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## BASIC COVERAGE OF THE AMENDED FEDERAL WAGE AND HOUR LAW

PAUL H. SANDERS \*

The Fair Labor Standards Amendments of 1949<sup>1</sup> became effective on January 25, 1950, as a major revision of the Federal Fair Labor Standards Act of 1938.<sup>2</sup> New "white-collar" regulations of the Wage-Hour Administrator, governing the exemption from this statute of executive, administrative and professional employees, likewise became operative on the same date.<sup>3</sup> Together, these changes bring about a most substantial alteration in pre-existing federal controls over minimum wages, overtime pay requirements and child labor.

Among the more important consequences of the 1949 Amendments, the following changes may be noted particularly: (1) The generally prescribed minimum hourly rate required to be paid to employees engaged "in commerce" or "in the production of goods for commerce" is raised from 40 cents to 75 cents per hour.<sup>4</sup> (2) The term, "regular rate of pay," which is the required basis for the computing of an employee's premium overtime payment for work in excess of 40 hours per week, is now defined in great detail.<sup>5</sup> The 1938 Act left the term undefined.<sup>6</sup> (3) The so-called "Belo contract" is now given express statutory authorization within certain limits.<sup>7</sup> Sanctioned by two decisions of the United States Supreme Court, these contracts provide means of eliminating any question of premium payments for overtime to the employee working an irregular number of hours unless he works enough hours to use up the guaranteed weekly sum at the "hourly rate" specified in the contract.<sup>8</sup> The new statutory provision would forbid the weekly guaranty from covering more than sixty hours of work. (4) An employer is now flatly prohibited from employing any "oppressive" child labor in commerce or in the

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1. Pub. L. No. 393, 81st Cong., 1st Sess. (Oct. 26, 1949).

2. 52 STAT. 1060 (1938), 29 U. S. C. A. §§ 201-19 (1947) (cited *passim* as FLSA and 1938 Act). In general, see Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321 (1946).

3. BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS REPORTER, Binder 5, Wages and Hours, 1949 WH 1913, 1917 (Sept. 12, 1949) [hereafter cited as BNA, 1949 WH—].

4. § 6(a) (1).

5. § 7(d), (e), (f), (g).

6. See Sanders, *Overtime Pay under the Fair Labor Standards Act*, 2 VAND. L. REV. 379 (1949).

7. § 7(e).

8. See Sanders, *supra* note 6 at 391-95.

production of goods for commerce.<sup>9</sup> Previously the problem had been approached indirectly through a prohibition of the shipment in interstate commerce of goods produced in an establishment employing "oppressive" child labor within a limited period prior to the shipment.<sup>10</sup> (5) The Administrator is now given express authority, though hedged with many restrictions, to sue on an employee's claims for unpaid compensation due under the statute.<sup>11</sup> In another section, however, the amendment operates to prevent the Administrator from securing, through injunction proceedings, the payment to individual employees of unpaid minimum wages or overtime compensation.<sup>12</sup> (6) Under exemptions, an important change in the 1949 statute relates to the redefinition of "retail or service establishment" so as to broaden the scope of the exemption given to employees of such establishments.<sup>13</sup> Subject to certain limitations, express exemptions from both the wage and hour requirements of the Act are now provided for the first time for employees of (a) laundry and cleaning establishments;<sup>14</sup> (b) daily newspapers with a circulation of less than four thousand;<sup>15</sup> (c) employers engaged in the business of operating taxicabs;<sup>16</sup> and (d) with respect to "woods operations" only, employers engaged in forestry or logging with crews of not more than twelve persons.<sup>17</sup> Complete exemption from the wage, hour and child labor provisions of the Act is provided for employees engaged in the delivery of newspapers to the consumer.<sup>18</sup> (7) By changing the definition of the terms "commerce" and "produced" Congress apparently has substantially altered the basic coverage of the Fair Labor Standards Act.<sup>19</sup>

It is this last change which is the subject of detailed consideration here. It may be noted that (apart from the child labor provisions) the essential framework of the Fair Labor Standards Act was not changed by the 1949 amendments. Under the 1938 Act and the Act as amended, the general requirements are the same—namely, employees engaged in commerce or in the production of goods for commerce shall receive not less than the statutory minimum rate of pay per hour (now 75 cents), and not less than one and one-half times their regular rate of pay for hours worked in excess of the weekly statutory maximum (40 hours since 1940). Basic coverage thus depends upon

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9. § 12(c).

10. § 12(a). See Lumpkin, *The Child Labor Provisions of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 391 (1939).

11. § 16(c). A proviso in this section limits the authority of the Administrator to sue, and the jurisdiction of the courts to hear, to cases involving issues of law already settled finally by the courts.

12. § 17.

13. § 13(a) (2).

14. § 13(a) (3).

15. § 13(a) (8).

16. § 13(a) (12).

17. § 13(a) (15). Sawmill operations are not included in the exemption.

18. § 13(d).

19. § 3(b), (j).

the scope of the terms "in commerce" and "production of goods for commerce." Two changes in this connection were effected by the 1949 statute.

(1) The term "commerce" is now defined as follows:

"'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or *between any State and any place outside thereof.*"<sup>20</sup> (The italicized words were substituted for "from any State to any place outside thereof" in the 1938 Act.)

(2) The terms "produced" and "production of goods" are now defined as follows:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely rclated* process or occupation *directly essential* to the production thereof, in any State."<sup>21</sup> (The italicized words are new, being substituted for the single word, "necessary" where "directly essential" now stands.)

The purpose of the first change is said to be to extend the coverage of the Act to employees engaged in incoming foreign commerce.<sup>22</sup> The purpose of the second was, undoubtedly, to limit coverage by requiring a closer relationship between the activities of the particular employee and the actual production of goods for interstate commerce than had been required by the courts in interpreting the 1938 Act.<sup>23</sup> The net effect of the changes is usually considered to be a loss of protection for a considerable number of employees as compared with the pre-existing situation. Just how many, of course, will depend upon the judicial interpretation given the foregoing terms. The 1938 Act has been the subject of more litigation in the last decade than any other federal statute and the subject of coverage has been involved in much of the litigation. It may safely be predicted that the ensuing decade will similarly involve a large volume of litigation and that the courts will find it necessary to determine in a great variety of individual instances whether work once considered "necessary" to production is likewise "closely related" and "directly essential" to such production. In this discussion an examination will be made of the assistance to be derived in determining the basic coverage of the Act from the legislative history of the above changes and the interpretation of the previous wording of the Act given by the Supreme Court and the Administrator.

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20. § 3(b).

21. § 3(j).

22. See H. R. REP. No. 1453, 81st Cong., 1st Sess. 13-14 (1949).

23. *Id.* at 14-15.

## LEGISLATIVE HISTORY

Although not approaching in dramatic effect the sequence of events which led to the enactment of the 1938 statute,<sup>24</sup> the Fair Labor Standards Amendments of 1949 nonetheless had a tempestuous career with political maneuver and counter-maneuver playing a considerable part in the form finally taken by the enactment. When the first session of the 81st Congress convened in January, 1949; numerous bills were introduced which would amend the Fair Labor Standards Act of 1938.<sup>25</sup> There was nothing unusual about this phenomenon. The principal difference this time was the apparent confidence of the Democratic Administration, based on the results of the 1948 elections, that this was an appropriate time to move for an increase in the statutory minimum wage and for an extension of FLSA general coverage. The economic report of the President to Congress in January, 1949, specifically recommended that FLSA coverage be "broadened."<sup>26</sup> The Wage-Hour Administrator in his annual report for the year 1948 had urged that there be added to the existing coverage of the 1938 Act all employees in industries substantially "affecting commerce."<sup>27</sup> H. R. 2033 and S.653, "Administration bills" embodying the recommended language of the Secretary of Labor and the Wage-Hour Administrator as to coverage, were introduced in the respective houses of Congress and made the basis of hearings. The language used in these committee prints extended coverage to the employees of "every employer who is engaged in any activity affecting commerce" where the activity of the employee was "in or about or in connection with any enterprise," where the employer is so engaged. This was in addition to the pre-existing provisions as to employees engaged "in commerce," or "in the production of goods for commerce." Section 3(n) of the recommended act in each instance defined "activity affecting commerce" as follows:

"'Activity affecting commerce' includes any activity necessary to commerce or competing with any activity in commerce or where the existence of labor standards below those prescribed by this Act would burden or obstruct or tend to burden or obstruct commerce or the free flow of commerce."

