

Chapter 10

FLSA COVERAGE: EMPLOYMENT RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS

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10f (RESERVED)

10a GENERAL

10a00 Purpose of chapter.

FOH chapter 10 contains interpretations regarding the employment relationship required for the Fair Labor Standards Act (FLSA or Act) to apply, the geographical limits of the Act's applicability, and employment which is specifically excluded from coverage under the Act. These coverage concepts are equally applicable to activities which constitute engagement in or production for interstate or foreign commerce and to employment in an enterprise described in section 3(s).

10b THE EMPLOYMENT RELATIONSHIP

10b00 Employment relationship required for FLSA to apply.

In order for the FLSA to apply there must be an employer-employee relationship. This requires an "employer" and "employee" and the act or condition of employment. FLSA sections 3(d), (e), and (g) define the terms "employer," "employee," and "employ."

10b01 FLSA employment relationship distinguished from the common law concept.

The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of the master and servant relationship. The difference between the FLSA employment relationship and the common law employment relationship arises from the FLSA statement that "[E]mploy includes to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him or her by another is sufficient to create the employment relationship under the FLSA.

10b02 Method of compensation not material.

The fact that no compensation is paid and the worker is dependent entirely on tips does not negate his/her status as an employee, if other indications of employment are present. If the worker is paid, the fact that he or she is paid by the piece or by the job or on a percentage or commission basis rather than on the basis of work time does not preclude a determination that the worker is, on the facts, an employee with respect to the work for which such compensation is received.

10b03 Religious, charitable, and nonprofit organizations, schools institutions, volunteer workers, members of religious orders.

- (a) There is no special provision in the FLSA which precludes an employer-employee relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who does this work as a means of livelihood. In such cases there is an employer-employee relationship for purposes of the Act.
- (b) Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees." However, the fact that such a person is a member of a religious order does not preclude an employer-employee relationship with a state or secular institution.

- (c) In many cases the nature of religious, charitable, and similar nonprofit organizations and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross; working with children with disabilities or disadvantaged youth; helping in youth programs as camp counselors, scoutmasters, or den mothers; providing child care assistance for needy working mothers; soliciting contributions or participating in benefit programs for such organizations; and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employer-employee relationship.
- (d) Although the volunteer services (as described in (c) above) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated services whose employment is subject to the standards of the Act. Where such an employment relationship exists, the Act requires payment of not less than the statutory wages for all hours worked in the workweek. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable work. For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. The Wage and Hour Division (WHD) will not consider that an employer-employee relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform non-clerical services in the church preschool during off-duty time from his or her office work as an act of charity. Conversely, a preschool employee may volunteer to perform work in some other facet of the church's operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.
- (e) As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation in such activities would not necessarily create an employment relationship.
- (f) The sole fact that a student helps in a school lunchroom or cafeteria for periods of 30 minutes to an hour per day in exchange for their lunch is not considered to be sufficient to make him or her an employee of the school, regardless of whether he or she performs such work

regularly or only on occasion. Also, the fact that students on occasion do some cleaning up of a classroom, serve the school as junior patrol officers or perform minor clerical work in the school office or library for periods of an hour per day or less without contemplation of compensation or in exchange for a meal or for a cash amount reasonably equivalent to the price of a meal or, when a cash amount is given in addition to a meal, it is only a nominal sum, is not considered sufficient in itself to characterize the students as employees of the school. A similar policy will be followed where the students perform such tasks less frequently but for a full day, with an arrangement to perform their academic work for such days at other times. For example, the students may perform full-day cafeteria service four times per year. In such cases, the time devoted to cafeteria work in the aggregate would be less than if the student worked an hour per day. However, if there are other indicia of employment, or the students normally devote more than an hour each day or equivalent to such work, the circumstances of the arrangement should be reviewed carefully.

- (g)** In the ordinary case, tasks performed as a normal part of a program of treatment, rehabilitation, or vocational training in the following situations will not be considered, under section 3(g) of the Act, as work of a kind requiring a hospital patient, school student, or institutional inmate to be considered an employee of the hospital, school, or institution conducting the program, for purposes of the FLSA: tasks performed by individuals committed to training schools of a correctional nature, which are required as a part of the correctional program of the institution as a part of the institutional discipline and by reason of their value in providing needed therapy, rehabilitation, or training to help prepare the inmate to become self-sustaining in a lawful occupation after release.
- (h)** The WHD will not assert that initial participation by a student with disabilities in a school-work program constitutes an employment relationship if certain conditions are met. However, after an employment relationship has developed, the provisions of the Act will be applicable.
- (i)** The conditions under which an employment relationship initially will not be asserted are:

 - (1) The activities are basically educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the students. The student may receive some payment for their work in order to have a more realistic work situation, or as an incentive to the student or to insure that the employer will treat the student as a worker.
 - (2) The time in attendance at the school plus the time in attendance at the experience station (either in the school or with an outside employer) does not substantially exceed the time the student would be required to attend school if following a normal academic schedule. Time in excess of 1 hour beyond the normal school schedule or attendance at the experience station on days when school is not in session would be considered substantial.
 - (3) The student does not displace a regular employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the school or an independent contractor including, for example, employees of a contractor operating the food service facilities at the school.

- (j) The shift to an employment relationship may occur shortly after the placement or it may occur later. As a general guide, work for a particular employer, either a private employer or the school, after 3 months will be assumed by the WHD to be part of an employment relationship unless the facts indicate that the training situation has not materially changed. Thus, if the conditions which warranted the finding that the student is not considered an employee continue, he or she may remain for a period of time as a trainee rather than an employee. On the other hand, if after the 3-month period the training aspects are subordinated and the work aspects clearly predominate, the student will be considered as an employee.

10b04 Employer asserts homework performed by independent contractor.

If the employer asserts their outside work or homework is performed by independent contractors, whether the workers are employees or independent contractors under the FLSA is determined by applying a multi-factor economic reality analysis that focuses on whether the worker is dependent on the employer for work (and thus is an employee) or is in business for themselves (and thus is an independent contractor). *See* FOH 10b05–10b07.

[03/11/2024]

10b05 Employment relationship.

- (a) An “employee” under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). “Employer” is defined to “include [] any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. 203(d).
- (b) In order for the provisions of the Act to apply, the worker must be considered an employee of an employer. In other words, there must be an “employment relationship” between the two. The provisions of the Act do not apply to workers who are properly classified as independent contractors.
- (c) Under the FLSA, the fundamental question is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor).
- (d) Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income. In fact, there is no single formula for determining whether an individual is economically dependent on the potential employer for work. Rather, an “economic reality test” is used to consider all the facts of a work relationship, rather than assuming that a label, contractual arrangement, or form of business decides if a worker is economically dependent on the potential employer. In assessing economic dependence, courts and the Department have historically analyzed the circumstances of the employment relationship, considering multiple factors to determine whether a worker is an employee or an independent contractor, with no factor or combination of factors having more weight than another.
- (e) FOH 10b06–07 discusses the analysis for determining whether a worker is an employee or independent contractor under the FLSA. If an employer asserts that a worker is not an employee for another reason (*e.g.*, because the worker is a volunteer or trainee), a different analysis may apply. *See* generally FOH 10b.

