Chapter 10

FLSA COVERAGE: EMPLOYMENT RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS

Source: FOH Modernization revision 677, published 03/31/2016. Substantive revisions made *after* 03/31/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 03/31/2016 can be found at the link beside this chapter at www.dol.gov/whd/foh.

Table of Contents

CHAPTER 10 TABLE OF CONTENTS

CHAPTER 10 TABLE OF CONTENTS

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 is 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.**

(a) For investigation purposes, it can be assumed that a homeworker is an employee, even though there may be a buying and selling arrangement between the parties.

(b) If the employer asserts their outside work or homework is performed by independent contractors, the following factors should be considered concerning the employer-employee relationship:

(1) Does the employer have the right to control the manner of the performance of the work or the time in which the work is to be done?

(2) Is the employer paying taxes for social security, unemployment, or workmen's compensation insurance?

(3) Has the homeworker ever collected any benefits, such as unemployment or workmen's compensation, because of employment by the employer?

(4) Does the employer furnish the material, or finance directly or indirectly the purchase of the material, which the homeworker uses?

(5) When did the practice of buying and selling between the employer and the homeworker begin, and what are the mechanics of the transaction?

(6) Does the homeworker bill the employer for the work done? Are bills of sale prepared? Are sales taxes paid, or are state or local exemptions obtained because of retail purposes? Are payments made in cash or by check?

(7) How does the homeworker's profit under the buying-selling arrangement compare with their wages as a homeworker?

(8) Whom does the homeworker consider to be the employer?

(9) Does the homeworker have a state certificate to do homework?

(10) What equipment is used, what is its value, and who furnishes it?

10b05 Test of the employment relationship: "suffer or permit."

(a) Under the FLSA and Migrant and Seasonal Worker Protection Act (MSPA), the definition of employ includes "to suffer or permit to work." This broad definition specifically rejects the common law standard, which focuses on the employer's control over the worker, as the test for employment. As a result, most workers are employees.

Using this definition, a worker is an employee under the FLSA and MSPA if, as a matter of economic reality, he or she is economically dependent on the employer. An independent contractor, on the other hand, is in business for himself or herself and depends on his or her business for work. There are bona fide independent contractors, and they generally do not receive the rights or benefits provided by the FLSA or MSPA.

FOH 10b06 -07 discuss the analysis for determining whether a worker is an independent contractor as opposed to an employee. 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.

[07/07/2017]

[01/03/2017]

10b06 Misclassification of employees as independent contractors: applying the economic realities factors.

(a) Examine the totality of the relationship

To determine whether a worker is an employee or independent contractor under the FLSA and MSPA, the economic realities of the worker's relationship with the employer must be examined. If the totality of the economic realities shows that the worker is economically dependent on the employer, then the worker is an employee. If the totality of the economic realities shows that the worker is in business for himself or herself, then the worker is an independent contractor.

Although the economic realities factors may differ some depending on applicable court decisions, the factors set forth in this section are generally considered when determining if a worker is an employee or independent contractor. These economic realities factors are not exhaustive; other factors that are relevant to the economic realities of the working relationship may be considered.

No single factor is determinative, and the factors should not be applied as a checklist. All of the evidence gathered as a result of applying the factors should be considered to determine whether the worker is economically dependent on the employer, and thus an employee.

(b) The economic realities factors

CHAPTER 10 TABLE OF CONTENTS

The examples and questions below are intended to help the Wage and Hour Investigator (WHI) in gathering relevant evidence to assess the economic reality of the working relationship.

(1) *Is the work an integral part of the employer's business?*

Integral does not mean important or unique. Integral work is work that is part of producing the good or providing the service that the employer is in business to produce or provide. It does not matter how many other employees may perform the same work. Work can be integral to an employer's business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers.

The closer that the service provided by the worker is to the type (or one of the types) of work that the employer performs for its customers and clients, the greater the likelihood that the worker is an employee. By contrast, the work performed by an independent contractor is generally outside the scope of the goods and/or services that the employer is in business to provide.