Developments in each house will be traced separately. In order that all of the basic, original materials may be made conveniently available there will be extensive quotation, including some matter that might normally be paraphrased.

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24. See Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 464 (1939).

25. BNA 1949 WH 1531-33.

26. H. R. REP. No. 267, 81st Cong., 1st Sess. 12 (1949).

27. WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS OF DEP'T OF LABOR, ANNUAL REPORT 90 (1948); BNA, 1949 WH 1541.

(a) *In the House of Representatives*

Representative Lesinski of Michigan, Chairman of the House Committee on Education and Labor, had embodied the Administration-recommended extension of coverage in his bill, H. R. 2033. The House Committee began its hearings on the bill on January 27, 1949. During the course of these, much opposition developed from witnesses representative of management as well as within the committee to the coverage provisions of the proposed bill. The Solicitor of the Department of Labor filed with the Committee a memorandum explaining the scope of, and reasons for, the proposed changes in coverage which read in part as follows:

"The major purpose of this section [3(n)] is to extend the benefits of the Fair Labor Standards Act to all employees within the reach of the commerce power of Congress exercised to its fullest constitutional extent, with the exception of those employees for whom specific exemptions are provided because of the local nature of their activities or because of special circumstances peculiar to their employment. Further purposes are to clarify the coverage of the act in situations where uncertainty now exists and to eliminate the existing inequities arising from uneven coverage within the same enterprise or between competing enterprises. To these ends the definition in section 3(n) of the committee print expresses a concept of coverage similar to that adopted in the National Labor Relations Act.

"The Supreme Court has stated that the present scope of the Fair Labor Standards Acts of 1938 'is not coextensive with the limits of the power of Congress over commerce,' and that its coverage is not as broad as that of the National Labor Relations Act. This bill remedies that deficiency. An important feature of the proposed coverage provided for in section 3(n) of the House committee print is that all employees employed in or connected with an enterprise where the employer is engaged in any activity affecting commerce would be covered. Thus, one of the important effects of the amendment would be to treat all employees in an enterprise affecting commerce equally, instead of applying the benefits of the law to some and not to others, depending upon whether or not they were individually engaged in commerce or in producing goods for commerce."<sup>28</sup>

It was contended on the other hand that the extension of the Act to the activities of employees which merely "affected commerce" was objectionable because it was "too indefinite" to enable an employer to determine whether he came within the scope of a statute which carried a criminal penalty and mandatory double damages for its violation.<sup>29</sup>

Indications that the Republicans and certain Southern Democrats on the Committee would insist on substantial revision of the proposed bill before reporting it out<sup>30</sup> undoubtedly led to the revised "administration" proposal embodied in H. R. 3190, introduced by Chairman Lesinski on March 3, 1949. This bill dropped the language "affecting commerce" but provided that "every

28. *Hearings before Committee on Education and Labor on H. R. 2033*, 81st Cong., 1st Sess., Vol. 1, pp. 121-22 (1949).

29. *Id.*, Vol. 2, p. 1312 (Testimony of Rufus G. Poole).

30. BNA, 1949 WH 1615.

employer who is engaged in commerce or in the production of goods for commerce" shall compensate, pursuant to FLSA requirements, "each of his employees employed in or about or in connection with any enterprise where he [the employer] is so engaged."<sup>31</sup> This would, of course, have had the effect of eliminating the individual-employee approach to coverage. It would have required all employees in an enterprise to be paid pursuant to FLSA if the employer, through that enterprise, were engaged in commerce or in the production of goods for commerce. The House Committee on Education and Labor amended H. R. 3190 in certain particulars, not bearing on basic coverage, and, as amended, voted by a count of 13 to 12, to report it favorably on March 9, 1949. The vote was along party lines, except three Southern Democrats aligned with the Republican minority. The bill was committed to the Committee of the Whole House.

In the report accompanying H. R. 3190 on March 16, 1949, Chairman Lesinski made the following statement on coverage:

"The committee has considered a great deal of testimony on the question of coverage and has concluded that as the act now stands it not only makes impossible the full attainment of its stated purpose to eliminate substandard labor conditions which burden the channels of interstate commerce but results in inequities among employers and employees alike by failure to prevent unfair wage competition among enterprises in which the employer is engaged in interstate commerce or in the production of goods for interstate commerce. Inasmuch as the application of the act is now dependent on the individual activities of employees, employers are frequently confronted with a choice of one of two evils: They may choose to risk a decision that particular employees in their enterprises are not engaged in commerce or in the production of goods for commerce only to be confronted later with liabilities because they failed to appraise correctly the meaning of those terms with respect to employees engaged in particular activities; or they may choose to consider all their employees to be subject to the wage and hour provisions of the act and subject themselves to competitive pressures from employers who pay the minimum wage only to those employees who are clearly subject to the act. As long as this practice is permitted under the act, the fair-minded employer who compensates all his employees in accordance with the national policy of eliminating substandard working conditions must, of necessity, be subjected to unfair competition from employers who adhere to such practices.

"The unfairness of the present provisions of the act delineating coverage in terms of activities of individual employees is further demonstrated by considering the unequal treatment of employees working for the same employer. Employees entitled to the protection of the act may be found working side by side with other employees who are not covered by the act. In such cases, understandable dissatisfaction and labor disputes can develop.

"The committee's prime concern has been to simplify, clarify, and equalize the coverage of the act with a view to furthering its basic purposes. The United States Supreme Court has already delineated with clearness the meaning of such terms as 'commerce' and 'production of goods for commerce.' . . . In the *Kirschbaum* case, . . . the United States Supreme Court has made the meaning of the term 'employer engaged in commerce' clear by stating that 'to the extent that his employees are

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31. § 6(a). See BNA, 1949 WH 1629.

"engaged in commerce or in the production of goods for commerce," the employer is himself so engaged.' In this regard it should be noted that the recommended coverage would in no event extend to any employer who does not have employees engaged in commerce or in the production of goods for commerce within the meaning of the 1938 act."<sup>32</sup>

The cleavage of opinion in the Committee, and some of the political maneuvering involved, is indicated by this extract from the Minority Views contained in the same report:

"Its [H. R. 3190] extended coverage trespasses on local business, service and marketing fields whose regulation should be with the States. . . .

". . . interpretations of the Administrator and, in some cases, substantiating decisions by the courts have stretched the meaning of the terms 'commerce' and 'the production of goods for commerce' to fantastic extremes and have brought under coverage of the act the employees of many small establishments and industries whose products pass through four or five hands before entering the field of interstate commerce. . . .

"Much of the new language in this bill was included either to give the force of law to past interpretations of the Wage and Hour Administrator; to enact into statutory law those decisions of the Supreme Court upholding the Administrator's far-reaching edicts; and in some cases to nullify certain adverse decisions of the Supreme Court. . . .