References:
[29 CFR 795.100–.110](#)

[03/11/2024]

10b06 **Determining whether a worker is an employee or independent contractor: applying the six economic reality factors.**

(a) *Economic reality test.* To determine if a worker is in business for themselves (and thus an independent contractor) or is economically dependent on an employer for work (and thus an employee), six factors (described in paragraphs (b)(1) through (6) of this section) are used to assess the economic realities of the working relationship. No one factor or combination of factors determines if a worker is an employee or independent contractor. Rather, all the circumstances of the work relationship should be examined. The weight given to each factor will depend on the facts and circumstances of the individual situation. In addition, these six factors are not exhaustive. As explained in paragraph (b)(7) of this section, additional factors may be considered if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.

(b) **Economic reality factors**

(1) *Opportunity for Profit or Loss Depending on Managerial Skill*

a. This factor considers whether the worker has opportunities for profit or loss based on managerial skill that affect the worker's economic success or failure in performing the work. Managerial skill can include initiative or business expertise or judgment. The following facts, among others, can be relevant in the determination:

1. Whether the worker determines or can meaningfully negotiate the charge or pay for the work provided;
2. Whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed;
3. Whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and
4. Whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

b. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

c. Examples: Opportunity for Profit or Loss Depending on Managerial Skill

1. Example 1: A worker for a landscaping company performs assignments only as decided by the company for its corporate clients. The worker does not independently choose assignments, ask for additional work from other clients, advertise the landscaping services, or try to reduce costs. The worker regularly agrees to work additional hours to earn more money. In this example, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may change based on the work available and their willingness to work more. Because of this lack of managerial skill affecting their opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.
2. Example 2: In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. These facts indicate independent contractor status under the opportunity for profit or loss factor.

(2) *Investment by the worker and the potential employer*

- a. This factor considers whether any investments by a worker are capital or entrepreneurial in nature. The fact that the worker makes investments that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, would weigh in favor of independent contractor status. On the other hand, costs of tools and equipment to a worker to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, would tend to indicate employee status.
- b. Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker's investments do not have to be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.
- c. Examples: Opportunity for Profit or Loss Depending on Managerial Skill
 1. Example 1: A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies

is not capital in nature and does little to further a business beyond completing specific jobs. These facts indicate employee status under the investment factor.

2. Example 2: A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents their own space. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (*e.g.*, they allow the worker to do more work and find new clients). These facts indicate independent contractor status under the investment factor.

(3) *Degree of permanence of the work relationship*

- a. This factor considers the nature and length of the work relationship. A work relationship that is indefinite in duration, continuous, or exclusive of work for other employers would weigh in favor of the worker being an employee. If the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple businesses, that would weigh in favor of the worker being an independent contractor. This may include regularly occurring fixed periods of work. The lack of a long working relationship does not necessarily suggest that the worker is an independent contractor. Short-term jobs for multiple employers may be due to the seasonal or temporary nature of the work or industry, and not the worker's business decision, and therefore may indicate employee status.

b. Examples: Degree of Permanence of the Work Relationship

1. Example 1: A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as decided by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity as the cook does not cook for other venues. These facts indicate employee status under the permanence factor.
2. Example 2: A cook has prepared specialty meals intermittently for an entertainment venue over the past three years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work from the entertainment venue for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.

(4) *Nature and degree of control*

- a. This factor considers the level of control the potential employer has, including reserved control, over the performance of the work and the economic aspects of the working relationship. Reserved control means the employer has the right to control even if they do not actually exercise the control.
- b. Facts relevant to the potential employer's control over the worker include whether the potential employer:
 - 1. sets the worker's schedule;
 - 2. supervises the performance of the work;
 - 3. explicitly limits the worker's ability to work for others, or places demands or restrictions on workers that do not allow them to work for others or work when they choose;
 - 4. uses technological means to supervise the performance of the work (such as by means of a device or electronically);
 - 5. reserves the right, for example, to supervise or discipline workers; or
 - 6. controls economic aspects of the working relationship, such as the prices or rates for services and the marketing of the services or products provided by the worker.
- c. More facts that show control by the potential employer indicate employee status; more facts that show control by the worker indicate independent contractor status for this factor.
- d. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control. However, actions taken by the potential employer that go beyond compliance with a specific, applicable federal, state, tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control.
- e. Examples: Nature and degree of control
 - 1. Example 1: A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines the staff assignments. Alpha House's policies prohibit nurses from working for other nursing homes while employed with Alpha House to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a

nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.

2. Example 2: Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contracted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse provides therapy sessions to residents at Beta House as well as other nursing homes in the community at the same time. These facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status under the control factor.

(5) *Extent to which the work performed is an integral part of the potential employer's business*

- a. This factor considers whether the work performed is an integral part of the potential employer's business.
 1. If the work performed by a worker is critical, necessary, or central to the potential employer's principal business, then this factor indicates that the worker is an employee.
 2. If the work performed by a worker is not critical, necessary, or central to the potential employer's principal business, then this factor indicates that the worker is an independent contractor.
- b. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part of the business.
- c. Examples: Extent to Which the Work Performed is an Integral Part of the Potential Employer's Business
 1. Example 1: A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because a necessary part of a tomato farm is picking the tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.
 2. Example 2: Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

(6) *Skill and initiative*

- a. This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.
 1. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work.
 2. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.
- b. Examples: Skill and Initiative
 1. Example 1: A highly skilled welder provides welding services for a construction firm. The welder does not make any independent decisions at the job site beyond what it takes to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding for the next job, or use their welding skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.
 2. Example 2: A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.

(7) *Additional factors*

- a. Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.

[03/11/2024]

10b07 **Facts that do not determine the worker's employment status.**

- (a) In an FLSA case, the following are examples of facts that do not determine whether the worker is an employee or independent contractor:
- (1) The worker is licensed by a state or local government;
 - (2) The worker relies entirely on tips;
 - (3) The worker has other sources of income;
 - (4) The worker is highly compensated;
 - (5) The place where work is performed (working at home or at the sites of the employer's customers does not indicate that the worker is an independent contractor);
 - (6) The absence of a formal employment agreement;
 - (7) An agreement stating that the worker is an independent contractor (the economic realities of the relationship, as opposed to the employer's characterization of the relationship, are relevant);
 - (8) The worker receives an Internal Revenue Service (IRS) Form 1099-MISC from the employer;
 - (9) The worker has obtained an employer identification number or has incorporated as an LLC, for example; or
 - (10) The worker has obtained worker's compensation insurance.

