radios, watches, TV sets, and the like; and

Contractors engaged in work under contracts limited to cutting or mowing grass, or irrigating lawns and seeded areas around buildings (as distinguished from airstrips, highways, or railroads) or on parade grounds, polo grounds, baseball fields, football fields, and golf courses. It should be noted, however, that employees of contractors engaged in operating concessions or in grounds maintenance may be subject to individual coverage where it affirmatively appears from all the facts and circumstances that, *at the particular base*, providing such goods and services to base personnel is so directly and vitally related to their effective participation in the movements in interstate or foreign commerce to and from the

base that without the provision there of such goods or services the instrumentality of commerce or production facility would be unable to function as planned.

- (e) In situations where the application of the principles set out in FOH 11i13(a) through (d) above is not clear, all of the facts shall be obtained and transmitted through channels to the RSOL for an opinion.
- (f) There may be situations where the operations or functions of a military installation are of such mixed or diverse nature, as for example, the U.S. Air Force Academy, that it would not be realistic to consider such an installation in its entirety as an interstate production facility or instrumentality of interstate commerce. In such situations, all the facts shall be obtained and transmitted through channels to the RSOL for an opinion.
- (g) Armed Services Housing Projects on or in close proximity to the military installations described in FOH 11i13(a) and (b) above are considered an integral part of such installations and employees engaged in the construction, operation, and maintenance of such housing units are considered covered accordingly. If the Armed Services Housing Project is not on or in close proximity to the military installation, the WHI shall obtain the facts, including the distance from the installation, whether other communities intervene, whether it is part of an established community of nonmilitary personnel, and whether it is tenanted exclusively by military and civilian personnel from the installation, and submit the file through channels to the RSOL for an opinion.

11i14 Instrumentality of interstate commerce: Canal Zone.

- (a) For purposes of 29 CFR 776.11, the Canal Zone in its entirety is considered an instrumentality of interstate commerce. In the usual situation, therefore, all employees engaged in work on government contracts for the construction, maintenance, and servicing of those buildings, areas and facilities which are provided so that the Canal may function as planned are covered on an individual basis.
- (b) In applying the above rule, no distinction is warranted between employees whose work relates to the physical facilities and areas through which the interstate or foreign commerce moves and other employees whose work is confined to supporting facilities or areas which are provided by the government as integral parts of its program for using the Zone as an instrumentality of commerce. Examples of such support facilities, which typically are necessary for the planned functioning of the Canal, are the following: barracks, schools, mess halls, civilian and military family housing units, and the like.
- (c) Situations may be encountered where the work performed by certain employees is so remote from commerce of the production of goods for commerce, and too insignificant as a factor contributing to the functioning of Zone facilities as an instrumentality of commerce, that WH would not at this time assert individual coverage on the basis of (a) and (b) above. Where the facts in a particular case appear to support such a conclusion, all the facts shall be transmitted through channels to the RSOL for an opinion.

11i15 Intrastate distribution of goods received from outside the state.

Intrastate distribution, by sales or otherwise, of goods or information received by the distributor directly from another state may be a part of the antecedent interstate movement, and thus constitute engagement in interstate commerce. Shipment of goods from another

state direct to a customer located in the same state as the distributor who ordered the shipment, constitutes interstate commerce by virtue of which both the distributor's employees who procured the shipment to be made and the customer's employees who receive the goods at the end of their interstate movement are covered by the FLSA as being engaged in interstate commerce. Similarly, shipment of goods from another state to a distributor who has procured the shipment to be made pursuant to a prior order from the customer, and transshipment from the distributor to the customer, constitute interstate commerce, by reason of which the distributor's employees who procured the shipment to be made from the other state, who received the goods, and who delivered them to the customer, are covered by the FLSA as being engaged in interstate commerce. This rule of coverage is not affected by the fact that goods received from outside the state are mixed with like goods originating within the state, so that the intrastate distribution is of goods received in part only from outside the state.

11i16 **Investigating agencies.**

Employees engaged in the investigative and clerical work performed by an independent investigating agency rendering services to clients who are engaged in the production of goods for interstate commerce are covered on an individual basis. Clerical employees who type reports of investigators as to the qualifications of prospective employees of establishments engaged in the production of goods for interstate commerce are in processes or occupations closely related and directly essential to the production of goods for interstate commerce. It is not material that none of the reports leave the state.

11j- k **(RESERVED)**

11L

11L00 **Local or collateral activities of an interstate producer.**

Certain employees of a producer of goods for interstate commerce may be engaged solely in essentially local activities that are undertaken by the employer independent of his/her productive operations, or that are undertaken by him/her as a dispensable collateral incident to those productive operations. These employees are not engaged in work closely related or directly essential to the production for interstate or foreign commerce. *See* 29 CFR 776.18(b).