"After H. R. 3190 had been amended section by section by vote in the committee, the majority of the committee offered a substitute measure that was in reality H. R. 3190 with some majority amendments thereto. We were forced to vote on reporting the substituted H. R. 3190 with less than 1 hour for discussion and consideration. We take this opportunity to make our position clear."<sup>33</sup>

The reported bill ran into a situation reminiscent of the 1938 Act<sup>34</sup> when the powerful Rules Committee failed to act on a request to issue a rule permitting the measure to come up before the House.<sup>35</sup> This delay gave the "coalition" opponents of H. R. 3190, led by Representative W. H. Lucas of Texas, time to prepare a new measure (H. R. 4272) which would have had the effect of eliminating many of the features of the Lesinski bill considered most objectionable. The Lucas bill was introduced on April 14, 1949, in the anticipation that it might be substituted for H. R. 3190 on the House floor.

H. R. 4272 is important in terms of coverage because in it, for the first time, appears much of the language on this point embodied in the statute as finally passed. This bill dropped any approach based on the employer's enterprise and approached coverage in the same way as the existing law, that is, whether the individual employee was engaged in commerce or in the production of goods for commerce. This was coupled with a definition of "production of goods" considerably narrower than the existing law:

"Sec. 3(j) . . . for the purposes of this Act an employee shall be deemed to have

32. H. R. REP. No. 267, 81st Cong., 1st Sess. 17-18 (1949).

33. *Id.* at 69-71.

34. See Forsythe, *supra* note 24, at 470, 472.

35. BNA, 1949 WH 1669.



been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in other manner working on such goods, or in any *closely related* process or occupation *indispensable* [necessary] to the production thereof, in any State." (Changes in existing statute italicized; part of existing statute deleted appears in brackets.)<sup>36</sup>

The problem of strategy appears to have been of great importance to Chairman Lesinski as well as the opponents of his reported measure from mid-April, 1949 until the final passage of the new statute. The opposition strategy was to substitute the Lucas bill (H. R. 4272) for the Lesinski bill (H. R. 3190), if and when the Rules Committee was by-passed or permitted the measure to come to the floor of the House.<sup>37</sup> Apparently fearful that the opposition substitution maneuver might succeed, Congressman Lesinski prepared the way for the possible complete abandonment of any attempt to generally revise the Fair Labor Standards Act. This was done by introducing H. R. 4552 on May 5, providing for no changes except the raising of the statutory minimum to 75 cents per hour.<sup>38</sup> However in mid-June the Committee on Education and Labor refused, by a tie vote, to report this bill favorably.<sup>39</sup>

In the latter part of July, the Administration forces in the House Committee began work on a new bill designed to attract additional support for an increase in the statutory minimum, the direct banning of child labor and the coverage of at least some additional employees through the rewriting of certain exemptions.<sup>40</sup> This plan culminated in H. R. 5856, introduced by Congressman Lesinski on August 2, 1949. On general coverage it made no changes in the existing statute except to include incoming foreign commerce in the definition of the term "commerce." This was a change about which there was no disagreement, it being embodied in all important proposals in the House regardless of the source. The exemption features in H. R. 5856, providing or broadening exemptions to retail and service establishments, certain logging, lumbering and sawmill operations, newspaper carriers, and small contract telegraph agencies were considered to be designed to attract support among Democratic congressmen from the southern states.<sup>41</sup> This compromise Administration bill, H. R. 5856, was substituted for H. R. 3190, and the way was cleared by the House Rules Committee for consideration of the new measure on the floor of the House on August 8, 1949.<sup>42</sup>

On August 5, 1949, Representative Lucas introduced H. R. 5894, a rewritten version of his H. R. 4272, but unchanged from that measure on basic

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36. For other important differences between the Lucas and Lesinski bills see chart in *id.* at 1721.

37. *Id.* at 1725.

38. *Id.* at 1744.

39. *Id.* at 1789.

40. *Id.* at 1822.

41. *Id.* at 1843.

42. *Ibid.*

coverage. When the matter came to the floor of the House, the coalition of certain Southern Democrats and Republicans was successful largely in substituting H. R. 5894 for the Administration proposal. Thus, with the principal exception of the provision for a flat 75 cents per hour minimum wage, the bill as finally passed by the House (carrying the number, H. R. 5856) on August 11, 1949, was the product of members opposing Administration efforts to extend coverage. This is, of course, clearly reflected in the definition it contained limiting those engaged in production of goods for commerce to those actually engaged in working on or with such goods or in "any *closely related* process or occupation *indispensable* to the production thereof."<sup>43</sup>

Representative Lucas had this to say on the floor of the House with respect to the coverage aspects of his bill:

"Section 3(j) changes the latter part of the existing definition of 'produced' by providing that an employee shall be deemed engaged in the production of goods if he is employed in any closely related process or occupation indispensable to the production thereof. . . . These changes are needed in order to stem, and in some cases, reverse the action of the Administrator and the courts in bringing under the act many businesses of a purely local type by giving to the word 'necessary' an all-inclusive construction.

"The changes do not in any way remove from the act the industries engaged in manufacturing, producing, or mining goods for interstate commerce. Moreover, they leave unchanged the coverage of employees who make, repair, or maintain machinery tools and dies used in the production of goods for interstate commerce, irrespective of whether such employees are employed by the manufacturer or producer of the goods or by an independent concern. The proposed changes would, however, reverse the Supreme Court's ruling that the act applies to a local window-cleaning company doing business wholly within the State but some of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce."<sup>44</sup>

(b) *In the Senate*

The companion bill to H. R. 2033 in the Senate was S. 653, introduced on January 27, 1949, by Senator Thomas of Utah, Chairman of the Committee on Labor and the Public Welfare.<sup>45</sup> In the same wording as H. R. 2033 this bill proposed to add to the existing coverage of the Act all employees engaged in enterprises of employers whose activity affected commerce. Even earlier than this, on January 6, 1949, Senator Thomas had re-introduced S. 248, the comprehensive measure for the revision of the FLSA which he had previously proposed for passage in the 80th Congress. It like-

43. § 3(j). Italics added.

44. 95 Cong. Rec. 11216 (Aug. 8, 1949). Following this action by the House, there was released a statement by a committee of the Congress of Industrial Organizations which listed some 28 types of employees, previously covered by FLSA, whose coverage would be removed or made doubtful by the provisions of the House bill. BNA, 1949 WH 1897-99.

45. BNA, 1949 WH 1564.

wise would have extended coverage to employees whose activities "affected commerce."<sup>46</sup>

Hearings were not conducted on the Senate bills until April 11, 1949. Beginning on this date before a subcommittee of the Committee on Labor and Public Welfare under the chairmanship of Senator Pepper of Florida, the hearings were concluded on April 22. In the meantime, it will be remembered that the House hearings had been concluded and the House Committee had favorably reported H. R. 3190 and Congressman Lucas had introduced the opposition measure, H. R. 4272. The Senate Labor Committee took no official action until July 8, 1949, when S. 653, embodying a limited number of amendments to the 1938 Act, none involving general coverage, was reported favorably. In the accompanying report Senator Pepper dismissed present consideration of the proposals for revision of coverage with: "The committee has not attempted to pass judgment on the merits of all these various proposals."<sup>47</sup>

Even after passage of the House Bill (H. R. 5856) the proposed amendments to S. 653 in the Senate did not relate to the coverage question.<sup>48</sup> This continued to be true through final passage of the Senate bill (substituted for and numbered H. R. 5856).<sup>49</sup> Thus the Senate bill retained the coverage provisions of the Fair Labor Standards Act of 1938 while the House measure sought to lessen the coverage of the existing law. This, and other differences,<sup>50</sup> necessitated a solution by conference committee after a refusal of the House to concur with the Senate.<sup>51</sup>

### (c) *The Conference Bill*

Although both houses had passed their bills by the end of August, the conference committee did not begin its work until near October 1, 1949. The difference in coverage provisions was recognized as a major stumbling-block to agreement.<sup>52</sup> It was reported that the requirement in the House bill that an employee's activity be "closely related" and "indispensable" to production for commerce was the provision "most unpalatable to Administration Democrats."<sup>53</sup> This conflict was resolved by agreement on the language of the statute as finally enacted, under which an employee is covered if he is engaged in activity "closely related and directly essential" to production. The words "closely related and directly essential" then embody the compromise, replacing "closely related and indispensable to" in the House bill and "necessary" in the 1938 Act. The Conference bill was passed by both houses and the Presi-

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46. *Id.* at 1531.