[03/11/2024]

10b08 Effect of sale on the employment relationship.

- (a) An employment relationship may exist between the parties to a transaction which is nominally a sale. For example, house-to-house canvassers who sell at retail the products of a particular company are typically employees of the company, although the specific facts of the canvassers' relationship with the company will be determinative. This may be the case notwithstanding that the company may issue contracts which are in the form of dealer contracts under which the company purports to sell its products to the canvassers at fixed wholesale prices and to recommend retail prices at which the products should be sold. As explained in FOH 10b05-07 above, a contract or agreement stating that the worker is an independent contractor does not determine the workers' status; instead, the economic realities of the relationship are determinative.
- (b) Similarly, an employee is not converted into an independent contractor by virtue of a fictitious sale of the goods produced by the employee to an employer, so long as the other indications of the employment relationship exist. Homeworkers who sell their products to a manufacturer are considered employees of the manufacturer where the economic realities of the relationship show that the worker is dependent on the employer for work instead of in business for themselves. When applying the nature and degree of control factor discussed in 10b06(a)(4) above, control exercised by the manufacturer over the homeworkers through its ability to reject or refuse to buy the product is similar to the control ordinarily exercised by a

manufacturer over employees performing work for the manufacturer at home on a piece rate basis.

[03/11/2024]

10b09 **Subject-matter of the employment relationship.**

- (a) The subject-matter of the employment relationship must be work or its equivalent. The Supreme Court has set forth the essential elements of work as:
 - (1) Physical or mental exertion (whether burdensome or not)
 - (2) Controlled or required by the employer
 - (3) Pursued necessarily and primarily for the benefit of the employer and his or her business
- (b) An essential element of work is not only that the employer receives certain benefits from the services of the alleged employees but that “the work necessarily or primarily benefits the company.”

10b10 **Effect of determination of the employment relationship.**

- (a) Once it is determined that one who is reputedly an independent contractor, lessee, partner, or the like, is in fact an employee, then all the employees of this so-called independent contractor engaged in the work for the principal employer likewise become the employees of the principal employer, who must guarantee compliance with the FLSA. Thus, the one who is responsible will be charged with seeing to compliance with the FLSA and must keep the records of the employees.
- (b) However, a manufacturer or producer may undertake to see to it that a true independent contractor complies with the FLSA, in order to avoid interference with the manufacturer’s own operations through a “hot goods” action under FLSA section 15(a)(1). Such an arrangement does not make the manufacturer or producer the employer.

10b11 **Trainees and student-trainees.**

- (a) The Supreme Court has held that the words “to suffer or permit to work,” as used in the FLSA to define “employ,” do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantages on the premises of another.
- (b) Whether trainees or students are employees of an employer under the FLSA will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA:
 - (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
 - (2) The training is for the benefit of the trainees or students.

- (3) The trainees or students do not displace regular employees, but work under their close observation.
- (4) The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded.
- (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
- (6) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

10b12 Government-sponsored employment development programs.

- (a) Certain federal and state training programs are designed to equip the labor force in an area with needed and marketable skills and may be specifically directed toward providing local industries with a labor pool from which workers having particular skills may be drawn.
- (b) Investigators may encounter programs of this type conducted under the auspices of federal and state agencies in which the facilities of business establishments are utilized during training hours under an agreement or lease arrangement with the agency. The instructors for such programs may, outside of training hours, be employed by the establishment whose facilities are used. Certain of the workers being trained may also be employed by this establishment outside of training hours.
- (c) Where the employees of the establishment are involved as either instructors or trainees, particular care shall be taken to determine whether there exists in actual fact an employment relationship, between the employer being investigated and the employees involved, during the hours devoted exclusively to the training program. The fact that the employer's facilities are utilized in the training program is not determinative of the existence of an employment relationship between the employer and trainees or instructors involved insofar as the hours devoted exclusively to such training is concerned. Nor is the fact that the training program is directly related to the employees' regular jobs in itself controlling where, as may be the case, the program is an independent training course conducted by the agency from which both employees and the employer benefit. See [FOH 10b11](#) and 29 CFR 785.27 -.32.
- (d) These instructions do not reflect a change in policy regarding the applicability of FLSA to trainees who are *employees*, during the training periods, of establishments investigated. They are designed, instead, to call attention to the need for a careful examination of the facts in each situation where training programs of the general type described are encountered. The existence of an employment relationship during training periods is of particular significance since an employee may be subject to the FLSA by virtue of employment in a covered enterprise even though not engaged in or producing goods for interstate commerce.

10b13 Employer identification numbers issued by Internal Revenue Service.

The issuance of employer identification numbers by the Internal Revenue Service (IRS) does not constitute a determination as to employer-employee relationship under the FLSA.

10b14 Students training in skilled paramedical occupations: nurses, x-ray technicians, etc.

- (a) Whether a student training for certain paramedical occupations is viewed as an employee of a hospital within the meaning of the Act will depend upon all the circumstances of the student's activities on the premises of the establishment. Where a bona fide student training program exists for such paramedical occupations and such program meets the criteria in FOH 10b11, no employment relationship will be deemed to exist. Generally this involves students training for such occupations as registered nurse, licensed vocational or practical nurse, x-ray technician, certified laboratory assistant, or any other skilled paramedical position. Such programs involve on-the-job training combined with extensive classroom lectures and laboratory instruction generally resulting in students receiving degrees, licensing, registration, or certification by an appropriate board or society. The mere payment of a scholarship, stipend, or allowance (as long as it does not exceed a reasonable approximation of the expenses incurred by the trainee taking the course or where it serves as an allowance for subsistence) will not be considered to establish an employment relationship.
- (b) Situations may be encountered where such a student will work in the hospital for compensation outside of the training schedule. In the typical case a student may do office or switchboard work. In such cases the student will be considered an employee during the time spent on such work and must be paid in compliance with the Act's requirements for such time. However, the fact that the student would be considered an employee during such time would not require the time spent in activities described in (a) above to be counted as hours worked.
- (c) On the other hand, the principles in (a) above do not include certain training programs such as those conducted for nurses' aides and orderlies where much of the training consists of on-the-job training and work experience with little if any related classroom lectures or laboratory instructions and which ordinarily do not lead to licensing, registration or certification. In many cases these programs exist only for the purpose of filling existing vacancies on the hospital staff. In such cases the students would be considered employees of the hospital. In this regard any time spent in the classroom or attending lectures would not be considered hours worked.

10b15 Golf course caddies.

Golf course caddies are engaged to serve the needs of particular players for substantial periods of time and their services are generally directed by and are of most immediate benefit to the players themselves. Arrangements may vary but the players, in one way or another, are expected to pay for the services rendered to them by the caddy. Because of these circumstances, the WHD is not prepared to assert that caddies are employees of the golf course operator.