11m

11m00 **Machinery and equipment.**

- (a) Employees engaged in the manufacture or supply of machinery or tools and dies used in the production of goods for interstate commerce are engaged in processes or occupations closely related and directly essential to the production of the goods. Likewise, those employees engaged in the reconstruction, installation, repair, and maintenance of such machinery, tools, dies, or specialized equipment that are, or are contemplated, to be used in the production of goods for interstate commerce are individually covered. This is true whether they are employed by the owner and operator of the machinery or by an independent contractor.
- (b) Employees are engaged in processes or occupations closely related and directly essential to the production of goods for interstate commerce when they are engaged in:

- (1) producing machinery for sale within the state to another manufacturer who in turn uses that machinery to produce goods for interstate commerce,
 - (2) producing completed parts for sale to another manufacturer within the state who installs them as replacements for worn-out parts in machinery used in the production of goods for interstate commerce,
 - (3) repairing or reconstructing machine parts which are installed within the state in machinery used in the production of goods for interstate commerce,
 - (4) installing within the state new or repaired parts to replace worn-out parts in machinery used in the production of goods for interstate commerce,
 - (5) repairing or reconstructing used machinery brought by their employer within the state for sale within the state to manufacturers engaged in the production of goods for interstate commerce, or
 - (6) office, maintenance, and custodial work which contribute to the integrated effort of the employer to meet the needs of producers of goods for interstate commerce.
- (c) Employees of an independent employer, who manufactures or supplies producers of goods for interstate commerce with things as directly essential to production as electric motors, are in processes or occupations closely related and directly essential to the production of the goods where the goods produced by the customer are shipped out of the state. This includes:
- (1) logging trucks for use in hauling logs from the woods to a mill or railroad,
 - (2) mine props for mining operations,
 - (3) oil-drilling machinery for the production of oil, and
 - (4) threshing equipment for the production of grain.

11m01 Magazine and newspaper wholesale distribution.

- (a) Where the goods are received from out of state but are distributed locally, the employees are individually covered. Where there is that practical continuity of movement of the goods from the out-of-state sources through the wholesaler to the customer, the employees engaged in receiving the periodicals, loading them in trucks for delivery to retail outlets, or in transporting them, are engaged in interstate commerce.
- (b) Employees of the “return department” engaged in stripping front covers from the returned copies for shipment by parcel post to the out-of-state publisher are engaged in the production of goods for interstate commerce.
- (c) Office and clerical employees are in activities that are so closely related to the interstate movement of the periodicals as to be engaged in interstate commerce. They are also in processes or occupations that are closely related and directly essential to the production of goods for interstate commerce.

11m02 Magazine subscriptions.

Employees in a local office of an organization that is engaged in securing subscriptions for magazines from persons throughout the U.S. are engaged in activities that are so closely related to the interstate movement of the orders for the magazines that they are regarded as engaged in interstate commerce.

11m03 **Meat packing.**

- (a) Employees of intrastate meat packers whose by-products are shipped out of the state, who engage in the production of by-products, are engaged in the production of goods for interstate commerce. Employees who handle, slaughter, and dress the livestock, remove the inedible portions, handle, and work on the by-products, fire the boilers, maintain, watch, or guard the premises, as well as for those who do the office work, are also individually covered. There is no distinction as to volume or amount of production for interstate commerce where the shipments are regular and recurrent.
- (b) Employees engaged in the production of by-products for a meat packer producing or processing meats which are sold for consumption within the same state are engaged in the production of goods for interstate commerce if, at the time when they are engaged in the production of the by-products the employer intends, hopes, expects, or has reason to believe that the by-products will be sent out of the state in the same or altered form.
- (c) Tankage which is waste material or garbage is given to a rendering company free of charge in winter and during the summer the employer pays a fee to a rendering company for its removal. The tankage ultimately finds its way out of state. Since this is only waste material or garbage, there is no production of goods for interstate commerce. This should be distinguished from a situation where a by-product is produced and shipped out of the state.

11m04 **Medical care.**

Medical personnel, such as nurses, first aid men and the like, who provide medical and first aid services at the place of employment for other employees who are engaged in commerce or in the production of goods for commerce are covered. Coverage is based on the principle that such employees are engaged in activities which facilitate commerce and are so proximately related to commerce as to be properly considered engaged therein or that their activities are closely related and directly essential to the production of goods for commerce.

11m05 **Mining, oil and gas wells.**

Mining is an activity that is production of goods. Among those engaged in production are employees who drill oil or gas wells and those who pump oil from wells, even though their employer is not the owner of the land or of the lease, but is an independent contractor.

11m06 **Multi-branch enterprises.**

- (a) **Window dressers**
 - (1) Window dressers of multi-branch establishments who regularly travel across state lines in the performance of their duties are engaged in interstate commerce. They may also be covered on the basis of engaging in interstate commerce if the display materials come from another state, depending in each case upon where the interstate journey of the display material ends.

(2) Goods from out-of-state that are destined for display in local outlets of a multi-branch enterprise do not ordinarily come to rest in a warehouse even though they may not be earmarked for a particular store in a chain. Display materials remain in interstate commerce until actually put on display.

(b) Inventory crews

Inventory crews who regularly travel across state lines in the performance of their duties are individually covered. Additional bases for individual coverage are the regular and recurrent use of interstate communication facilities and the preparation of information for transmission across state lines.

(c) Retail chain employees maintaining perpetual inventories

Central office employees who are engaged in maintaining perpetual inventories of merchandise stocked by retail shops of a multi-branch enterprise, all located within a single state and which receive merchandise from out of the state, are engaged in interstate commerce when their work contributes materially to the consummation of the transactions by which merchandise is received by the retail stores from outside the state.

(d) Employees of warehouse engaged in placing price and sales tickets on merchandise

Warehouse employees of a multi-branch intrastate retail enterprise who are engaged in placing tickets containing retail prices, styles, and the like, on merchandise still in interstate commerce before delivery to the individual shops are engaged in interstate commerce. Such work is not a sufficient interruption to the interstate journey to break it.