(2) *Does the worker's managerial skill affect the worker's opportunity for profit or loss?*

Whether the worker applies managerial skill to make independent business decisions that will affect his or her opportunity for profit or loss is relevant to the worker's economic dependence. The ability to determine workforce size (such as by hiring helpers) may demonstrate the exercise of managerial skill because the number of workers engaged in work can affect the opportunity for profit or loss. On the other hand, a worker's decision to work more hours or work more jobs to earn more is not a managerial skill and does not suggest that the worker is in business for himself or herself; employees make the same decisions.

Generally, the less business risk that the worker carries in the relationship with the employer, the greater likelihood that an employment relationship exists.

(3) *How does the worker's relative investment compare to the employer's investment?*

If the amount of the worker's investment compares favorably with that of the employer and there is some risk that the worker will suffer a loss, those facts would indicate that the worker is in business for himself or herself.

The worker's investment will generally be smaller in scope and value than the employer's investment. Nonetheless, the worker's investment compares favorably with the employer's when the investment is relatively substantial and when the investment is used for the purpose of sustaining an independent business beyond the job or project that the worker is performing. A favorable investment by the worker indicates that he or she is on similar footing as the employer.

The fact that a worker has made an investment is not enough to suggest that the worker is in business for himself or herself. Any investment should be a capital investment that indicates a sustainable business to suggest that the worker is an independent contractor.

CHAPTER 10 TABLE OF CONTENTS

(4) *Does the work performed require special skill and initiative?*

There is a reasonable correlation between the worker's degree of skill and the marketability and value of his or her services. An unskilled task which may be easily learned and performed by almost any worker is a task for which many workers (both trained and untrained) can realistically compete and is also a task for which the competing workers would not be able to demand or expect higher wages. The lower the worker's skill level, the lower the value and marketability of his or her services, and the greater the likelihood of his or her economic dependence on the employer using those services.

Although a worker's lack of specialized skill generally suggests that he or she is an employee, the fact that a worker is skilled or in possession of specialized skill is not itself indicative of independent contractor status. Specialized skills alone do not suggest that the worker is an independent business, especially if those skills are technical and used to perform the work. Many employees possess very specialized skills. For skills to be indicative of independent contractor status, they should demonstrate that the worker exercises independent business judgment.

(5) *Is the relationship between the worker and the employer permanent or indefinite?*

The greater the length of the relationship or the more frequent the work, the greater the likelihood that an employment relationship exists between the parties. Ongoing or indefinite relationships that do not have a stated termination date suggest that the worker is an employee.

If the relationship is not permanent or indefinite, the reason for the lack of permanence or indefiniteness is significant. Sometimes, the lack of permanence is due to operational characteristics intrinsic to the industry, such as when employers hire part-time workers and/or use staffing agencies or, in the agricultural industry, when employers hire workers only for the growing and/or harvest season. In situations like these, the lack of permanence may not indicate that the worker is in business for himself or herself. When the work is, by its nature, seasonal, intermittent, or part-time, it may be consistent with an employment relationship. On the other hand, if the lack of permanence is due to the worker's own business initiative, this indicates that the worker is in business for himself or herself.

(6) *What is the nature and degree of the employer's control?*

Control may be direct, such as when the employer directly tells the worker what tasks to do and how to do them. Control may also be indirect. For example, the employer may not continuously observe and direct the workers doing their jobs, but may exert control through the quality control process or by a pricing or piece-rate structure. If the employer retains control over how the work is performed or the progress of the work, that control suggests an employment relationship with the worker.

On the other hand, if an employer's quality control is more limited and focuses on reviewing the final product of the work, then the worker may be working independently. It is also important to note that the employer can exercise control over the worker even if the worker works off-site, such as at home or on the premises of the employer's customers.

CHAPTER 10 TABLE OF CONTENTS

Low-skilled work may require only minimal instruction to the worker that does not need to be repeated multiple times each day or even every day. In such cases, the minimal instruction is more a function of the type of work performed and may not suggest that the worker is working independently. Moreover, the worker's work may be subject to control by the employer's customer. If the employer exercises limited control, but the employer's customer exercises control in place of the employer, the worker is not working independently and is more likely to be economically dependent on the employer.

(c) Other considerations

The six economic realities factors identified above may not be the exclusive factors to consider when determining whether a worker is an employee or independent contractor under the FLSA or MSPA. Some courts may apply a variation of the above factors, and other factors that are relevant to the economic realities of the working relationship may be considered. However, only evidence that examines whether the worker is, as a matter of economic reality, economically dependent on the employer or in business for himself or herself should be considered.