10b16 Special duty nurses or sitters in hospitals and nursing homes.

- (a) In some cases a special duty nurse or sitter may be employed to care for a patient in a hospital or nursing home. Whether the employee is employed by the patient or by the hospital or nursing home is a question of fact. For example, if the hospital or nursing home determines whether use of a special duty nurse or sitter will be permitted, what the pay is to be (even though paid directly by the patient), and decides which special duty nurse or sitter will be assigned to a particular patient, the hospital or nursing home is considered to be the employer.
- (b) On the other hand, if the patient or their representative contracts directly with the special duty nurse or sitter as to pay, hours of work and other working conditions, and the establishment

does not control or supervise such work, an employment relationship does not exist between the special duty nurse or sitter and the establishment. This same principle will apply to a nurse or other employee on the hospital or nursing home staff who is employed during her off-duty hours as a special duty nurse or sitter by a patient in the establishment. During the period or periods in which the employee is so engaged on this special duty by the patient, the WHD will consider the employment relationship as with the patient and not with the hospital or nursing home.

- (c) A special duty nurse or sitter who is employed *by the patient* to care for such patient in a hospital or nursing home, as described in (b) above, is not employed “in connection with the operation of” the hospital or nursing home (*see* 29 USC 203(r)). The employment is in the nursing home or hospital only because the patient is there and the work is not connected “with the operation of” the hospital or nursing home *as such*.

10b17 **Newspaper area correspondents or stringers.**

Some newspapers have arrangements to obtain news stories (particularly local interest stories from outlying areas served by the newspaper) from persons identified in the industry as area correspondents or stringers. These writers ordinarily select their own materials which they obtain in the course of other occupations or while attending local events such as parties, athletic contests, and the like. They are paid on a per word or per line basis for stories submitted and accepted by the newspaper. The arrangements vary but traditionally the newspapers have considered these people to be in the same general category as professional free-lance writers and not employees. The WHD will not assert that an employer-employee relationship exists in such cases.

10b18 **Graduate students: research assistants.**

In some cases graduate students in colleges and universities are engaged in research in the course of obtaining advanced degrees and the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract. Normally, the graduate students involved in these programs are simultaneously performing research under the grants or contracts and fulfilling the requirements of an advanced degree. Under such circumstances the WHD will not assert an employer-employee relationship between the students and the school, or between the student and the grantor or contracting agency, even though the student receives a stipend for their services under the grant or contract.

10b19 **Externs.**

In some cases medical students elect in their senior year of medical school to work as externs in a hospital for a short period, sometimes 6 weeks. An extern is assigned to one of the hospital’s major areas of post-graduate training, such as medicine, general surgery or obstetrics. They attend the needs of patients under the immediate supervision of licensed physicians and also attend conferences, teaching rounds, and classroom exercises. The program is designed to provide the student with professional experience in the furtherance of their medical education in the same general manner as that provided interns. Such a program constitutes a part of the educational opportunities provided to the externs. Since such training is so predominantly for the benefit of the extern, the WHD will not assert that such externs are employees of the hospital to which they are assigned.

10b20 **Administrative residents in hospitals.**

- (a) Some college graduate school programs provide that candidates for the degree of Master of Hospital Administration (sometimes identified as Master of Business Administration, Master of Arts, Master of Public Health, etc.) must serve a certain period (often 12 months) of administrative residency in a hospital. The candidates continue as students on the rolls of the college. In the usual case, the hospital administrator responsible for the resident is also on the college faculty. The resident performs various tasks in the hospital, and generally prepares a thesis or various reports to the college concerning hospital administration. The resident may receive a stipend or allowance from the hospital. Pending interpretation by the courts, the WHD for purposes of enforcement of the Act will not assert that such students are employees of the hospital to which they are assigned as residents.
- (b) In some instances, the resident to augment income may secure employment in the hospital entirely apart from any duties performed as a resident. The principles stated in FOH 10b14(b) apply to such employment.

10b21 **Student observers in hotels and motels.**

- (a) Certain colleges providing academic training in hotel administration require their students to obtain a stipulated number of practice credits in order to qualify for a degree. These students act as observers in hotels and motels, usually during the summer months. Typically, the students have some assigned duties and move from department to department to learn the business. Generally, the students are paid a nominal sum, such as \$100 per month plus room and meals.
- (b) Where such a program is designed to provide a student with professional practice in the furtherance of his or her college education and the training is academically oriented for the benefit of the student, the WHD will not assert that the students are employees of the hotel or motel to which they are assigned.

10b22 **Job Corps enrollees.**

- (a) The Job Corps is a residential program for youths between 16 and 21 years of age established under the Economic Opportunity Act of 1964, as amended. Enrollees live in a Job Corps center (or camp) which is operated by either a governmental organization or a private organization, in either case supervised by a federal agency. Under section 107(a) of this act, the Director of the Job Corps is authorized to “provide or arrange for the provision of programs of useful work experience and other appropriate activities for enrollees.”
- (b) In implementing this provision, the Job Corps has made arrangements for the enrollees to work in private firms where they may perform work covered by the FLSA. Such arrangements with private employers are usually for part-time work and the average duration is 4 months. In such work experience programs, supervision over the enrollees is maintained in order to monitor their progress and maximize the quality of training given them. Arrangements are made between the Job Corps and the private employer-trainer regarding the division of training costs and the payment of wages.
- (c) If a Job Corps enrollee performs work subject to the FLSA in a private firm in such a work experience program he would be considered for purposes of the FLSA to be jointly employed by the corporation operating the center or camp and the private employer. Wages paid to

enrollees by either of the joint employers will be considered in determining compliance with the Act.

- (d) It is the position of the WHD that where such an enrollee is assigned to receive training and work experience with a private employer in an off-the-center work site, the following activities will not create an employer-employee relationship:
 - (1) In the preliminary stages of work experience, when the enrollee has had little or no previous training in the occupation and does no useful work, but is merely being acquainted with the employer's business
 - (2) Time spent by the enrollee in a classroom situation in which no useful work is performed
- (e) The following activities will generally create an employer-employee relationship assuming productive work is performed:
 - (1) When an enrollee has been sent to the employer for a short period in order to determine his or her aptitude and interest in an occupation preliminary to giving training
 - (2) When the enrollee has been sent to the employer for a short period in order to determine whether the training received is adequate to enable him or her to get and keep a job in the occupation
- (f) Job Corps enrollees also engage in on-site work experience, in connection with the conservation and development of natural resources and public recreational areas usually in conservation centers, and in performing other tasks at the center itself. No such work performed by enrollees inures to the benefit of the contractor who provides the training program and the WHD will not assert that these activities are considered as work for an employer within the coverage of the Act. Similarly, classroom activities whether or not resulting in a useful product would be part of or incidental to the vocational training program.
- (g) In determining the wages paid employees described in (c) above the joint employers may include the reasonable cost of such items as food, lodging, clothing, laundry, transportation to and from work, and medical and dental care in accordance with 29 CFR 531. The reasonable cost of providing an employee with medical and dental care may be based on the average of the costs actually incurred for all employees over a representative period.
- (h) In a Job Corps center (or camp) operated by a private employer, the above principles in no way affect the application of the FLSA, McNamara-O'Hara Service Contract Act (SCA) or Walsh-Healey Public Contracts Act (PCA) to the employer's own employees or employees of any subcontractors involved. *See* FOH 13b10 and FOH 14c01.