11m07 Music service.

Music service furnished to establishments engaged in the production of goods for interstate commerce is not an activity closely related and directly essential to the production of the goods.

11n

11n00 Newspapers.

Employees, including drivers, engaged in the intrastate distribution and delivery of newspapers containing news received from other states are engaged in activities that are so closely related to the dissemination of information and advertising received from other states as to be in interstate commerce.

11n01 Nonprofit research and educational institutions.

Employees of educational, eleemosynary, or nonprofit organizations may be covered on an individual basis. This will be so even though they engage in laboratory and other scientific and industrial research which does not result in anything more tangible than information. If such information or goods is produced for interstate commerce, the employees are individually covered. In addition, employees, such as office and clerical personnel, whose work involves the regular use of the interstate mails, telegraph, telephone, and similar

instrumentalities for communication across state lines are actually engaged in interstate commerce.

11o

11o00 **Oil wells.**

- (a) Employees engaged in extracting oil or gas from wells for shipment in interstate commerce are actually producing goods for interstate commerce. In addition, those who are engaged in preliminary drilling for oil or gas are engaged in a process or occupation closely related and directly essential to the production of the oil or gas. It is not material that the drilling is performed by an independent contractor, or that the drilling operations do not result in a producing an oil or gas well.
- (b) The clearing of land, digging of pits, building of earthen fire walls, and construction of derricks or boiler and pump houses, preliminary to, and in exclusive connection with, the oil drilling operations are individually covered by FLSA.
- (c) Employees engaged in the installation of storage tanks at the well site, or building slush pits, levees, or dikes to prevent the flooding of an oil field, the wells of which are producing oil for interstate commerce, are in processes or occupations closely related and directly essential to the production of the oil.
- (d) However, employees of a materialman engaged in supplying material, such as brick or ready-mixed concrete are not closely related to the production of oil.
- (e) The following processes or occupations are closely related and directly essential to the production of oil:
 - (1) The making of geophysical surveys, where the surveys are relied upon by the petroleum producing industry as guides to prospective fields
 - (2) The dismantling or moving of oil well drilling equipment from a completed oil well to the site of a new well
 - (3) Watching or guarding oil well drilling machinery between the times when one well is completed and another begun

11p

11p00 **Personal loan companies.**

- (a) Specialized financial institutions make loans to borrowers on their personal notes which are thereafter discounted in bulk by sale to a discounting organization located in a different state from the loan company. The employees of the loan company making the loans are so closely related to the interstate commerce inherent in the interstate transfer of funds as to become a part thereof. The activities of the employees include interstate financial transaction analogous to the operations of banks and other financial institutions and the regular use of the channels and instrumentalities of interstate commerce in maintaining contact with the affiliated company or companies as well as in connection with the making of loans and credit investigations. If the business of the company requires the regular use of interstate channels

of communication with borrowers residing in other states, the receipt of payments from such accounts, and the collection of such accounts, the cashiers, stenographers, and other employees involved in these activities are engaged in interstate commerce. *See* FOH 11f05 regarding finance companies.

- (b) Where the discounting organization is located within the same state as the loan company, and the activities of the loan company are confined within the state, individual coverage does not exist for the discounting activity.

11p01 Petroleum products bulk plants.

- (a) Where a distributor receives out-of-state shipments of petroleum products at a bulk plant for distribution to retail service stations under long-term leases or contracts, interstate commerce does not end until the products are received by the retail service stations. It is not necessary that shipments to the bulk plants be based upon prior specific orders. The temporary storage at the bulk plants is merely a convenient and intermediate step in the process of getting them to their final destination.
- (b) Employees who transfer the products from tank cars to storage tanks and delivery trucks for delivery to retail outlets are actually engaged in interstate commerce. Those engaged in the maintenance of the bulk plant equipment are also engaged in interstate commerce, since their activities of inspecting and servicing motors and pumps used to make the transfer are so closely related to the movement of the petroleum products in interstate commerce as to be a part of the movement. Such bulk plants may be considered as fixed facilities of interstate commerce.

11p02 Post offices, mobile truck.

Employees of mobile truck post offices engaged under contract in the carriage of U.S. mails are engaged in interstate commerce, since they are either transporting goods across state lines or as part of the stream of interstate commerce.

11p03 Printing establishments.

Employees of printing establishments engaged in printing forms, catalogues, directories, documents, letterheads, greeting cards, and advertising materials are engaged in the production of goods for interstate commerce where the employer knows or has reason to believe that the goods will be taken or sent out of the state by a subsequent purchaser or other person into whose possession the goods will come.

11p04 Printing ink supply establishments.

Employees engaged in producing ink which is purchased by a local establishment to print paper shipped in interstate commerce are producing goods for interstate commerce, since the ink is a part or ingredient of the goods (paper) which move in interstate commerce.

11p05 Processing: effect on interstate commerce.

- (a) Processing generally interrupts the movement of goods in interstate commerce. Individual coverage may exist on other grounds, however. The line to be drawn between operations that constitute a mere incident of the interstate distribution of goods received from outside the

state and those that constitute processing that terminates the prior interstate movement is a matter of degree. It is not possible to formulate any infallible test that will serve to resolve every conceivable situation that may arise. It is not necessarily true that any processing defined as “production” in FLSA section 3(j) is sufficient to break the flow of goods in interstate commerce. The test of what constitutes processing involves a number of factors, including the complexity of the operation, the change that is made in the goods, and the time required.