47. SEN. REP. No. 640, 81st Cong., 1st Sess. 2 (1949); see, also, BNA 1949 WH 1927.

48. BNA, 1949 WH 1869, 1870, 1886.

49. *Id.* at 1889.

50. *Id.* at 1893.

51. *Id.* at 1927.

52. *Id.* at 1942.

53. *Id.* at 1928.

dent signed the measure on October 26, 1949. In a formal statement on the occasion of the signing, the President said: "I regret that the new Act exempts from its provisions some workers who have been covered heretofore and that it fails to extend coverage to many other groups of workers who need its protection."<sup>54</sup>

The meaning of the coverage provisions by the Conference bill, in the opinion of the members of the Conference Committee, was heclouded somewhat by developments in the Senate. The House conferees were required by rule to file a statement explaining the agreed upon provisions, prior to the vote on a conference bill. The House Conference Report so prepared contains the following extremely important material with respect to the provisions which are now law:

*"Commerce.*—The definition of 'commerce' in section 3(b) of the act now covers outgoing foreign commerce 'from any State to any place outside thereof' in addition to interstate commerce 'among the several States.' It does not cover incoming foreign commerce. The House bill amended the definition by substituting the word 'between' for the word 'from' and the word 'and' for the word 'to,' so that the definition would cover foreign commerce 'between any State and any place outside thereof.' The Senate amendment did not contain any provision amending this definition. The conference agreement adopts the House provision. The effect of the amendment is to eliminate inequalities under the act between employees engaged in foreign commerce based on whether the flow of such foreign commerce is out of a State rather than into it. The amendment, will, for example, place employees of importers on an equal footing with employees of exporters under the act.

*"Produced.*—The House bill amended the definition of 'produced' in section 3(j) by inserting the words 'closely related' before the words 'process or occupation' and substituting the word 'indispensable' for the word 'necessary.' The Senate amendment left the definition of 'produced' as contained in the present law unchanged. The bill as agreed to in conference follows the House bill except that the words 'directly essential' are substituted for the word 'indispensable.'

"Coverage under the act for a large category of employees is determined by the definition of the term 'produced.' The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers 'any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on \* \* \* goods.' Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance, clerical, or custodial work. The second part of the present definition, covering any employee engaged in 'any process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers (*McComb v. Deibert* (E. D. Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (*McComb v. Factory Stores*, 81 F. Supp. 403 (N. D. Ohio 1948)).

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54. *Id.* at 1981, 1982.

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

"The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling*, 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

"1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State (*McComb, Administrator v. Super-A Fertilizer Works*, 165 F. (2d) 824 (C. C. A. 1)).

"2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (*Schroeder v. Clifton*, 153 F. (2d) 385 (C. C. A. 10); cert. den., 328 U. S. 858).

"3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (*Martino v. Michigan Window Cleaning Company*, 327 U. S. 173; reh'g den., 327 U. S. 816).

"4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

"5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

"6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 C. C. H., Labor Law Reporter, 4th ed., No. 25,150,385).

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."<sup>55</sup>

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55. H. R. REP. No. 1453, 81st Cong., 1st Sess. 13-15 (1949). On the floor of the House, Chairman Lesinski said: "The amended section gives the courts a more specific guide as

In the Senate, on the other hand, Senator Pepper's summary on behalf of a majority of the Senate conferees was not filed until after the vote on the conference bill. There resulted some criticism as to such a procedure as well as disagreement from Republican conferees as to the substance of the statement with regard to the new definition of "produced."<sup>56</sup> Senator Pepper had this to say about the insertion of "closely related and directly essential" in place of "necessary":

"The amendment made by the conference agreement is intended to produce a more specific guide than does the word 'necessary' with respect to the relationship which a process or occupation must have to the production of goods in order for an employee employed in such a process or occupation to be brought within the coverage of the Act as an employee engaged in the production of such goods. . . .

"What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close, as distinguished from remote and tenuous. Its reference to activities directly essential to production does not, as did the House bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings.

"The definition in the present act provides no clear cut-off preventing extension of the coverage of the Act to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce. It might be argued, for instance, that employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce, are doing work necessary or even essential to such production because the factory workers could not perform their work without a place to live. Such work would not be closely related and directly essential to production, within the meaning of the conference agreement, and it would therefore be clear that coverage of the real estate firm's employees could not be predicated on the rental of living quarters to factory workers. Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided

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to the intention of Congress; it does not, however, radically revise the coverage of the Act as it has been interpreted by the courts in the past. Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto. For example, employees of a dealer who sells sawmill equipment to a producer of mine props, which are sold to a mine within the same State producing coal for commerce, would not be sufficiently closely related to the production of the coal to come within the coverage of the act." 195 Cong. Rec. 15135 (Oct. 18, 1949).

56. BNA, 1949 WH 1973-74.

as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in *Consolidated Timber Co. v. Womack* (132 F. (2d) 101 (C. A. 9)); *Hanson v. Lagerstrom* (133 F. (2d) 180 (C. A. 8)); *Basik v. General Motors Corp.* (Mich. Sup. Ct.), 19 N. W. (2d) 142.)

"Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer:

"1. Office or white-collar workers. *Borden Co. v. Borella* (325 U. S. 679); *Roland Electrical Co. v. Walling* (326 U. S. 657); *Meecker Cooperative v. Phillips* (158 F. (2d) 698) (C. A. 2); *Walling v. Friend* (156 F. (2d) 429 (C. A. 8)); *Hertz Driveurself Stations v. U. S.* (150 F. (2d) 923 (C. A. 8)).

"2. Employees repairing, maintaining, improving or enlarging the buildings, equipment, or facilities of producers of goods. *Roland Electrical Co. v. Walling*, 326 U. S. 657; *Kirschbaum v. Walling* (316 U. S. 517); *Borden Co. v. Borella* (325 U. S. 679); *Walling v. McCrady Construction Co.* (156 F. (2d) 932 (C. A. 3)); *Walling v. Mid-Continent Pipe Line Co.* (143 F. (2d) 308 (C. A. 10)); *Bowie v. Gonzales* (117 F. (2d) 11 (C. A. 1)); *Bozant v. Bank of New York* (156 F. (2d) 757 (C. A. 2)).

"3. Plant guards, watchmen, and other employees performing protective or custodial services for producer of goods. *Walton v. Southern Package Corp.* (320 U. S. 540); *Wantock v. Armour & Co.* (323 U. S. 126); *Walling v. Sondock* (132 F. (2d) 77 (C. A. 5)); *Engebretson v. Albrecht* (150 F. (2d) 602 (C. A. 7)); *Slover v. Wathen* (140 F. (2d) 258 (C. A. 4)); *Shepler v. Crucible Steel Co.* (140 F. (2d) 371 (C. A. 3)); *Walling v. Thompson* (65 F. Supp. 686 (D. C. Calif.)).

"The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer.

"The work of employees of employers who produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities:

"1. Production of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by purchaser in producing goods for interstate commerce. *Holland v. Amoskeog Machine Co.* (44 F. Supp. 884 (D. C. N. H.)); *Tormey v. Kiekhafer Corp.* (76 F. Supp. 557 (E. D. Wis.)); *Walling v. Amidon* (153 F. (2d) 159 (C. A. 10)); *Walling v. Hammer* (64 F. Supp. 690 (W. D. Va.)); *Roland Electrical Co. v. Walling* (326 U. S. 657).