10b23 School employees: after hours work.

- (a) In some cases school employees will work outside of their normal working hours where a third party (either public or private) uses the school facilities. For example, a community organization may use the school cafeteria for a banquet or the auditorium for a concert, and the food service or custodial employees of the school will perform the necessary services. Time spent in the operation of a school and the maintenance of school property, both during

and after regular school hours is normally considered hours worked under the Act. School employees engaged in the operation and maintenance of school facilities during periods in which their services are made available to a third party are considered to be jointly employed by the school and the third party if the school itself contracts for the use of such employees. The total time spent in work for the joint employers will be counted as hours worked and paid for in compliance with the minimum wage and overtime pay provisions of the Act.

- (b) If the school does not require that its employees be utilized by nonschool organizations when using school facilities but such employees are hired merely for the convenience of the outside group and are paid directly by them, the hours worked and compensation paid to such employees for this time need not be included in determining compensation due to the employee for their employment by the school.

10b24 University or college students.

- (a) University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act. In addition to the examples listed in FOH 10b03(e), students serving as residence hall assistants or dormitory counselors, who are participants in a bona fide educational program, and who receive remuneration in the form of reduced room or board charges, free use of telephones, tuition credits, and the like, are not employees under the Act.
- (b) On the other hand, an employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act.

10b25 Fraternal orders: officers and volunteers.

The WHD will not assert that an employment relationship exists under the Act for persons who volunteer their services, including those who are elected, to a fraternal order not as employees and without contemplation of pay. Included would be such persons as the secretary and director or trustees of individual lodges. The payment of a nominal sum would not affect the status of a bona fide volunteer. *See* FOH 12a03.

10b26 School-related work programs.

- (a) Pursuant to the provisions of section 14(d) of the FLSA, the WHD will take no enforcement action with respect to minimum wage or overtime for public or private elementary or secondary students employed by any school in their school district in various school-related work programs, provided that such employment is in compliance with applicable child labor provisions. This position is adopted without prejudice to the rights of individual employees under section 16(b). This non-enforcement policy is not applicable to workers with disabilities in sheltered workshops operated by elementary or secondary schools since sheltered employment is not considered to be an integral part of a regular education program.
- (b) If such employment is not in compliance with applicable child labor provisions, the students so employed must be paid minimum wage and overtime for all hours worked in any workweek in which they were so employed. Also, the employer will be subject to child labor civil money penalties (CMPs).

10b27 **Prison inmates.**

- (a) Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, road gangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the Act (*see* FOH 10b03(g)).
- (b) A different situation exists, however, where inmates are contracted out by an institution to a private company or individual. In such instances an employer-employee relationship is created between the private company or individual and the prisoners. This is true regardless of whether the work is performed within the confines of the institution or elsewhere.

10b28 **Jurors.**

Service on jury duty for either a petit or grand jury does not result in the establishment of an employment relationship. Thus, all jurors and prospective jurors called to serve by the requesting public agency are not employees under the Act.

10b29 **Foster parents.**

- (a) Some governmental agencies operate social service programs which arrange for and finance the rearing of children by foster parents. No employment relationship will be deemed to exist where:
 - (1) A state or licensed private agency selects an individual who voluntarily agrees to become a foster parent *in accordance with state standards, and*
 - (2) The foster parent services are provided in the foster parent's home, *and*
 - (3) The state either directly or indirectly finances the foster parent services.

10b30 **Volunteers under the Domestic Volunteer Service Act of 1973.**

(a) **“Foster Grandparent” and “Senior Companion” programs**

Volunteers participating in either the “Foster Grandparent” or “Senior Companion” programs under the Domestic Volunteer Service Act of 1973 (DVSA) are not employees under the FLSA.

(b) **“University Year for Action” (UYA) programs**

- (1) Situations may be encountered where a university has established a federally-funded “University Year for Action” service learning program pursuant to the DVSA. These programs provide that students will receive college credits when they volunteer to perform various services, often for a nonprofit private organization, on a full-time basis for a year. The students receive a subsistence-level stipend to cover their expenses, and they are required to live at the low income level of the people they serve. The legislative history of the DVSA and the FLSA make clear that these students are not considered employees for purposes of the FLSA.

- (2) Universities which receive federal UYA funds have a 5 year funding limit, but are required to make every effort to continue the program after federal funds cease. Under such UYA continuation programs, the students generally receive college credit, pay tuition, receive a stipend, keep a journal of their experiences, make presentations of their work and learning, and present periodic written reports of their progress in achieving the program's objectives. In addition, the sponsor, ordinarily a faculty member, evaluates their internship performance.
- (3) Where a UYA continuation program meets this description, the WHD will not assert that an employment relationship exists. However, where programs are encountered which differ materially from the above described circumstances, obtain all the facts of the case and refer the file to the National Office (NO)/Division of Enforcement Policy and Procedures (DEPP), ATTN: FLSA/Child Labor Branch.

10b31 Government activities: volunteer services.

The principles in FOH 10b03(c) may apply with respect to certain governmental activities. For example, an office employee of the city may volunteer to perform non-clerical services, such as coaching a softball or basketball team in a city-sponsored program during his or her off-duty time as a charitable or civil act. Similarly a person may participate in the civil defense program for civil or personal motives. Where a person performs such volunteer services without promise or expectation of compensation, at hours that suit his or her own convenience whether by schedule or otherwise, and where no regular employee is replaced in the performance of normal duties, no employer-employee relationship exists with respect to such time. The activity may be performed on the employer's premises so long as it is not done during any time the employee is required to be on the premises and the control exercised by the employer is only minimal. A person, however, may not be both an employee and a volunteer while performing essentially the same duties. Thus, a person employed in park activities cannot have his or her time divided into working hours and volunteer hours while performing the same or related duties.

10b32 Government-financed child care services.

