AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

employees of a telegraph company preparing messages for interstate transmission, television cameramen photographing sports or news events for simultaneous viewing at television receiving sets in other State, and railroad train crews or truck drivers hauling goods from one State to another are not engaged in the ''production'' of goods by virtue of such activities, but are covered by the Act only as employees ''engaged in commerce.''

(d) *Nonmanual work.* The ''production'' described by the phrase ''producing * * * or in any other manner working on'' goods includes not only the manual, physical labor involved in processing and working on the tangible products of a producing enterprise, but equally the administration, planning, management, and control of the various physical processes together with the accompanying accounting and clerical activities.[75] An enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Other employees may be equally important in actually producing the goods, such as employees who conceive and direct policies of the enterprise; employees who dictate, control, and coordinate the steps involved in the physical production of goods; employees who maintain detailed and meticulous supervision of productive activities; and employees who direct the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the labor policies, and the maintenance of the plants and equipment. (For regulations governing exemption from the wage and hours provisions of employees employed in a bona fide executive, administrative, or professional capacity, see part 541 of this chapter.) Employees who perform these and similar activities are an integral part of the coordinated productive pattern of a modern industrial organization. The Supreme Court of the United States has held that from a productive standpoint and for purposes of the Act the employees who perform such activities ''are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products'' in the manufacturing plant or other producing facilities of the enterprise.[76]

§ 776.17 Employment in a "closely related process or occupation directly essential to" production of goods.

(a) *Coverage in general.* Employees who are not actually ''producing * * * or in any other manner working on'' goods for commerce are, nevertheless, engaged in the ''production'' of such goods within the meaning of the Act and therefore within its general coverage if they are employed ''in any closely related process or occupation directly essential to the production thereof, in any State.''[77] Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged ''in any process or occupation necessary to the production'' of goods for commerce. The amendments deleted the word ''necessary'' and substituted the words ''closely related'' and ''directly essential'' contained in the present law. The words ''directly essential'' were adopted by the Conference Committee in lieu of the word ''indispensable'' contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both ''closely related'' and ''directly essential'' to the production of goods for interstate or foreign commerce.

The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither

[75] *Borden Co.* v. *Borella,* 325 U.S. 679; *Hertz Drivurself Stations.* v. *United States,* 150 F. 2d 923 (C.A. 8); *Callus* v. *10 E. 40th St. Bldg.,* 146 F. 2d 438 (C.A. 2), reversed on other grounds in 325 U.S. 578.

[76] *Borden Co.* v. *Borella,* 325 U.S. 679, 683.

[77] If coverage of an employee is determined to exist on either basis, it is, of course, not necessary to determine whether the employee would also be covered on the other ground. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42 (C.A. 5), affirmed in 317 U.S. 88.

''in commerce'' nor in actually ''producing or in any other manner working on'' goods for commerce) whose coverage under the Act formerly depended on whether their work was ''necessary'' to the production of goods for commerce. Some employees whose work might meet the ''necessary'' test are now outside the coverage of the Act because their work is not ''closely related'' and ''directly essential'' to such production; others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.[78]

The scope of coverage under the ''closely related'' and ''directly essential'' language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress [78] including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language,[79] this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier ''necessary'' test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

(b) *Meaning of ''closely related'' and ''directly essential''.* The terms ''closely related'' and ''directly essential'' are not susceptible of precise definition; as used in the Act they together describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce: (1) Which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.[80]

Not all activities that are ''closely related'' to production will be ''directly essential'' to it, nor will all activities ''directly essential'' to production meet the ''closely related'' test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work ''closely related'' to such production, but some such employees may be outside the coverage of the Act because their work is not ''directly essential'' to production of the goods. (For a discussion of this point and specific illustration, see § 776.18(b).) Similarly, there are some situations in which an employee performing work ''directly essential'' to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them ''closely related'' to the productive activities of another. (For a more detailed discussion and specific illustrations see § 776.19.)

(c) *Determining whether activities are ''closely related'' and ''directly essential''.* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words ''directly essential'' refer only to the relationship

[78] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec. p. 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; colloquy between Representatives McConnell and Javits, 1949 Cong. Rec., p. 15129; of statements of Representative Barden (1949 Cong. Rec. p. 15131), Representative Brehm (1949 Cong. Rec. p. 15132), and Senator Taft (1950 Cong. Rec., p. A–1162).