- (b) Operations that have been held only incidental to interstate distribution, and which will not stop the flow of interstate commerce, include: the making of minor adjustments and performing minor services on new automobiles; the blending of different grades of gasoline; and the candling, sizing, and packing of eggs.
- (c) Among operations that have been held to be processing are: the mixing of materials to make concrete; the making of sandwiches and other such products from crackers, bread, and the like; the pasteurization and bottling of unpasteurized beer; the blending of wines; the grinding or blending of coffee; the dilution, pasteurization, clarification, and homogenization of milk or cream; the bottling of milk; the neutralization and churning of sour cream to form butter the processing of cottage cheese to improve consistency and increase fat content; and, the making of chocolate milk.

11q (RESERVED)

11r

11r00 Refrigerator equipment servicemen.

Individual coverage does not generally extend to a service employee if his or her work consists solely of repair and maintenance work within the state on refrigeration equipment for retail stores or other local customers who are not engaged in the production of goods for interstate or foreign commerce, even though he or she may be employed by a distributor who is engaged in interstate commerce. However, where the terms of an interstate contract of sale call for the installation of the equipment, and specifically provide for the servicing of the equipment for a period subsequent to its installation, employees who service the equipment pursuant to the terms of the interstate contract would be individually covered by the FLSA.

11r01 Retail and service.

- (a) Employees of even primarily local retail and service establishments can be individually covered. Examples of covered activities include:
 - (1) ordering of supplies and goods by mail, telephone, and fax and receipt of goods ordered from out-of-state suppliers,
 - (2) processing of credit card purchases such as preparation of credit card slip initiating a transaction with an out-of-state credit card company or transmission of a credit card check to an out-of-state clearinghouse, and
 - (3) transmission of information regarding a customer’s personal check to an out-of-state clearinghouse for approval.

- (b) In addition to those examples noted in (a) above, employees of retail chains with out-of-state main offices are frequently individually covered because of their regular contacts by mail, telephone, fax, etc. with the main office.

11s

11s00 **Sand and gravel.**

Employees of a sand and gravel company which sells its products to a local tile manufacturer, who uses it in the manufacture of drainage tile for sale to local farmers engaged in the production of goods for interstate commerce, are not engaged in processes or occupations closely related and directly essential to the production of the farm products which may be shipped out of the state.

11s01 **Savings and loan associations.**

Employees of savings and loan associations, like those of banks, which make loans to persons residing in other states and take as security property located in other states, are engaged in interstate commerce. The sale of stock by such associations to, or the acceptance of deposits of, the federal government also frequently involve commercial transactions across state lines. The bank may be engaged in interstate commerce because of membership in a Federal Home Loan Bank. The insuring of accounts with the Federal Savings and Loan Insurance Corporation constitutes engagement in interstate commerce.

11s02 **Shopping analysts.**

Traveling analysts, who investigate the efficiency of sales personnel of various stores throughout the country and forward or carry reports back across state lines to their headquarters, are engaged in interstate commerce and production of goods for interstate commerce in any workweek in which the analysts are engaged in “handling, transporting, or in any other manner working” on reports, copies of which move across state lines. Individual coverage may also be asserted on the basis that the work performed by the analyst is closely related and directly essential to the production of goods for interstate commerce, if the customer’s establishment produces goods for interstate commerce.

11s03 **Sign installation or painting.**

- (a) Employees engaged in the installation, maintenance, or servicing of signs which are installed on the premises or in front of an instrumentality of interstate commerce, or which are installed within the structure to indicate the location of terminal or other facilities or to direct customers or passengers in the use of the instrumentality, are engaged in activities so closely related to interstate commerce as to be a component part thereof.
- (b) Employees engaged in the installation, maintenance, or servicing of signs on factories producing goods for interstate commerce, the signs identifying the structure as well as incidentally advertising the business, are not performing work which is closely related to the production of goods for interstate commerce.
- (c) Employees engaged in painting signs on trucks which are regularly engaged in interstate commerce are covered on an individual basis.

11s04 **Stock brokerage houses.**

Employees of stock brokerage businesses are ordinarily engaged in interstate commerce. Employees engaged in the sale, purchase, transmittal, and receipt of bonds, shares of stock, and other securities to and from out-of-state customers and sources are directly engaged in interstate commerce. Registered representatives, customers' men, and clerical employees performing work directly related to such sales, purchases, transfers, transmittals, and receipts are engaged in activities which are so closely related to the interstate movement of the securities as to be engagement in interstate commerce.

11s05 **Students and instructors repairing planes.**

Where planes moving or used in interstate commerce are worked upon by students under instructor supervision, such students and instructors are engaged in the production of goods for interstate commerce. The work is productive work and the fact that its performance is part of training for which no compensation is paid to students or to the school would not take the students and instructors out of the category of employees producing goods for interstate commerce. *See* FOH 11t08 and FOH 10b11.