- (a) Whether individuals who provide child care services in their own homes under an agreement with a government social service agency are employees of such agency would depend upon the total fact situation involved in the arrangement. If the parent (or person standing in the place of a parent) is free to select, and in fact does select, an individual from a list of persons supplied by the agency as qualified to perform the child care services, with the agency merely agreeing to reimburse the child care operator selected, an employer-employee relationship would not exist between the government agency and the operator. Further, if the agency utilizes bona fide volunteers as day care operators over whom no control is exercised, and the monetary payment is simply to reimburse the operator for expenses, no employment relationship would exist. However, the activities of such day care homes may be covered under the Act, and the operator responsible for compliance with respect to any employees employed in connection with the operation of the child care center. *See* FOH 12g00.
- (b) Conversely, if in fact such freedom of choice does not exist, and the parent is told to which home the child must be taken for this service, and the agency is closely involved in directing and controlling the operator in performing the duties in rendering the child care services, an employer-employee relationship would exist between the agency and the operator.

10b33 **Election judges and officials.**

The WHD will take no position as to whether persons employed by a public agency, such as a Board of Elections or similar office, to serve as election judges and officials on election days are employees of the public agency and covered by the Act.

10b34 **Patient workers.**

- (a) The court has held that patient workers in hospitals or institutions whose work is of any consequential economic benefit to the facility are to be treated as employees. While the court has generally considered all circumstances in determining whether an employment relationship existed, the court specifically rejected as determinative the alleged therapeutic value of the work or the patient's level of performance. In general, we would hold that there is consequential economic benefit to the institution if the work in question would be performed by someone else if it were not done by the patient. However, where a patient is undergoing evaluation or training, we will not hold the patient to be an employee during the first three months of engagement in a work activity or activities provided the patient spends no more than 1 hour a day and no more than 5 hours a week in such activities and provided further that competent instruction and supervision is provided the patient during such period.
- (b) A patient in a hospital or institution may volunteer and need not be considered an employee for such services which would not be compensated by the institution if performed by a person other than a patient. Such volunteer services may include wheeling another patient in a wheelchair to and from certain activities, planting a vegetable garden if the fruits of such labor belong to the patient, and other similar activities. However, the ordinary maintenance, patient care, office work and other activities that are performed in the operation of an institution would create an employment relationship.

10b35 **Residential drug abuse and alcohol treatment programs.**

- (a) There are certain types of situations in residential drug abuse and alcohol treatment programs where an employment relationship would not be deemed to exist. For example, a residential care program which seeks to establish a family setting for treatment of persons with drug or alcohol problems would *not* create an employment relationship under the Act between the residents and the institution where:
 - (1) The work performed by the residents is that which is ordinarily done on a daily basis in a private home and is solely for the mutual benefit of the occupants of the home (institution).
 - (2) Residents do not perform work activities which would ordinarily be performed by full-time employees of the institution so that there is no displacement of regular full-time employees through substitution of resident workers.
 - (3) Residence in the institution and performance of activities by the occupants is short-term (usual no more than a year) as opposed to generally long term occupancy in such institutions as those concerned with the mentally ill, individuals with intellectual or developmental disabilities, the aged, or the terminally ill.
 - (4) The institution is relatively small, houses a limited number of residents, and has no paid staff other than counselors.

10b36 Veterans making artificial poppies.

It has long been the practice in United States (U.S.) Department of Veterans Affairs (VA) hospitals to have disabled veterans make artificial poppies that are dispensed on street corners by the Veterans of Foreign Wars and the American Legion. Whether these veterans are performing this work as employees would depend on the fact in each case. However, in view of VA's involvement, the WHD will not handle complaints or investigate in this area but will refer such matters to the VA.

10b37 Pharmaceutical externs and interns.

- (a) Colleges and universities which offer degree programs in pharmacy may require clinical or work experience at a pharmacy site. These externship courses combine classroom lectures and lab work with on-site work training under the supervision of a qualified pharmacist. Participation by students in such extern courses as part of their pharmacy curriculum is predominantly for their benefit and in furtherance of their educational opportunities. In some states completion of such courses may reduce the postgraduation and prelicensing internship requirements, thus enabling the students to become licensed in a shorter time. Therefore, the WHD will not assert that an employment relationship exists because of such work training.
- (b) The states generally have a requirement that graduates of a pharmacy degree program must serve as an apprentice or intern for up to a year prior to licensure. However, where such individuals are serving in a postgraduation internship, an employment relationship would exist between the graduate interns and the pharmacies at which they work prior to licensing.

10b38 Programs for youthful or first-time offenders designed as an alternative to incarceration.

- (a) As part of their sentences, youthful or first-time offenders may spend a number of hours in public service activities in community action programs or nonprofit organizations formed for a public purpose. The WHD will not assert that an employment relationship exists between offenders and participating organizations where the juvenile or first-time offenders:
 - (1) voluntarily enter into the program for their own benefit,
 - (2) do not displace regular employees or impinge on the employment opportunities of others,
 - (3) are under the supervision or control of the courts, and
 - (4) perform the work without contemplation of pay.

10b39 Drying out period for alcoholics in sheltered workshops (SWS).

An alcoholic admitted to an SWS frequently requires a drying out period before he/she is capable of performing work. The alcoholic's presence in the SWS during this period is primarily intended to keep him/her away from alcohol and *not* to perform any significant productive work. Consequently, the WHD will not assert that an employment relationship exists in the case of an individual who is substantiated to be an alcoholic (*see* FOH 64f09) during the first 4 weeks (28 consecutive calendar days) in the SWS unless it is clearly evident

that the individual has been engaged in activities which provide consequential service or benefit to the SWS (*see* FOH 64f05).

10b40 **Welfare/workfare programs.**

- (a) More and more states are adopting welfare/workfare programs, *i.e.* programs that require persons to perform work in some capacity in exchange for receiving welfare assistance. These programs need to be carefully examined to determine if an employer-employee relationship subject to the FLSA exists. If the welfare recipient is an employee subject to the FLSA, the following facts must be determined:
- (1) Does the state welfare/workfare statute grant the state authority to require the welfare recipient to work for their assistance?
 - (2) What hours of work are required of welfare recipients and are records kept of those work hours?
 - (3) Does the welfare assistance (cash/benefits) provide a wage of not less than the applicable minimum wage and proper payment of overtime when worked?
 - (4) Are recipients employed in violation of the child labor provisions?
- (b) If FLSA violations exist, potential back wage and CMP liability should be determined, and copies of documentation supporting the facts obtained above, forwarded to the DEPP for review *prior* to any discussion with state authorities regarding FLSA compliance. After this review, the Assistant Administrator for the Office of Policy will advise the Regional Office (RO) on how to proceed.