[79] *See Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

[80] See H. Mgrs. St. 1949, pp. 14, 15; Sen. St., 1949 Cong. Rec., p. 15372; cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

of the employee's work to production. Work ''directly essential'' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is ''closely related'' to production cannot be limited to those which show its closeness in terms of need or function.[81] It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in §§ 776.18 and 776.19.)

(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business.[82] Moreover, in some cases where particular work ''directly essential'' to production is performed by an employer other than the producer the degree of such essentiality may be a significant factor in determining whether the work is also ''closely related'' to such production. (See § 776.19.) No one of the factors listed in this paragraph is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite ''close and immediate tie''[83] to the production of goods for interstate or foreign commerce. It is the sum of the factors relevant to each case that determines whether the particular activity is ''closely related'' to such production. The application of the principles in this paragraph is further explained and illustrated in §§ 776.18 and 776.19.

(3) In determining whether an activity is ''directly essential'' to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is ''essential'' and ''directly'' so to such operations. These are questions of degree; even ''directly'' essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see §§ 776.18(a) and 776.19) will vary in the degree of their essentiality and in the directness of the aid which they provide to production. An activity may be ''directly essential'' without being indispensable in the sense that it cannot be done without; yet some activities which, in a long chain of causation, might be indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new

[81] Of course, if the need of function of the activity in production is such that the tie between them is both close and immediate (cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517), as for example, where an employee is employed to repair electric motors which are used in factories in the production of goods for commerce, this fact may be sufficient to show both the direct essentiality and the close relationship of the employee's work to production. See *Roland Electrical Co.* v. *Walling,* 326 U.S. 657. See also § 776.19 and H. Mgrs. St., 1949, pp. 14, 15.

[82] Cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *10 E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Borden Co.* v. *Borella,* 325 U.S. 679; *Armour & Co.* v. *Wantock,* 323 U.S. 126.

[83] See *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

factory itself, are not ''directly'' essential.[84] An activity which provides something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in the production of goods for commerce (see § 776.19(b)) will, however, be no less ''directly'' essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.[85] The application of the principles in this paragraph is further explained and illustrated in §§ 776.18 and 776.19.

§ 776.18 Employees of producers for commerce.

(a) *Covered employments illustrated.* Some illustrative examples of the employees employed by a producer of goods for interstate or foreign commerce who are or are not engaged in the ''production'' of such goods within the meaning of the Act have already been given. Among the other employees of such a producer, doing work in connection with his production of goods for commerce, who are covered because their work, if not actually a part of such production, is ''closely related'' and ''directly essential'' to it,[86] are such employees as bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining, servicing, repairing or improving the buildings,[87] machinery, equipment, vehicles, or other facilities used in the production of goods for commerce,[88] and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are ''engaged in the production'' of goods for commerce, within the meaning of the Act, and who are therefore entitled to its wage and hours benefits unless specifically exempted by some provision of the Act.

(b) *Employments not directly essential to production distinguished.* Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production. It is clear, for example, that an employee would not be covered merely because he works as a domestic servant in the home of an employer whose factory produces goods for commerce, even though he is carried on the factory payroll. To illustrate further, a producer may engage in essentially local activities as a landlord, restauranteur, or merchant in order to utilize the opportunity for separate and additional profit from such ventures or to provide a convenient means

[84] Cf. 10 *E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; Sen. St. 95 Cong. Rec., October 19, 1949, at 15372.

[85] See *Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.).

[86] See H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372. See also *Borden Co.* v. *Borella,* 325 U.S. 679.

[87] No distinction of economic or statutory significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is administered, managed, and controlled. *Borden Co.* v. *Borella,* 324 U.S. 679.

[88] Such mechanics and laborers as machinists, carpenters, electricians, plumbers, steamfitters, plasters, glaziers, painters, metal workers, bricklayers, hod carriers, roofers, stationary engineers, their apprentices and helpers, elevator starters and operators, messengers, janitors, charwomen, porters, handy men, and other maintenance workers would come within this category.