11t

11t00 **Telephone answering service.**

- (a) A telephone answering service which offers to and does in fact receive and transmit interstate telephone messages holds itself out as being engaged in the channels of interstate commerce and in the operation of an instrumentality of interstate commerce. It is not material that the percentage of interstate calls is small, so long as the service is prepared to handle them and they are regularly received and transmitted. Employees of such a telephone answering service who are engaged in receiving and transmitting telephone messages are continuously covered under the FLSA on an individual basis as being engaged in interstate commerce, notwithstanding that in particular workweeks no interstate telephone calls or messages regarding such calls are received or transmitted.
- (b) Employees of a telephone answering service who spend more than an insignificant amount of their time handling telephone communications for establishments engaged in the production of goods for interstate commerce are engaged in closely related processes or occupations directly essential to the production of such goods for interstate commerce.

11t01 **Telephone solicitors.**

Telephone solicitors may also be engaged in commerce or in a closely related process or occupation directly essential to the production of goods for commerce. Solicitors who make calls out-of-state are clearly engaged in commerce. Solicitors who make only intrastate calls are also covered individually if the checks and bank drafts received pursuant to their solicitations are sent out of state by their employer. Similarly, such intrastate callers are covered individually if they work for organizations that operate on a national or multi-state basis, since their solicitations are closely related and directly essential to such organizations' interstate activities.

11t02 **Telephone and telegraph pole production.**

Employees engaged in the production or supply of telephone or telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems are covered. Such poles are produced to supply the needs of interstate communication.

11t03 **Test pilots.**

Test pilots are engaged in an occupation closely related and directly essential to the production of airplanes for interstate commerce by their employer.

11t04 **Theatrical booking agencies.**

Employees of an employer who acts as a theatrical booking agency, or as manager and representative of various theatrical performers, band leaders, and radio artists, may be subject to the FLSA on the basis of individual coverage. Where such an agent arranges performances throughout the U.S., his or her employees may be directly engaged in interstate commerce, in connection with the carrying on of interstate activities. This is true also of employees of a motion picture company which books motion pictures to be displayed in theaters throughout the country.

11t05 **Theatricals.**

Employees of circuses, carnivals, and road shows who in the performance of their work are regularly engaged in traveling across state lines are individually covered. Employees engaged in similar work at a fixed location are not so covered as such work has no connection with interstate commerce.

11t06 **Toll road employees.**

Employees of a toll road company are engaged in interstate commerce where vehicles move in interstate commerce over the toll road. Those who operate the road and operate a bridge which carries the highway are engaged in interstate commerce. Those employees who repair, maintain, and service the toll road are in activities so closely related to the interstate movement of goods transported over the road as also to be engaged in interstate commerce.

11t07 **Trailers.**

An establishment engaged in the manufacture or repair of trailers which it will sell or rent for carrying goods in interstate commerce is engaged in the production of goods for interstate commerce.

11t08 **Trainees.**

If trainees who are employees within the meaning of FLSA (*see* FOH 10b11 and 12) work solely on scrap materials which do not leave the state, they are not covered on an individual basis. Such employees may, however, be covered as employed in an enterprise described in FLSA section 3(s).

11t09 **Transportation.**

- (a) Transportation of semi-finished goods between production plants within the state is covered as part of the productive process if the finished goods are to be shipped outside the state.

- (b) The concept of transportation as an aspect of interstate movement is not limited to the transportation that, in the narrowest view, involves the crossing of a state line. An employee is engaged in interstate commerce if he or she is engaged in the hauling of goods or persons that are in transit to or from another state. Intrastate transportation is a part of interstate commerce if it forms a part of one larger movement in the course of which a state line is crossed.
- (c) The loading of goods onto a conveyance for transportation in interstate commerce constitutes engagement in interstate commerce, and unloading and reloading at any point in the interstate journey is of the same character. Similarly, the unloading of goods at the end of their transportation in interstate commerce is engagement in interstate commerce.
- (d) Coverage under the FLSA on the basis of engagement in interstate commerce through engagement in transportation is not confined to persons who are immediately concerned in the foregoing activities. Included also are employees whose activities are so closely related thereto as to be, for all practical purposes, a part thereof, such as inspectors, investigators, freight agents, clerical employees, stockroom clerks, and red caps.

11t10 Transportation terminals.

- (a) Transportation terminals, through which flow goods, freight, or passengers moving in interstate commerce, are fixed facilities of interstate commerce. As a general rule, employees engaged in work in or about such fixed facilities of interstate commerce are subject to the FLSA as they are engaged in interstate commerce, or so closely related to the flow of goods through the terminals as to be regarded as engaged in interstate commerce. This is applicable to operational, maintenance, custodial, and clerical employees of the terminals.
- (b) Certain employees engaged in work at the terminal providing services or facilities, which those carrying on interstate commerce may use, are not covered on an individual basis. This will apply whether such personnel are employed by the instrumentality of interstate commerce which operates the terminal or by the independent employer or concessionaire. For example, employees of drug stores, lunch counters, newsstands, barbershops, and shoeshine parlors are not closely enough related to the movement of goods through the terminals to be regarded as engaged in interstate commerce.
- (c) A terminal porter who not only keeps the station clean but also assists passengers with their baggage and employees of an establishment owning and operating coin-actuated baggage lockers installed in stations are engaged in a terminal service so closely related to the physical transportation of goods and passengers in interstate commerce as to be a part of interstate commerce.

11t11 Travel.

Employees of a travel agency who are engaged in the sale of transportation tickets for interstate or foreign travel, or who conduct interstate sight-seeing tours, are individually covered by the FLSA.

11t12 Truck renting companies.

