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minimum wage to ''each of his employees who is engaged in commerce or in the production of goods for commerce.'' It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act's coverage. If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that he is not ''engaged in commerce or in the production of goods for commerce.'' To the extent that his employees are so engaged, he is himself so engaged.[9]

(b) In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer's business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee's work.[10] It is apparent, too, from the 1949 amendment to the definition of ''produced'' and its legislative history that an examination of the character of the employer's business will in some borderline situations be necessary in determining whether the employees' occupation bears the requisite close relationship to production for commerce.[11]

§ 776.3 Persons engaging in both covered and noncovered activities.

The Act applies to employees ''engaged in commerce or in the production of goods for commerce'' without regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the Act. The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to ''each'' and ''any'' employee so engaged, and section 15(a)(1) prohibits the introduction into the channels of interstate or foreign commerce of ''any'' goods in the production of which ''any'' employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act.[12] This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the Act is, by reason of that fact, thereafter indefinitely entitled to its benefits.

§ 776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the Act.[13] Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours

[9] *Kirschbaum* v. *Walling*, 316 U.S. 517. See also *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178.

[10] *Borden Co.* v. *Borella*, 325 U.S. 679; *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Donovan* v. *Shell Oil Co.*, 168 F. 2d 229 (C.A. 4); *Hertz Driveurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Horton* v. *Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437.

[11] H. Mgrs. St., 1949, pp. 14, 15; Sen. St. 1949 Cong. Rec. 15372.

[12] *United States* v. *Darby*, 312 U.S. 100; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Schmidt* v. *Peoples Telephone Union of Maryville, Missouri*, 138 F. 2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728; *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4).

[13] See *Gordon's Transports* v. *Walling*, 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; *Walling* v. *Black Diamond Coal Mining Co.*, 59 F. Supp. 348 (W.D. Ky.); *Fleming* v. *Knox*, 42 F. Supp. 948 (S.D. Ga.); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see § 778.2(c) of this chapter.

benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

(b) It is thus recognized that an employee may be subject to the Act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the Act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly essential to production of goods for commerce.[14] The Division's experience has indicated that much so-called ''segregation'' does not satisfy these tests and that many so-called ''segregated'' employees are in fact engaged in commerce or in the production of goods for commerce.

[14] See *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4).

§ 776.5 Coverage not dependent on method of compensation.

The Act's individual employee coverage is not limited to employees working on an hourly wage. The requirements of section 6 as to minimum wages are that ''each'' employee described therein shall be paid wages at a rate not less than a specified rate ''an hour''.[15] This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. ''Each'' and ''any'' employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement.[16] Regulations prescribed by the Administrator (part 516 of this chapter) provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate.[17]

[35 FR 5543, Apr. 3, 1970]

§ 776.6 Coverage not dependent on place of work.

Except for the general geographical limitations discussed in § 776.7, the Act contains no prescription as to the place where the employee must work in order to come within its coverage. It follows that employees otherwise coming within the terms of the Act are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere.[18] The specific provisions of the Act relative to regulation of homework serve to emphasize this fact.[19]

[15] Special exceptions are made for Puerto Rico, the Virgin Islands, and American Samoa.

[16] *United States* v. *Rosenwasser*, 323 U.S. 360.

[17] For methods of translating other forms of compensation into an hourly rate for purposes of sections 6 and 7, see parts 531 and 778 of this chapter.

[18] *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C.A. 6); *Walling* v. *Twyeffort Inc.*, 158 F. 2d 944 (C.A. 2); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4).

[19] See 6(a)(2); Sec. 11(d).