10c **TYPES OF EMPLOYERS**

10c00 **Scope of the term “employer.”**

- (a) Section 3(d) of the amended Act defines “employer” to include “... any person acting... in the interest of an employer in relation to an employee and includes a public agency...” and section 3(a) defines “person” to mean “...an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.” Thus, by interpolation of the definition of “person” into the definition of “employer,” the scope of the term “employer” becomes apparent.
- (b) Section 3(x) of the amended Act defines “public agency” to mean the Government of the U.S., the government of a state or political subdivision thereof, any agency of the U.S. (including the U.S. Postal Service and Postal Rate Commission), a state, a political subdivision of a state, or any interstate governmental agency.

10c01 **A partnership as an employer.**

A partnership is a “person” for purposes of the FLSA, and may be a party to the employment relationship as an employer. The employment relationship is not considered to exist between a bona fide partnership and the partners of whom it is composed. Such partners are self-employed, since they cannot be said to be employed by an employer separate and distinct from themselves. Merely calling individuals who are essentially employees by the term

partners under a so-called partnership agreement, which fails to invest them with the usual attributes of partnership in an enterprise, does not make them such.

10c02 **Cooperatives as employers.**

The FLSA contains nothing to indicate that cooperative organizations, as such, are to be excluded from the category of employers subject to its terms. It is clear that the employment relationship may exist at least between such an organization and non-members whom it hires or suffers or permits to work. Nor can it be said that membership in a cooperative in the ordinary case establishes a mutual agency analogous to a partnership or otherwise identifies the member so closely with the cooperative that they cannot become, respectively, employer and employee. Among the circumstances which may be taken to indicate that a cooperative is an entity separate and distinct from its worker-members, are a corporate form of organization, the presence of the usual incidents of the employment relationship (*i.e.*, control by the governing body or a designated officer over the work performed, the member's hours of labor, selection for and discharge from the job and the like) and the exercise of financial or managerial control or the furnishing of capital or management services by outsiders, especially if such outsiders are wholesalers, manufacturers, or others who purchase or dispose of the products of the cooperatives.

10c03 **Corporations as employers.**

A corporation is a legal entity separate and distinct from its stockholders. In the ordinary case, a corporation and a stockholder therein can become parties to the employment relationship as employer and employee, and a worker who is, in other respects, in the position of an employee of a corporation must be treated as such for the purposes of the FLSA, even though the worker owns shares of stock in his or her corporate employer. Ownership of stock does not destroy the duality of the parties to the relationship, even where the worker is an officer of the corporation or where none but stockholders do the corporation's work.

10c04 **Excluded employers.**

The term "employer," as used in section 3(d) of the FLSA, "does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." The qualifying phrase, "other than when acting as an employer," indicates observance of the FLSA with respect to any individuals directly employed by it, whether or not such individuals are members of the organization, and even though they are elected to their positions by the entire membership.

10c05 **Political subdivisions of a state.**

The determination of whether a particular body is a "political subdivision" of a state within the meaning of FLSA section 3(d) must be controlled by the intention of Congress. In general, the term "political subdivision" is interpreted for purposes of the FLSA to include counties, townships, cities, towns, villages, school districts, drainage districts, etc.

10c06 **Status of contractors with a government.**

The fact that an employer is doing work for the federal government or a state government does not transform the employer into a government instrumentality, nor place him/her in the position of the "United States or any [s]tate or political subdivision of a [s]tate." Not even

the fact that the federal or a state government has contracted for the performance by a private employer of a function purely governmental in character is sufficient to make the government the employer of the individuals employed by the contractor to perform the function.

10c07 Federal Reserve Bank employees.

Federal Reserve Bank employees are not employees of the U.S. within the meaning of FLSA section 3(d).

10c08 Farm Credit Administration Banks and Associations.

Employees of the following Farm Credit Administration Banks and Associations are considered as “employees” within the meaning of FLSA and subject to its provisions in the same manner as employees of the ordinary commercial bank or credit establishment: Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, Production Credit Associations, and Banks for Cooperatives.

10c09 Status of state-sponsored workshops.

(a) A state-sponsored workshop or other institution for aid to the handicapped may or may not be considered the same as the state, depending on the facts concerning the establishment and operation of the particular institution. Employment in a state workshop for the blind is considered to be employment by the state itself where:

- (1) The institution was founded by an act of the legislature for the purpose of providing a central and responsible state unit to administer relief to the blind.
- (2) The financial operations of the institution were audited by a fiscal officer of the state.
- (3) Its identity with the state was further established by statutory provisions vesting supervision and control in a board of trustees, of whom a majority were appointed by the Governor, and providing for the financing of the institution out of public funds.

10c10 Status of foreign governments.

Although the FLSA does not expressly exclude foreign governments from the category of employers subject to its provisions, the usual principles of international comity are applied to exclude the direct agencies of such governments from compliance with the Act. This rule, however, applies only if the agency is exercising part of the sovereign power of the foreign government. If the agency is a commercial one engaged in commercial operations in competition with American industries, the agency is not excluded under this principle and the employees are entitled to the benefits of the FLSA. The United Nations is in the same category as a foreign government.

10c11 States and political subdivisions: single employers.

(a) The government of a state, that is, all the departments and agencies of any of the 50 states, constitutes a single employer under the Act. Similarly, the government of a political subdivision, *e.g.*, county, city, etc., with all of its departments and agencies, constitutes a single employer under the Act. However, such entities are separate and distinct from the government of the state and from other political subdivisions. Thus, where an employee

works for more than one agency of the state government, or for more than one agency of a political subdivision, such employee's employment is by a single employer. Each agency is both individually and coequally responsible for compliance with all applicable provisions of the Act with respect to such employee. However, *see* FOH 59d.

- (b) Political subdivisions (*see* FOH 10c05) and interstate agencies have traditionally been recognized as entities separate and distinct from the government of the state.

10c12 Community action agency.

(a) Public agencies

- (1) Whether a community action agency, which administers various antipoverty and economic opportunity programs, is a covered employer under the FLSA depends upon the facts in a particular situation. Any community action agency which is an entity of a state, a political subdivision of a state, or a combination of public agencies is clearly an employer covered under the Act. *See* 29 USC 203(d), 29 USC 203(x), and FOH 10c05.
- (2) However, a community action agency which consists solely of a private nonprofit agency or organization that has been *designated* by the state (or political subdivision thereof) would not thereby become a "public agency." This does not, of course, preclude coverage of such private community action agency under another provision of the FLSA. A private community action agency does not become a "public agency" merely because it receives and disburses federal funds. However, *see* FOH 59d.

(b) Enterprise coverage

Enterprise coverage does not apply to the charitable, educational, religious or similar activities of private nonprofit organizations *except* where such activities are performed in connection with the type of institution set out in section 3(s)(1) of the Act or in connection with commercial ventures.

(c) Individual coverage

Individual coverage may apply to employees of such organizations.

10d TYPES OF EMPLOYEES

10d00 Scope of the term "employee."