"2. Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate commerce. *Reynolds v. Salt River Valley Water Users Asso.* (143 F. (2d) 863 (C. A. 9)); *Phillips v. Meecker Coop. Light and Power Asso.* (158 F. (2d) 698 (C. A. 8)); *Lewis v. Florida Light and Power Co.* (154 F. (2d) 751 (C. A. 5)); *West Kentucky Coal Co. v. Walling* (153 F. (2d) 152 (C. A. 6)).

"3. Industrial laundry work for customers engaged in manufacturing, mining, or other production of goods for interstate commerce. *Koerner v. Asso. Lincn Suppliers Laundry* (279 Ap. Div. 986, 62 N. Y. S. (2d) 774)." <sup>57</sup>

Several weeks later this provoked the following vigorous statement pre-

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57. 95 Cong. Rec. 15372-73 (Oct. 19, 1949).

pared by Senator Taft, one of the Senate conferees, for publication in *The Congressional Record*:

"On October nineteenth Senator Pepper submitted a statement expressing the views of a majority of the Senate conferees as to the intentions of the conference which prepared the conference report on the Minimum Wage Bill. It seems to me that this report was prepared in the first instance by the attorneys for the Wage-Hour Administration in an effort on their part to retain jurisdiction in various fields which the conference report clearly intended to take away from them. The Wage-Hour Administration for years has been trying to extend its jurisdiction beyond the field provided by Congress and is now trying to nullify the present Congressional action.

"The conference committee never considered this statement, or summary, nor was there ever any meeting of the Senate conferees to consider or discuss it. My own view is that the report and the act finally adopted speaks for itself. I am quite certain that the conclusions of the report submitted by the Senior Senator from Florida as to the intentions of the conferees are incorrect in many important particulars, and that the report of the House Managers is much closer to their actual intentions.

"Since other individuals' views have been submitted, however, I have prepared a partial discussion of some of the points at issue and submit it herewith.

"Considered in its entirety the summary submitted by the Senior Senator from Florida does not state what the amendments are intended to accomplish. Its approach is a negative one of pointing out what the amendments are not intended to accomplish. This is especially true with respect to those amendments which were introduced to limit the coverage of the Act as interpreted by the Administrator and the courts. For example, the retail and service establishment exemption adopted by the overwhelming vote of the Senate was intended to prevent the Administrator and the courts from asserting coverage over those retail and service businesses on the main streets of America which were never intended to be covered when the original Act was written in 1938.

"Likewise the conferees agreed to a redefinition of the term 'produced' intending to prevent extension of coverage to such operations as 'window cleaning' and 'grass cutting' on the far-fetched theory that such operations are 'necessary' to the production of goods. We specifically authorized 'Belo' type contracts because the Administrator, refusing to accept the decision of the Supreme Court which had held such plans to be in conformity with the Act, had made a series of attempts to modify or overrule that case. The summary, prepared in the office of the Administrator, in many instances seeks to confirm those very interpretations of coverage which the conferees were seeking to reverse.

"The conferees in their meetings had before them a memorandum setting forth specific cases showing the extreme lengths to which the Administrator and the courts had gone in interpreting the term 'produced.' The conferees were in agreement that such cases should be overruled.

"The cases discussed and the agreement of the conferees are set forth in detail at pp. 14-15 of the Statement of the Managers on the Part of the House.

"During the meetings of the conference committee the House conferees insisted that the definition of the term contained in the House bill be agreed to. They yielded only to the extent of agreeing to substitute the words 'directly essential' for the word 'indispensable' in the definition. It was understood by both the House and Senate conferees, however, that the definition as finally agreed to was intended to have a substantially limiting effect upon the coverage of the Act as heretofore interpreted by both the Administrator and the courts. Nothing is more clear than that there would never have been any conference agreement on a minimum wage bill, had the Senate conferees not agreed to such narrowing of the Act's coverage.

"The summary, however, in effect states that the redefinition of 'produced' has not



had the effect of cutting down the coverage of the Act at all, but has merely provided a more specific guide and created more certainty as to coverage. The summary concedes only that under the redefinition, coverage is not to be extended to the following activities or employees:

"1. Procurement of land for a new factory.

"2. Manufacture of bricks for new factory buildings.

"3. Employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce.

"But no change in the definition was needed to assure that the Act would not be extended to such activities or employees, since neither the Administrator nor the courts had ever held or even hinted that such activities or employees were covered.

"The summary is chiefly concerned with pointing out that the redefinition of 'produced' has done no more than to confirm all outstanding interpretations of such term—both administrative and judicial. For example, it cites *Consolidated Timber Co. v. Womack*, 132 F. 2d 101 (C. C. A. 9); *Hanson v. Lagerstrom*, 133 F. 2d 120 (C. C. A. 8) and *Basik v. General Motors Corp.*, 311 Mich. 705, 19 N. W. 2d 142 as authority for the proposition that coverage has not been withdrawn from 'employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production.' The employees in such cases were cookhouse employees in a lumber camp and cafeteria workers in an industrial plant, providing eating facilities for employees engaged in producing goods for interstate commerce. There may be situations where such services are 'closely related' and 'directly essential' but the conferees never intended to create such broad coverage as the quoted passage indicates.

"I am in agreement with the summary that under the redefinition of 'produced' the Act continues to apply to office workers, plant guards, watchmen and maintenance workers of the primary employer engaged in producing goods for commerce as well as to production employees of tool and die concerns and public utilities furnishing things without which the primary employer could not conduct his business. Many of the cases the summary cites, however, go far beyond the situations to which I have just referred. For example, it cites:

"1. *Roland Electrical Co. v. Walling*, 326 U. S. 657—office employees of a firm, which made, repaired or maintained machinery for customers within the state who used same in producing goods for interstate commerce.

"2. *Meeker Cooperative v. Phillips*, 158 F. 2d 698 (C. C. A. 8)—office employees of an electric power company supplying electrical energy to customers within the state for use by the latter in producing goods for interstate commerce.

"3. *Borden v. Borella*, 325 U. S. 679—employees maintaining, servicing and guarding an office building owned by an interstate manufacturing company and occupied primarily by its executive and administrative offices.

"4. *Walling v. McCrady Construction Co.*, 156 F. 2d 932 (C. C. A. 3)—employees of a construction company some of whom were engaged in constructing new facilities for existing interstate manufacturing plants.

"5. *Bozant v. Bank of New York*, 156 F. 2d 787 (C. C. A. 2)—custodial and maintenance employees of an office building occupied by lawyers, brokers and banks. Coverage was asserted as to the custodial and maintenance employees because the banks prepare, execute or validate bonds, shares of stock etc. some of which move out of the state.

"6. *Tormey v. Kiekhafer Corp.*, 76 F. Supp. 557 (E. D. Wis.)—employees doing research and experimental work for an interstate manufacturer. Their work was abandoned and no new or improved products were shipped in commerce as a result of their activities.

"7. *Walling v. Hamner*, 64 F. Supp. 690 (W. D. Va.)—employees of a sawmill operator who produced and sold mine props within the state to supply companies, which in turn sold them also within the state to interstate coal companies for use in producing coal for interstate commerce. The employer also made mine props for a coal company within the state which produced coal that it transformed into coke and shipped out of the state."<sup>58</sup>

At this writing no official opinions or interpretations have been released by the Wage-Hour Administrator. The Solicitor of the Labor Department, whose opinions do not have the same legal status, in terms of reliance under the Portal-to-Portal Act, as those of the Administrator, however, has advised:

"This will reply to your letter of November 19, 1949, requesting my opinion regarding the coverage under the Fair Labor Standards Act, as amended, of employees of a fertilizer concern who are engaged in producing fertilizer, all of which is sold for use by farmers in the same State. A substantial quantity of the crops grown by these farmers are sold in interstate commerce. You state that the materials from which the fertilizer is made are received from outside the State and are then mixed in the company's plant. You request my opinion as to whether the Act now applies, and whether, under the amendments effective January 25, 1950, it will apply to employees working on these materials after they have 'come to rest' in the fertilizer factory from points outside the State.