- (a) Employees of establishments engaged in the business of leasing or renting trucks on a drive-it-yourself system are covered on an individual basis in any workweek in which they are engaged in:
 - (1) maintaining, servicing, and repairing vehicles which are used on a regular and recurrent basis to transport goods in interstate commerce (this includes not only vehicles used to transport goods directly across state lines, but also those used to transport goods from a wholesale establishment to another point within the same state, if such distribution is covered under the principles of the *Jacksonville Paper* case (see FOH 11w08)); and
 - (2) maintaining, servicing, and repairing vehicles used in the production of goods for interstate commerce.
- (b) Employees who receive and re-ship vehicles received from another state which have not come to rest are engaged in interstate commerce. Employees whose activities relate to clerical duties connected with such receipt and shipment are so closely related to the movement in interstate commerce as to be also regarded as engaged in interstate commerce.
- (c) Employees engaged in maintenance, service, and repair activities, and the clerical duties connected with the rental and use of vehicles on a regular basis to transport goods in interstate commerce, are engaged in interstate commerce and the production of goods (vehicles) for interstate commerce. Clerical duties include related bookkeeping, waiting on customers, checking out of cars and trucks, making out shop-repairs orders, and similar activities.
- (d) Employees engaged in maintaining, servicing, and repairing vehicles used in the production of goods for interstate commerce are in closely related processes or occupations directly essential to the production of goods for interstate commerce. All of the employees, including watchmen and porters, who are part of their employer's integrated effort to supply to producers of goods for interstate commerce the vehicles used in production of goods are similarly individually covered.

11u (RESERVED)

11v

11v00 Vending machines.

Vending machine goods received from out-of-state sources remain "in commerce" under the *Jacksonville Paper* rule (see FOH 11w08) through the warehouse where initially received in a state and until placed in vending machines within the same state. Thus, for example, a routeman employed to stock vending machines with such goods is engaged in individually covered work. See FOH 24c03.

11w

11w00 Warehousing: controlling principles.

- (a) Employees of a warehouse, the storage facilities of which are used in the course of interstate transportation and distribution of goods, are engaged in interstate commerce.

- (b) The unloading, inspecting, and checking of goods received at warehouse from outside the state, and the keeping of records with respect thereto, constitute engagement in interstate commerce.
- (c) Whether employees engaged in and about a warehouse in handling goods after their receipt from outside the state are engaged in interstate commerce, depends upon the disposition and destination of the goods after they leave the warehouse. In those situations where the flow of interstate commerce terminates upon receipt of the goods at the warehouse, only those employees are individually covered whose activities pertain to the receipt of the goods. In situations where the flow of interstate commerce continues through or begins after the warehousing operations, all employees are individually covered who participate in any of the work through which goods are received, stored, or distributed, or in any activities so closely related thereto as to be a part thereof.
- (d) Where goods are received from outside the state and stored in bulk warehouses, the stream of interstate commerce does not necessarily end there, but may continue until the goods are delivered from the warehouse to a dealer or consumer. In the case of subsequent distribution within the same state, if the goods belong to a wholesaler who will distribute them to retailers or other wholesalers, the warehouse employees who handle the goods during their stay in the warehouse and who deliver them to the retailers or wholesalers, may be engaged in interstate commerce under the principles of the *Jacksonville Paper* case. See FOH 11w08.
- (e) Goods that are destined for another state may be considered to be moving in interstate commerce even prior to their crossing of a state line. Hence, the *temporary storage* of such goods may be considered engagement in interstate commerce, depending upon the circumstances of such storage with relation to previous and subsequent movement of the goods. All employees in the ordinary warehouse *servicing chain stores* which receives goods from outside the state are individually covered even though the distribution may be entirely intrastate. A similar result will follow where the distribution of the warehouse or wholesale house is confined to a limited group of retailers, such as wholesalers who distribute only to members of a particular association of retail stores.

11w01 Warehousing: chain store.

- (a) Employees of a chain store warehouse engaged in storing out-of-state merchandise for direct shipment to customers of several retail stores are covered on an individual basis. However, whether a particular employee is so covered depends upon his or her own activities. Normally, warehouse employees of such chain stores “are performing wholesale duties in the very midst of the stream of interstate commerce,” and they “customarily deal with both incoming and outgoing interstate shipments.” However, if an individual’s work is in no way concerned with the interstate aspect of his or her employer’s business, then he or she is not individually covered.
- (b) A repair and service facility, even though conducted in a chain store warehouse servicing retail stores, is to be distinguished in its activities from the process of wholesaling. Employees whose activities are confined solely to delivery, repair, and servicing of merchandise which has already reached the retail stores or which has been sold to retail customers by the retail stores are not individually covered by the FLSA if all of the merchandise is delivered within the state in which the chain store warehouse is located.

11w02 Washers, car or bus.

Car or bus washers employed by an interstate bus line, and engaged in work either at the terminal or at the company garage, are engaged in work so closely related to the movement of goods in interstate commerce as to be engagement in interstate commerce.

11w03 Waste material, scrap metal, and junk.