- (a) Section 3(e)(1) of the amended Act defines the term "employee" to include any individual employed by an employer, except as provided in sections 3(e)(2), (3), and (4).
- (b) Section 3(e)(2) of the amended Act provides that in the case of an individual employed by a public agency, the term "employee" means:
 - (1) any individual employed by the Government of the United States -

- b. as a civilian in the military departments (as defined in section 102 of title 5, United States Code),
 - c. in any executive agency (as defined in section 105 of such title),
 - d. in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,
 - e. in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or
 - f. in the Library of Congress;
- (2) any individual employed by the United States Postal Service or the Postal Rate Commission, and
- (3) any individual employed by a state, political subdivision of a state, or an interstate governmental agency, other than such an individual -
- g. who is not subject to the civil service laws of the state, political subdivision, or agency which employs him, and
 - h. who
 - 3. holds a public elective office of that state, political subdivision, or agency,
 - 4. is selected by the holder of such an office to be a member of his personal staff,
 - 5. is appointed by such an office holder to serve on a policy-making level, or
 - 6. who is an immediate adviser to such an office holder with respect to the constitutional or legal powers of his or her office, or
 - 7. is an employee in the legislative branch or legislative body of such state, political subdivision, or agency and is not employed by the legislative library of such state, political subdivision, or agency.
 - i. The first category (FOH 10d00(b)(3)b.1., above) is limited to those persons who are elected by the voters of the pertinent jurisdiction.

With respect to the second and third categories (FOH 10d00(b)(3)b.2. and 3., above) the following are examples of tests which are to be considered:

- 8. Is the person's employment entirely at the discretion of the elected office holder?
- 9. Is the position not subject to approval or clearance by the personnel department or division of any part of the government?

10. Is the work performed outside of any position or occupation established by a table of organization as part of a legislative, executive, or judicial branch, or a committee or commission established by such a branch?
11. Is the person's compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the office holder?

The fourth category (FOH 10d00(b)(3)b.4., above) is limited to that of a legal advisor (*i.e.*, a lawyer).

j. Thus individuals such as pages, stenographers, telephone operators, clerks, typists and others employed by the branch or commission as a whole, may be considered "employees" under the Act. An additional example would be deputy sheriffs who, although they are selected by and work under the direction of the sheriff, are employed only after approval of their employment by the Board of Commissioners. They are not employed at the sole discretion of the sheriff pursuant to the second (FOH 10d00(b)(3)b.2., above) category.

- (c) Of course, employees who are not excluded by the provisions of section 3(e)(2)(C) may qualify for exemption under 29 CFR 541 if the tests are met.
- (d) Pursuant to section 3(e)(4) of the FLSA, the term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate government agency, if-
 - (1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, and
 - (2) such services are not the same type of services which the individual is employed to perform for such public agency.
- (e) An employee of a public agency which is a state, political subdivision of a state, or an interstate governmental agency may volunteer to perform services for any other state, political subdivision, or interstate governmental agency, including a state, political subdivision or agency with which the employing state, political subdivision, or agency has a mutual aid agreement.

10d01 Employees of the Library of Congress.

Pursuant to section 4(f) of the amended Act, the Secretary is authorized to enter into an agreement with the Librarian of Congress for enforcement of the FLSA with respect to any individual employed in the Library of Congress. An agreement is now in effect which provides that the Library of Congress will investigate its own complaints.

10d02 Employees of the United States.

Section 4(f) of the amended Act authorizes the Civil Service Commission (now the Office of Personnel Management) to administer the provisions of the FLSA with respect to any

individual employed by the U.S. (other than an individual employed in the Library of Congress, U.S. Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).

10d03 **Suits by federal, state, and local government employees under section 16(b).**

Section 16(b) of the FLSA and section 6 of the Portal-to-Portal Act provide that employees of a public agency may sue for back wages in any federal or state court of competent jurisdiction for themselves or other employees.

10d04 **(Reserved.)**

10d05 **Member of the elected official's personal staff.**

- (a) Section 3(e)(2)(C) excludes from the definition of employee under the FLSA individuals who are selected by an elected office holder to be a member of his or her personal staff. The personal staff does not include individuals who are directly supervised by someone other than the elected official even though they may be selected by and serve at the pleasure of such official.
- (b) Generally personal staff includes only persons who are under the direct supervision of the elected official and who have almost daily contact with him or her. It would, for example, include the official's private secretary, but not the secretary to his or her assistant, or the stenographers in a pool that services the official's department, or staff members in an operational unit whose head reports to the elected official. It would typically not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

10d06 **National Guard technicians.**

National Guard technicians, whose positions are created by federal statute, are federal civilian employees and the application of the FLSA to them is a matter within the jurisdiction of the Civil Service Commission (now Office of Personnel Management) under section 4(f) of the Act. *See* FOH 10d02.

10e **GEOGRAPHICAL LIMITS**

10e00 **Geographical limits of FLSA.**

- (a) Pursuant to section 13(f) of the FLSA, the provisions of sections 6, 7, 11, and 12 of the Act do not apply to any employee whose services are performed in a work place within a foreign country or within territory under the jurisdiction of the U.S. states other than the following:
 - (1) A state of the United States
 - (2) The District of Columbia
 - (3) Puerto Rico
 - (4) Virgin Islands
 - (5) Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act (43 USC 1331)

- (6) American Samoa
 - (7) Guam
 - (8) Wake Island
 - (9) Johnston Island
- (b) Effective 03/24/1976, the FLSA, except for section 6, applied to the Northern Mariana Islands.
- (c) Effective 10/21/1986, the FLSA no longer applied to Eniwetok Atoll or Kwajalein Atoll (99 Stat. 1770).

10e01 FLSA application to employees performing duties both in the U.S. and foreign countries such as Canada, Mexico, or Panama.

- (a) Coverage shall be asserted for U.S. and foreign citizens employed at or working out of an establishment or work site, located in a state, as defined in the Act, even though the employer is a foreign citizen, when such employees are engaged in or producing goods for interstate commerce or are employed in an enterprise described in section 3(s).
- (b) Employees employed by and working in an establishment located in a foreign country are not considered subject to the FLSA merely because they make deliveries in the states, or pick up materials in the states for transport to a foreign country.

On the other hand, where an employee of such an establishment is working in the U.S. for a substantial period of time and performs covered, nonexempt work, coverage would be asserted. A worker who travels more than 25 miles from the U.S. border or spends more than 72 hours in the U.S. on a single visit (whichever occurs first) is considered to have spent a substantial period of time in the U.S. Once a worker has spent a substantial period in the U.S., all hours of work in the U.S. on that visit must be compensated at no less than the minimum wage, including hours of work prior to the worker reaching the 25 mile or 72 hour mark.

10e02 Employees in foreign countries.

The FLSA does not apply to employees exclusively employed in foreign countries even though they may be American citizens and employees of an American employer.

10f (RESERVED)

[01/03/2017, 03/08/2018]