"Under the present Act, the employees you describe would, in my opinion, be covered by the Act as employees engaged in a process or occupation necessary to the production of goods (farm products) for interstate commerce. *McComb v. Super-A Fertilizer Works*, 165 F. 2d 824 (C. A. 1). However, under the Act as amended by the Fair Labor Standards Amendments of 1949, it is my opinion that coverage of these employees may no longer be based on the relationship of their work to the production of crops for interstate commerce by the farmers who use the fertilizer. It is apparent from the legislative history of the recent amendment to section 3(j) of the Act that Congress did not intend that employees of an independent fertilizer company producing fertilizer for use by farmers in the same State should be considered to be covered by the Act as engaged in a 'closely related process or occupation directly essential to' the production of goods (crops) by such farmers for commerce. Such employees, therefore, would, in my opinion, not be covered by the Act if they have nothing to do with the ordering or receiving of goods from other States and do not otherwise engage in commerce or in the production of goods for commerce, as defined in the Act."<sup>59</sup>

#### PRE-EXISTING INTERPRETATION OF 1938 ACT

As indicated above, the 1949 Amendments do not change the basic framework of the 1938 Act with respect to requiring certain compensation for employees engaged "in commerce" or "in the production of goods for commerce," although the definitions of some of the terms of that framework are altered. As before, the problem is to be approached on an individual employee basis; that is, not in terms of plants or industries, but in terms of the nature of the activity of a particular employee. The prior interpretation given by the Su-

58. BNA, 1950 WH 1007-10.

59. *Id.* at 2021-22.

preme Court to those terms affected by the change should prove useful in determining the scope of the change.

(a) *Employees Engaged in Commerce*

Section 3(b) of the 1938 Act defined "commerce": "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or *from any State to any place outside thereof.*" (The italicized words are now replaced by "between any State and any place outside thereof.")

The General Statement of Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938 issued by the Wage-Hour Administrator on July 3, 1947 included the following on employees in commerce:

"The first category of workers included, those 'engaged in (interstate) commerce,' applies, typically but not exclusively, to employees in the telephone, telegraph, radio, and transportation industries, since these industries serve as the actual instrumentalities and channels of interstate commerce. Employees who are an essential part of the stream of interstate commerce are also included in the phrase 'engaged in commerce'; for example, employees of a warehouse whose activities are connected with the interstate receipt or distribution of goods. Employees engaged in producing fuel, power, or other goods or facilities for use or consumption entirely within the State by essential instrumentalities of interstate commerce, when such use or consumption directly aids or facilitates the interstate activities performed by means of such instrumentalities, may likewise be deemed 'engaged in commerce.' They would, in any event, be producing goods 'for commerce' as explained in § 776.7(c). Thus, for example, the Act is considered applicable to employees engaged in producing electric energy, steam, fuel, or water for use within the State by railway terminals or depots, telephone exchanges, radio broadcasting stations, etc. The activities of such employees directly facilitate, aid, and contribute to interstate transportation, transmission and communication." <sup>60</sup>

At the time of the release of the above administrative interpretation the United States Supreme Court had interpreted the phrase in a number of opinions, the gist of which may be presumed to be included in the above statement.

In the first Supreme Court decision, *Walling v. Jacksonville Paper Co.*,<sup>61</sup> there was involved the coverage of warehouse employees of a wholesale paper company at those branches where interstate shipments were received, but distribution to customers did not involve delivery or shipment out of the state. It had been decided by the lower court that those employees engaged in the procurement or receipt of interstate shipments were engaged "in commerce."<sup>62</sup> The Supreme Court's decision added to this coverage those employees engaged in delivering or shipping goods within the state which had not, *in fact*, come to rest in the warehouse at the end of their interstate journey. Included were

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60. 29 CODE FED. REGS. § 776.6 (Supp. 1947).

61. 317 U. S. 564, 63 Sup. Ct. 332, 87 L. Ed. 460 (1943).

62. *Jacksonville Paper Co. v. Fleming*, 128 F. 2d 395 (5th Cir. 1942).

interstate shipments destined for specific customers by reason of prior order or understanding. The Court, through Mr. Justice Douglas, said:

"It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. . . . If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondents warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse."<sup>63</sup>

The Court did not find, under the facts of the case, any "practical continuity of movement" with respect to goods moving to intrastate customers, where there were no prior orders or understandings. In the companion case of *Higgins v. Carr Bros. Co.*,<sup>64</sup> the same principles were used to deny coverage to a fruit wholesaler's employee, who prepared shipments for delivery to customers within the state. The court pointed out that a showing of competition with wholesalers making interstate shipments was immaterial: ". . . that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act . . . and extended federal control to business 'affecting commerce.'"<sup>65</sup>

The *Jacksonville Paper* case indicated the scope of the interstate movement of goods and something of the required relationship to such movement. Another group of Supreme Court cases decided in the 1942 term deal with situations where the employee does not purport to be engaged in or handling goods moving in interstate commerce but whose activities are related to the channel or facility of interstate movement. *Overstreet v. North Shore Corp.*<sup>66</sup> involved the application of the Act to certain employees of an employer operating a toll bridge and toll road, connecting with an interstate arterial highway, the bridge being a drawbridge over a navigable waterway carrying interstate traffic. The Court held the Act applicable to the drawbridge operator, an employee engaged in repair and maintenance of the bridge and toll road and the ticket seller and toll collector. It was stated that a "practical test" should be followed of what "engaged in interstate commerce" means and that such a test had been evolved under the coverage requirements of the Federal Employers Liability Act<sup>67</sup> prior to its amendment in 1939. Under this other statute it had been held that the work of keeping railroad tracks and bridges in repair was so closely related to the indispensable facilities of interstate com-

63. 317 U. S. at 567-68, 569.

64. 317 U. S. 572, 63 Sup. Ct. 337, 87 L. Ed. 468 (1943).

65. 317 U. S. at 574.

66. 318 U. S. 125, 63 Sup. Ct. 494, 87 L. Ed. 656 (1943).

67. 36 STAT. 65 (1908), 45 U. S. C. A. §§ 51 *et seq.*

merce as to be in practice and legal contemplation a part of such commerce.<sup>68</sup> The toll bridge and toll road being considered the indispensable facilities of interstate movement in the case before the Court, the employees maintaining and repairing such facilities would be "engaged in commerce," "because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement."<sup>69</sup> Employees of contractors engaged in building new abutments for and repairing bridges for an interstate railroad were held to be "in commerce" in *Pederson v. J. F. Fitzgerald Construction Co.*<sup>70</sup> A few months later, however, in *McLeod v. Threlkeld*,<sup>71</sup> the Court denied coverage to the person employed as a cook by a caterer furnishing meals under contract to the maintenance-of-way employees of an interstate carrier. The dining car in which the employee's activities were performed ran on rails and followed the maintenance crew to such points as their work required.

The majority opinion stated:

"The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. . . . Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the case where the employees supply themselves."<sup>72</sup>

Four judges dissented on the theory that the activities of the cook were a necessary part of the carrying on of a business engaged in interstate commerce. The dissenters urged that the construction of "in commerce" should be as broad as "production of goods for commerce" so far as "necessary" employees were concerned.<sup>73</sup>

The Court of Appeals for the Tenth Circuit attempted a synthesis of these Supreme Court decisions in *New Mexico Public Service Co. v. Engel*.<sup>74</sup> This case involved the coverage under the "in commerce" provision of FLSA of a plant engineer, operating machinery which generated electricity, all of which was sold to customers within the state where generated. A very small percentage of the total output of electricity went to such customers as an interstate railroad, a telephone company and an emergency municipal airport. The court refused to apply the *de minimis* doctrine, and held the employee to be covered on the ground that the services he performed consistently and con-

68. 318 U. S. at 129.