- (a) The collection, reconditioning, reprocessing, salvaging, sorting, loading, unloading, or otherwise working on or handling waste material, scrap metal, or junk for shipment out of the state, is covered on an individual basis. For example, the loading of scrap metal on railroad cars for interstate shipment constitutes engagement in interstate commerce. Likewise, operations performed on waste paper, rags, or metal for shipment directly or indirectly out of the state or for use by producers in the manufacture of goods to be shipped out of the state, such as paper boxes, reclaimed woolens, and the like, is the production of goods for interstate commerce since such materials are a part or ingredient of the goods produced which ultimately move in interstate commerce.
- (b) The removal of waste material, scrap metal, and junk from establishments that are engaged in the production of goods for interstate commerce is covered on an individual basis. The removal of such waste material is closely related and directly essential to the production of such goods. It is immaterial that the waste material is picked up at the door of such an establishment or from the adjoining alley or sidewalk, or that it does not subsequently move in interstate commerce.

11w04 Watching and guarding.

- (a) Personnel engaged in watching and guarding buildings, premises, equipment, and other goods may be subject to the FLSA as either engaged in interstate commerce, or in the production of goods for interstate commerce. Employees engaged in watching or guarding the following instrumentalities of interstate commerce are engaged in interstate commerce:
 - (1) Movable facilities of interstate commerce, such as trucks, railroad cars, or ships, whether empty or loaded
 - (2) Fixed facilities of interstate commerce, such as interstate warehouse buildings, freight and passenger terminals, power transmission buildings, telephone exchanges, and radio stations
 - (3) Covered construction of the channels of interstate commerce, such as interstate highways, waterways, and railroad roadbeds. This is true even though the watchman is employed by an independent protective agency
- (b) Watchmen who are employed at a fixed facility of interstate commerce, such as a warehouse or distribution depot devoted to the receipt and shipment of goods in interstate commerce, is covered on an individual basis. Similarly, an employee who watches goods, which by their nature have not yet come to rest, is engaged in activities closely enough related to interstate commerce to be engagement in interstate commerce. For example, if he or she watches trucks, freight cars, and boats prior to the unloading of out-of-state goods, his/her work is individually covered.
- (c) Employees engaged in watching or guarding buildings, premises, equipment, materials, or other goods that are being used in the production of goods for interstate commerce are subject

to the FLSA as being engaged in the production of goods for interstate commerce. They are in processes or occupations that are closely related and directly essential to the production of goods watched or guarded.

- (d) It is not necessary that the production operations must be carried on at the precise moment that the watching or guarding is done. If that which the employee guards is used regularly in the day time in the production of goods for interstate commerce, the night watchman is covered. Nor is it material that the plant which he or she guards is temporarily shut down, although for a fairly long period. However, where production has definitely ceased and no further production is being contemplated, the watching or guarding cannot be said to be closely related and directly essential to the production of any goods.
- (e) Whether a watchman who watches building materials on construction jobs is individually covered depends upon the nature of the construction job. In general, the watchman stands in the same position as other employees, such as carpenters and laborers. Where the other employees are subject to the Act because they are in processes or occupations that are closely related and directly essential to the production of goods for interstate commerce, the guard is individually covered. For example, employees, including watchmen engaged in the maintenance, repair, reconstruction, improvement, or extension of facilities used in the production of goods for interstate commerce, are in closely related processes or occupations directly essential to the production thereof. Similarly, such work in connection with fixed facilities and channels of interstate commerce, such as warehouse buildings, freight and passenger terminals, pipeline stations, telephone exchanges, radio stations, interstate highways, waterways, and railroad roadbeds, is so closely related to the interstate movement of goods through or over them as to be engagement in interstate commerce.

11w05 Wholesaling: general considerations.

- (a) Employees engaged in activities characteristic of the wholesaling business may be engaged in interstate commerce by virtue of their connection with the procurement or receipt of goods received directly from outside the state, the handling and distribution of goods moving in interstate commerce, or the original shipment of goods out of the state.
- (b) Employees of a wholesaler who participate in the sale, shipment, etc., of goods to points outside the state are engaged in interstate commerce.
- (c) Employees of wholesalers (with the exception of employees engaged in work relating to the ordering and receipt of merchandise from outside the state) are not individually covered, if the wholesaler brings goods into the state for general distribution to the trade, stores them to await orders, and then distributes them on order.

11w06 Wholesaling: receipt of out-of-state goods.

- (a) Employees of a wholesaler who are engaged in the procurement and receipt of goods from outside the state are engaged in interstate commerce without regard to the nature of the employer's business or the subsequent disposition of the goods. This is true whether the goods are received by the wholesaler or directly by the customer on behalf of whom they were procured to be shipped. Included within the coverage of the FLSA on this basis are employees whose work is so closely related to the actual procurement or receipt of the goods as to be, for all practical purposes, a part thereof. For example, employees who keep records of interstate purchases and goods received and maintain the accounts payable ledger, and

other allied and receiving employees, are so closely related to the interstate movement of the goods as to be engaged in interstate commerce. Moreover, maintenance and custodial employees of such a wholesale establishment are covered on an individual basis for similar reasons. For example, maintenance employees engaged in repairing the materials-handling equipment, the watchman who protects goods prior to unloading, and the janitor who cleans the office of the wholesaler, are likewise so closely related to the movement of the goods ordered and received as to be engaged in interstate commerce.

- (b) The coverage of the employees whose activities are performed with respect to the out-of-state goods while such goods are in or about the establishment of the wholesaler is determined by the status of the goods at the time of the performance of the activity in question. If at that time the goods are in fact still in the stream of interstate commerce, performance of work connected therewith by any employee will be either actual engagement in interstate commerce or so closely related thereto as to be regarded as part thereof.