[07/07/2017]

[01/03/2017]

10b07 Facts that are not relevant to the ultimate determination of the worker's status.

(a) In an FLSA or MSPA case, the following are examples of facts that are not relevant to the ultimate decision of 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) Where the 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)

(4) The absence of a formal employment agreement

(5) 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)

(6) The worker receives an Internal Revenue Service (IRS) Form 1099-MISC from the employer

(7) The worker has obtained an employer identification number or has incorporated, for example as an LLC, especially if the employer required or requested him or her to do so

(8) The worker has obtained worker's compensation insurance, especially if the employer required or requested him to do so

CHAPTER 10 TABLE OF CONTENTS

(9) Any other evidence that the parties intended the relationship to be an independent contractor one

[07/07/2017]

[01/03/2017]

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. Thus, house-to-house canvassers who sell at retail the products of a particular company are employees of the company, although their contracts with the company are in the form of dealer contracts under which the company purports to sell its products to them at fixed wholesale prices and to recommend retail prices at which the products should be sold, where the control exercised by the company over the so-called dealers is not substantially different than that exercised by an employer over their outside salesmen.

(b) Likewise, an employee is not converted into an independent contractor by virtue of a fictitious sale of the goods produced by him or her to an employer, so long as the other indications of the employment relationship exist. Homeworkers who sell their products to a manufacturer are his or her employees where the control exercised by the manufacturer over the homeworkers through their ability to reject or refuse to buy the product is not essentially different from the control ordinarily exercised by a manufacturer over employees performing work for him or her at home on a piece rate basis.

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.

CHAPTER 10 TABLE OF CONTENTS

(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.

CHAPTER 10 TABLE OF CONTENTS

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.

CHAPTER 10 TABLE OF CONTENTS

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.

CHAPTER 10 TABLE OF CONTENTS

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 -

a. as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

b. in any executive agency (as defined in section 105 of such title),

c. in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

d. in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

e. 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 -

a. who is not subject to the civil service laws of the state, political subdivision, or agency which employs him, and

b. who

1. holds a public elective office of that state, political subdivision, or agency,

2. is selected by the holder of such an office to be a member of his personal staff,

3. is appointed by such an office holder to serve on a policy-making level, or

4. who is an immediate adviser to such an office holder with respect to the constitutional or legal powers of his or her office, or

5. 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.

c. 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:

1. Is the person's employment entirely at the discretion of the elected office holder?

2. Is the position not subject to approval or clearance by the personnel department or division of any part of the government?

3. 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?

4. 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).

d. 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.

CHAPTER 10 TABLE OF CONTENTS

(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).

CHAPTER 10 TABLE OF CONTENTS

(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 JOINT EMPLOYMENT

[01/03/2017]

10f00 General.

Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, for compliance with a law. The purpose of this section is to provide guidance on two types of joint employment under the FLSA and the MSPA: horizontal joint employment and vertical joint employment.

Both the FLSA (29 CFR 791.2) and MSPA (29 CFR 500.20(h)) have regulations providing guidance regarding joint employment. As discussed below, given that the FLSA and MSPA define the scope of employment and joint employment in the same manner, guidance in the FLSA joint employment regulation may be useful in MSPA investigations, and guidance in the MSPA joint employment regulation may be useful in FLSA investigations.

Although this chapter focuses on horizontal and vertical joint employment, the scope of employment under the FLSA and MSPA is very broad given that both statutes define "employ" as including "to suffer or permit to work." *See* FOH 10f01 below. Although it does not appear in the regulations, the "horizontal" and "vertical" terminology is frequently used by courts and may be helpful in identifying potential joint employment scenarios. It is not critical, however, to use this terminology or classify every factual scenario as vertical or horizontal. There may be additional situations where two or more employers satisfy that broad definition of employment with respect to an employee's work and therefore jointly employ the employee.

[01/03/2017]

10f01 Scope of employment and joint employment under FLSA and MSPA.

(a) As noted in FOH 10b01, courts have consistently held that the FLSA's definition of "employ," which includes "to suffer or permit to work," is broader than the traditional common law concept of employment. Most workers are employees under the FLSA.