69. *Id.* at 130.

70. 318 U. S. 740, 63 Sup. Ct. 558, 87 L. Ed. 1119 (1943).

71. 319 U. S. 491, 63 Sup. Ct. 1248, 87 L. Ed. 1538 (1943).

72. 319 U. S. at 497.

73. *Id.* at 501.

74. 145 F. 2d 636 (10th Cir. 1944).

tinuously were "essential to the movement of commerce and not merely sporadic and isolated."<sup>75</sup> In reaching this conclusion the court referred approvingly to the "test" of *McLeod v. Threlkeld*<sup>76</sup> requiring an activity to be "closely related" to commerce. "And in that connection closeness depends upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce. . . . If a cessation of the services of the employee causes an interruption or interference with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof."<sup>77</sup> It may be noted that the employee in this case would also be engaged "in the production of goods for commerce" under the General Statement of Coverage issued by the Wage-Hour Administrator in 1947.<sup>78</sup>

(b) *Employees Engaged in the Production of Goods  
for Commerce*

Section 3(j) of the 1938 Act defined "production of goods" as follows:

" . . . an employee shall be deemed to have been engaged in the production of goods for commerce if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods *or in any process or occupation necessary to the production thereof, in any State.*" (The italicized words are now replaced by "or in any closely related process or occupation directly essential to the production thereof.")

The Administrator's General Statement of Coverage included in part this explanation of the interpretation of this section:

"(a) The second category of workers included, those engaged 'in the production of goods for (interstate) commerce,' applies typically but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in Section 3(j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.' Therefore the benefits of the statute are extended to such employees as maintenance and repair workers, watchmen, clerks, stenographers, messengers, all of whom, if not actually engaged in the production of goods, must be considered as engaged in processes or occupations 'necessary to the production' by the producer of goods for commerce. Enterprises cannot operate without such employees. If they were not doing work 'necessary to the production' of goods they would not be on the payroll. Significantly, it is provided in section 15(b) that 'proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within 90 days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was

75. *Id.* at 640.

76. *Supra*, note 72, and accompanying text.

77. 145 F. 2d at 638.

78. 29 CODE FED. REGS. § 776.7(c) (Supp. 1947).

engaged in the production of such goods.' Hence, all the employees, in a place of employment where goods shipped or sold in interstate commerce were produced, are included in the coverage, unless the employer maintains the burden of establishing, as to particular employees, that their functions are so definitely segregated that they do not contribute to the production of the goods for interstate commerce as these terms are broadly defined in the act. . . .

"(c) The Fair Labor Standards Act, however, in its application to employees engaged in the production of goods for interstate commerce, is not limited to employees engaged in the production (as defined in the act) of goods for shipment across State lines. The courts have indicated that goods are produced 'for commerce,' even though they do not subsequently leave the State, if they are produced in order to supply the needs of interstate commerce, or to serve as an essential part of such commerce, or to aid or facilitate the carrying on of interstate commerce by essential instrumentalities or facilities of commerce such as interstate railroads, highways, telegraph or telephone systems, pipe lines, airports, harbors, and the like. For example, employees must be considered engaged in the production of goods for interstate commerce when engaged within a State in such activities as producing ice, electric energy, railroad ties, crushed rock, bituminous aggregate, ready-mixed concrete, telephone and telegraph poles, or other similar items for use or consumption wholly within the same State by interstate railroads, telegraph or telephone companies, etc., in carrying on interstate transportation or communication; or for use or consumption within that State in the maintenance, repair, or reconstruction of essential instrumentalities of interstate trade, commerce, transportation, transmission or communication."<sup>79</sup>

This discussion can center on the coverage of the "fringe employees," that is, those employees whose activities are in some way related to, but do not themselves actually amount to, the working on or handling of goods destined to move across a state line. Where the employee actually works on or handles in some way at least some ingredient of such goods, no question of coverage arises unless a specific exemption is involved. The change in the statute does not affect those employees engaged in such activities.

The case of *A. B. Kirschbaum Co. v. Walling*,<sup>80</sup> decided in 1942, may be regarded as the leading case on this phase of FLSA coverage. There was involved in the case the application of the statute to certain custodial, maintenance and building service employees of an employer in whose loft building independent manufacturing concerns were principally engaged in producing goods for interstate commerce. The court found the employees in question to be covered. In the majority opinion, Mr. Justice Frankfurter said:

"Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. . . . We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it

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79. *Id.* § 776.7(a), (c).

80. 316 U. S. 517, 62 Sup. Ct. 1116, 86 L. Ed. 1638 (1942).

is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."<sup>81</sup>

In two decisions in 1945 the Supreme Court considered the coverage of maintenance and building service employees in office buildings in which no actual productive processes were performed. The employees were held to be covered in *Borden Co. v. Borella*,<sup>82</sup> where the building in question was owned, operated and 58% of its space occupied, by a manufacturing concern with plants producing for commerce in many states. From its offices in the building, the owner directed much of its general activities throughout the country. The Court explained that here the building employees performed their functions where production was administered, managed and controlled and that the distinction between such a fact situation and that in *Kirschbaum v. Walling* was without economic or statutory significance:

"In the economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved in changing the form or utility of a tangible article. Such labor is but an integral part of the coordinated productive pattern of modern industrial organizations. Equally a part of the pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities. . . . From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office 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 various manufacturing plants."<sup>83</sup>

By being "essential or necessary" to the administrative and executive employees of the company in the office building, the employees involved were deemed necessary to the production emanating from the manufacturing plants in other localities. In the companion case of *10 East 40th Street Bldg., Inc. v. Callus*,<sup>84</sup> however, the Court, with four justices dissenting, refused coverage to the same sort of employees in a general office building (with no manufacturing), even though there was included in its great variety of tenants the executive and sales offices and sales agencies of manufacturing and mining concerns. The following language from Mr. Justice Frankfurter's opinion may be contrasted with the quotation from the preceding case:

"Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the

81. 316 U. S. at 524, 525. The question of how much of the building must be devoted to the production of goods for commerce in order for the maintenance employees to be covered is discussed in *D. A. Schulte, Inc. v. Gangi*, 328 U. S. 108, 66 Sup. Ct. 925, 90 L. Ed. 1114 (1946).

82. 325 U. S. 679, 65 Sup. Ct. 1223, 89 L. Ed. 1865 (1945).

83. 325 U. S. at 683.

84. 325 U. S. 578, 65 Sup. Ct. 1227, 89 L. Ed. 1806 (1945).



scope of the Fair Labor Standards Act. . . . In giving a fair application to § 3(j), courts must remember that the 'necessary' in the phrase 'necessary to the production' . . . 'is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority.' *A. B. Kirschbaum Co. v. Walling*, . . . 316 U. S. at 525. . . . Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods."<sup>85</sup>

The duties of a night watchman at a veneer plant in "protecting the building, machinery and equipment from injury or destruction by fire or trespass" at times when no production was scheduled, were considered to bring the employee within the coverage of the Act in *Walton v. Southern Package Corp.*<sup>86</sup> The application of the Act to fire fighters was vigorously contested in the case of *Armour & Co. v. Wantock*,<sup>87</sup> decided almost a year later. The employer made use of quotations from *Kirschbaum v. Walling* and *Overstreet v. North Shore Corp.* to argue that the word "necessary" meant "indispensable," "essential," or "vital." Mr. Justice Jackson speaking for a unanimous Court rejected this argument:

"In their context, the restrictive words like 'indispensable,' which petitioner quotes, do not have the automatic significance which petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods. . . . A court would not readily assume that a corporation's management was spending money on a mere hobby or an extravagance. The company does not prove or assert that this fire protection is so unrelated to its business of production that it does not for income-tax purposes deduct these wages of these employees from gross income as 'ordinary and necessary expenses.' . . . If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act."<sup>88</sup>

In *Warren-Bradshaw Drilling Co. v. Hall*,<sup>89</sup> the Act was applied to members of the rotary-drilling crew of an employer who contracted with the owners or lessees of oil lands to drill holes to agreed upon depths short of oil sand. Another type of crew would "bring in" the oil well or demonstrate it to be a "dry hole." The activities were considered to be a necessary part of the productive process, since oil could only be produced by piercing the earth's surface. This led Mr. Justice Roberts to exclaim in dissent:

"The labor of the man who made the tools which drilled the well, that of the sawyer who cut the wood incidentally used, that of him who mined the iron of

85. 325 U. S. at 582, 583.