11w07 Wholesaling: where out-of-state goods come to rest.

- (a) Out-of-state goods of an intrastate wholesaler do not come to rest until they reach the destination *intended* for them by the importer. Normally, the destination intended for goods received for storage and subsequent distribution in intrastate commerce is the place where they are held for future distribution, such as shelves or storage bins, rather than the first place at which they are set after unloading from the carrier. The fact that there may be some delay in moving the goods from the point of unloading to the shelves or bins is an immaterial circumstance which does not alter the results.
- (b) Thus any employee whose duties relate to the ordering of goods from other states is subject to the FLSA as engaged in interstate commerce. This will include not only those who make telephone calls, send telegrams, write letters, or handle payments, all in connection with such purchases, but also employees who keep records of purchases, orders, and receipts, or in any manner perform work which is materially related to the purchases.
- (c) Employees engaged in receiving out-of-state goods are actually engaged in interstate commerce, and those whose work is materially related thereto are so closely related to the interstate movement as to be engaged in interstate commerce.
- (d) Any employee whose duties includes the performance of the following types of work, even after the out-of-state goods have been unloaded and deposited on the unloading platform or warehouse floor, is engaged in interstate commerce:
 - (1) Checking goods against invoices
 - (2) Placing goods on shelves or in storage bins
 - (3) Making reports on missing or damaged goods
 - (4) Entering articles received in interstate commerce in the stock book

11w08 Wholesaling: prior orders, pre-existent understandings, and anticipation of needs.

- (a) The U.S. Supreme Court, in the *Jacksonville Paper Company* case, has defined those conditions under which goods remain within the channels of interstate commerce until

delivered to the customer level. The first group comprises those goods purchased by the wholesaler upon the order of a customer with the definite intention that the goods shall be carried at once to the customer.

- (b) The second group comprises those goods obtained by the wholesaler from the manufacturer or supplier to meet the needs of specified customers pursuant to some understanding with the customer even though not necessarily for immediate delivery. The Court ruled that the goods comprising each of these two groups are within the channels of interstate commerce until delivery is finally effected to the specific customer, known and intended at the time of purchase by the wholesaler.
- (c) The third group comprises those goods the orders for which have been based, by the wholesaler, on anticipation of the needs of a stable group of specific customers rather than upon prior orders or understandings.

11w09 Wholesaling: chain store distribution.

In the *American Stores* case, the Court of Appeals held that where the warehouse and the retail stores, located within the same state, are part of an integrated unit, goods do not come to rest in the warehouse in the sense that the flow of goods in interstate commerce has been terminated. Thus, all employees in the ordinary chain store warehouse receiving goods from outside the state are individually covered, even though the distribution effected is entirely intrastate. Likewise, the employees would be individually covered where the distribution of the warehouse or wholesale house is confined to a limited group of retailers, such as wholesalers who distribute only to members of a particular association of retail stores or to a limited number of retailers who handle the particular product or brand.

11w10 Wholesaling: interstate shipment by wholesaler.

Employees of a wholesaler who participate in the sale or shipment of goods outside of the state are engaged in interstate commerce. The movement of the goods is initiated by the employee who first removes them from the point at which previously stored for future distribution; all employees whose duties are thereafter related to such movement are individually covered. This broad group includes such typical and illustrative occupations as order pickers, checkers, packers, shipping clerks, loaders, clerical and office employees who keep records or prepare correspondence relative to either the sale or the movement of the goods, and maintenance and custodial employees, including watchmen and janitors.

11w11 Wholesaling: second wholesalers.

If, in fact, the movement of goods in interstate commerce has ceased in the establishment of the first wholesaler, the subsequent handling of such goods by the employees of the second wholesaler is not covered on an individual basis, unless or until the second wholesaler initiates a new movement in interstate commerce. However, if the goods have remained in interstate commerce through the establishment of the first wholesaler, the receipt of such goods in the establishment of the second wholesaler is the same as receiving the goods directly from outside the state and is therefore individually covered. Similarly, if the second wholesaler receives the out-of-state goods by direct consignment or by drop-shipment from their out-of-state source, they are deemed to have been received directly from outside the state. Those employees who in any manner perform work which is materially related to the

purchase or receipt of such goods prior to their arrival at their intended destination are covered on an individual basis.

11w12 Woods and mine crew auxiliary employees.

Employees of an isolated lumber or mining camp such as cooks, kitchen helpers, timekeepers, and repair shop mechanics who are engaged solely in connection with and for the purpose of aiding FLSA covered productive activities are engaged in a closely related process or occupation directly essential to the production of goods for interstate commerce.

11w13 Wrecking contractor.

- (a) Employees of a wrecking contractor engaged in demolition work and in the sale of the salvaged parts are covered on an individual basis where the employer has reason to believe that part of the salvaged material will move in interstate commerce or will become part of goods that are shipped in interstate commerce, whether as a result of a direct sale by the employer or indirectly as a result of its disposition by his customer.
- (b) Individual coverage also exists where the employees are engaged partially or wholly in wrecking buildings as a part of the reconstruction, remodeling, or expansion of facilities used in the production of goods for interstate or foreign commerce, whether the employees are engaged in work at the job site, such as office and clerical workers, watchmen and guards, employees maintaining and repairing equipment used on the job, or employees transporting such equipment to and from the job site.