CHAPTER 10 TABLE OF CONTENTS

(b) The MSPA defines "employ" in exactly the same way as the FLSA, using the suffer or permit standard, and the scope of employment relationships under the MSPA is the same as it is under the FLSA.

(c) Both the FLSA and MSPA provide for joint employment when an employee is employed by two (or more) employers at the same time, and the WHD has promulgated regulations for the FLSA and MSPA that provide guidance regarding joint employment. As discussed below, the FLSA and MSPA regulations address two types of joint employment. Because the suffer or permit standard includes joint employment and ensures that the scope of employment relationships subject to the FLSA and MSPA is as broad as possible, the concept of joint employment should also be defined expansively under these laws. Moreover, because the FLSA and MSPA both define "employ" using the same suffer or permit standard and because the MSPA expressly incorporates the FLSA's joint employment principles, the guidance in the FLSA and MSPA regulations may be relied on interchangeably across the two statutes. In other words, the type of joint employment addressed in the MSPA regulation will arise in FLSA cases, and the guidance in the MSPA regulation is helpful to analyzing joint employment in those FLSA cases. And, the types of joint employment addressed in the FLSA regulation will arise in MSPA cases, and the guidance in the FLSA regulation is helpful to analyzing joint employment in those MSPA cases.

(d) Using the broad suffer or permit standard, the WHD examines whether an employment relationship exists in each investigation, and whether joint employment exists in each investigation where there is more than one possible employer. Joint employment means that there is an employment relationship between an employee and additional employers. Joint employment is employment under the FLSA and MSPA, and each joint employer has all of the obligations and responsibilities of an employer. One employer's obligations and responsibilities are not primary or secondary to any other employers' obligations and responsibilities under the FLSA and MSPA.

[07/07/2017]

[01/03/2017]

10f02 **Types of joint employment.**

(a) **Horizontal joint employment**

Horizontal joint employment exists where two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. In possible horizontal joint employment situations, there is an employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer. A horizontal joint employment analysis focuses on the relationship between the two (or more) employers and whether they are sufficiently related such that they jointly employ the employee.

The FLSA regulation provides guidance regarding horizontal joint employment. *See* 29 CFR 791.2(b).

Horizontal joint employment is explained in more detail in FOH 10f03.

[07/07/2017]

CHAPTER 10 TABLE OF CONTENTS

(b) Vertical joint employment

Vertical joint employment exists where an employee of one employer (referred to as an intermediary employer) is also, with regard to the work performed for the intermediary employer, economically dependent on another employer, the possible joint employer.

Unlike in horizontal joint employment cases, where the association between the possible joint employers is relevant, the vertical joint employment analysis examines the economic realities of the relationship between the employee and the possible joint employer to determine whether the employee is economically dependent on the possible joint employer and is its employee too.

The MSPA regulation describes seven economic realities factors to analyze joint employment. *See* 29 CFR 500.20(h). These seven economic realities factors provide useful guidance in vertical joint employment cases to determine whether an employee is economically dependent on a possible joint employer and are not limited to the agricultural context.

Vertical joint employment is explained in more detail in FOH 10f04.

[07/07/2017]

(c) FLSA and MSPA joint employment concepts are complementary

(1) *The joint employment principles in the FLSA regulation may be helpful in MSPA cases, and the joint employment principles in the MSPA regulation may be helpful in FLSA cases*

The horizontal joint employment discussed in the FLSA regulation may arise in MSPA cases; in such MSPA cases, the guidance provided in the FLSA regulation may be useful in resolving that case. Likewise, the vertical joint employment discussed in the MSPA regulation will arise in FLSA cases; in such FLSA cases, the guidance provided in the MSPA regulation may be useful in resolving that case.

(2) *Either type of joint employment may arise (and the guidance in either regulation may be useful) in a given situation*

Even though the FLSA regulation's focus is the relationship between the two possible joint employers while the MSPA regulation's focus is the relationship between the grower (*i.e.*, the possible joint employer) and the worker, both regulations have as their foundation the broad scope of employment that derives from defining the term employ as including "to suffer or permit" work. Moreover, the MSPA adopted the FLSA's joint employer principles as its own.