86. 320 U. S. 540, 64 Sup. Ct. 320, 88 L. Ed. 298 (1943).

87. 323 U. S. 126, 65 Sup. Ct. 165, 89 L. Ed. 118 (1944).

88. 323 U. S. at 130, 131.

89. 317 U. S. 88, 63 Sup. Ct. 125, 87 L. Ed. 83 (1942).

which the tools were made, are all just as necessary to the ultimate extraction of oil as the labor of respondents. Each is an antecedent of the consequent,—the production of goods for commerce.”<sup>90</sup>

Two decisions in 1946, in which Mr. Justice Burton wrote the opinion, will complete this survey of Supreme Court interpretation of “necessary to production.” The first is one which the House Conference Report states the Amendment was intended to overrule. In *Martino v. Michigan Window Cleaning Co.*,<sup>91</sup> the employees involved were principally engaged in washing windows on customers’ premises used in the production of goods for commerce. The coverage question was disposed of very briefly: “If the services rendered in this case had been rendered by employees of respondent’s customers engaged in the production of goods for commerce, those employees would have come under the Act. Respondent’s employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts.”<sup>92</sup>

In *Roland Electrical Co. v. Walling*,<sup>93</sup> the employees were engaged in commercial and industrial wiring and electrical work for customers of their employer operating facilities of interstate commerce and plants producing goods for such commerce. The employees in question (including a few clerical employees) were held to come squarely within the coverage of the Act.

“This [Act] does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration. . . . There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production. . . . The *necessity* to the petitioner’s customers, in their productive work, of the sales made and the services supplied to them by the petitioner’s employees is the foundation of petitioner’s business. The essential need for motors and wiring in the conduct of electrically operated productive processes of manufacture is beyond question.”<sup>94</sup>

#### CONCLUSION

This discussion has attempted to provide a basis for judging the effect of the amendments to the general coverage provisions of the Fair Labor Standards Act by presenting in some detail the legislative history of the changes in the statute and pertinent Supreme Court interpretations of the prior wordings. These should make obvious the fact that there is no simple formula by which the new problems of coverage will be determined. Certain observations may be made with respect to drawing the lines that the courts will have to determine.

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90. 317 U. S. at 94.

91. 327 U. S. 173, 66 Sup. Ct. 379, 90 L. Ed. 603 (1946).

92. 327 U. S. at 176-77.

93. 326 U. S. 657, 66 Sup. Ct. 413, 90 L. Ed. 383 (1946).

94. 326 U. S. at 664. Italics in original.

(1) The change in the definition of "commerce" so as to include *incoming* foreign commerce should not raise any particular difficulties. Typically, for example, the employees of importers will now be covered, presumably under the same limitations as were laid down by the Court in *Walling v. Jacksonville Paper Co.*<sup>95</sup>

(2) There can be little question that the requirements that an employee be engaged in activity "closely related" and "directly essential" to production of goods were placed in the Act with the expectation of limiting its coverage. It was the product of the "coalition" group who were working to defeat the efforts of the Administration to extend coverage. So far as those responsible for drafting the language and insisting upon its inclusion in the statute as enacted are concerned, there can be no doubt but that it was their desire to withdraw coverage in certain situations deemed to have only a tenuous relationship to the production of goods for commerce. This language was not placed in the Act to clarify and provide a surer basis for existing court and administrative decisions on coverage. It was placed there, and retained there, by those who were antagonistic to many of such existing interpretations and applications. Although there can be no doubt of the hopes of those originating and insisting upon such language, it still does not necessarily follow that a majority of the two houses of Congress had the same hopes with respect to the language used, or that the language used has the effect of accomplishing such hopes, assuming that they existed.

(3) The new language, in requiring the covered activity to be both "closely related" and "directly essential" to the production of goods, suggests that there are two separate elements of relationship to be satisfied. It is predicted, however, that the two phrases will not receive separate interpretation in any significant sense. "Closely related" will be considered as adding emphasis only, and if the activity is, in fact, found to be "directly essential" to production it will inevitably be considered "closely related," regardless of the actual "closeness" in a geographical, chronological or productive process sense.

(4) A possible line of demarcation for activities to be deemed "directly essential" to the production of goods for commerce is to be found in the cases interpreting "in commerce" coverage. The "test" of *McLeod v. Threlkeld*<sup>96</sup> required the employee's activities to be in or "so closely related to the movement of commerce as to be a part of it." In that case, the Court refused coverage to a cook preparing and serving meals to railroad maintenance employees who would themselves be considered "in commerce." Being beneficial to the personal needs of other employees was not enough—the relationship had to be interstate "movement" itself. In the same way the new wording could require a similar relationship to the production of goods in contrast to rendering

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95. 317 U. S. 564, 63 Sup. Ct. 332, 87 L. Ed. 460 (1943), *supra* notes 61-63.

96. 319 U. S. 491, 63 Sup. Ct. 1248, 87 L. Ed. 1538 (1943), *supra* notes 71-73.

services personally beneficial or useful to the employees who produce the goods. With this approach employees engaged in food preparation and serving and the erection and maintenance of company-owned employee homes would normally be excluded from coverage. On the same general analogy it could be held that engaging in an activity directly essential to the activity of employees who are in turn directly essential to the production of goods for interstate commerce is not sufficient for coverage. For example, an employee of a company producing cleaning equipment, used entirely in the state for cleaning premises where goods are produced for commerce would, on this basis, be excluded from coverage.

(5) It might be said that, in general, the approach indicated in the above paragraph has been the basis of coverage under the term "necessary" in the 1938 Act. This is recognized in the five types of "fringe" employees which the House Conference Report states are still covered. Maintenance, custodial and clerical employees are admitted to be performing activities "closely related" and "directly essential" to the production of goods whether hired by the producer or employed by an independent contractor who has the producer for a customer. Similarly the employees who make or repair the equipment used in production or furnish power for production are admittedly still covered. Once it is stipulated (as it seemingly inevitably must be) that it is the nature of the employee's activity with respect to production and not whom he is employed by, that must be controlling, some of the examples of non-coverage given by the House Conference group would seem inconsistent. If a janitor of an industrial plant would be covered when he was engaged in washing the plant's windows, or mowing the lawn around the plant or exterminating insects within the plant, then on what basis can employees on the payroll of an independent contractor doing exactly the same work in the same place be excluded? This is an obvious and glaring inconsistency apparent on the face of the House Conference Report.

(6) A "practical test" might be followed by asking: "What would happen to the actual production of goods for commerce if this particular type of activity were not performed?" This is, in effect, applying the "indispensability" test but in large measure such a test has in fact been followed. The new wording would in effect require, not only that the activity contribute something essential to the actual production of goods, but that it have such effect immediately. This may be taken to be satisfied, if it exists, with reference to any part or ingredient of the goods which finally move in interstate commerce.

(7) The conclusion seems to grow that there is real likelihood that the coverage of the Act will not be substantially altered and that most activities

held to be "necessary" will also be "closely related" and "directly essential." The legislative history being to some extent contradictory and internally inconsistent, the courts will likely conclude that the change in language had little consequence in fact, apart perhaps from the specific cases mentioned in the House Conference Report.<sup>97</sup>

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97. *Supra*, note 55, and accompanying text.