(3) *The MSPA regulation's guidance may be useful in analyzing possible joint employment arising in industries other than agriculture*

The MSPA regulation's guidance on joint employment is useful in any case where an employer contracts with an intermediary employer for the provision of workers or services. For instance, a staffing agency in the janitorial industry provides workers to clean a hospital. The staffing agency is the intermediary employer, like a farm labor

contractor (FLC), and assuming that it is an independent contractor of the hospital, the issue is whether the hospital is a joint employer of the janitorial workers. This is possibly a vertical joint employment relationship, and the economic realities factors described in the MSPA joint employment regulation may help to determine whether the workers are economically dependent and thus employees of the hospital (in addition to the staffing agency).

(4) *The FLSA regulation's guidance may be useful in a MSPA case*

The FLSA regulation's guidance may be useful in a MSPA case where, for instance, two growers employ the same workers and there is evidence that one grower is controlled by the other. In this case, there may be horizontal joint employment, and the joint employment analysis would benefit from the guidance in the FLSA regulation to determine if the two growers are associated and share control of the workers because of their association.

(5) *There are complex situations in which both regulations can be used to analyze the potential for joint employment*

For example, a temporary help agency may provide workers to a warehouse that is operated by two different big box retailers. There could be vertical joint employment between the workers of the temporary help agency and each of the big box retailers, and the arrangement or association between the retailers to operate the warehouse could be horizontal joint employment.

[01/03/2017]

10f03 Horizontal joint employment.

(a) In horizontal joint employment cases, the employee is employed by two or more employers, and the issue is whether these employers, because of their association with each other or other considerations, jointly employ the employee. The focus in a horizontal joint employment case is the relationship between the possible joint employers.

[07/07/2017]

(b) The FLSA regulation provides guidance regarding horizontal joint employment

The FLSA regulation provides that a single worker may be "an employee to two or more employers at the same time." *See* 29 CFR 791.2(a). In such cases, the employee's work for the joint employers during the workweek is considered as one employment, the hours worked for each employer are aggregated to determine the employee's total hours worked for overtime purposes, and the joint employers are responsible, both individually and jointly, for FLSA compliance, including paying overtime compensation for all hours worked over 40 during the workweek. *See* FOH 32j12. An employee has joint employers where the employee performs work which simultaneously benefits two or more employers or works for two or more employers at different times during the workweek and one of the following is present:

(1) There is an arrangement between the employers to share the employee's services (*e.g.*, to interchange employees)

CHAPTER 10 TABLE OF CONTENTS

(2) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee

(3) The employers are not completely disassociated with respect to the employment of a particular employee and share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer

29 CFR 791.2(b)

(c) Facts to consider when assessing the relationship or degree of association between the possible joint employers

The focus in most horizontal joint employment cases is the degree of association between the possible joint employers with respect to the employee. *See* 29 CFR 791.2(a). In other words, the third scenario described above is the most common. Particular facts to consider when analyzing the degree of association between, and sharing of control by, the possible joint employers include:

(1) Do the possible joint employers share some common ownership (*i.e.*, one owns the other or they have the same owner)?

(2) Do the possible joint employers share control over operations (*i.e.*, hiring, firing, payroll, advertising, overhead costs)?

(3) Are the possible joint employers' operations inter-mingled (*i.e.*, is there one administrative operation for both employers, or the same person schedules and pays the employees no matter which employer they work for)?

(4) Do the possible joint employers have any overlapping officers, directors, executives, or managers?

(5) Does one possible joint employer supervise the work of the other?

(6) Do the possible joint employers share supervisory authority for the employee?

(7) Do the possible joint employers treat the employees as a pool of employees available to both of them?

(8) Do the possible joint employers share clients or customers?

(9) Are there any agreements between the possible joint employers?

These facts have been used by the Department of Labor and courts in horizontal joint employment cases, but they are not an all-inclusive list of evidence that is relevant to the analysis. Moreover, not all or even most of these facts need to be present for joint employment to exist. Horizontal joint employment exists when there is sufficient evidence that the two employers use the workers and their businesses for their mutual benefit. In many cases, the possible joint employers are separate legal entities and employ the employee at different locations; horizontal joint employment may exist in such situations.

CHAPTER 10 TABLE OF CONTENTS

29 CFR 791.2(a)

(d) When the analysis indicates horizontal joint employment

If the employee's work for the two or more employers during the workweek is considered as one employment, then the employee's hours worked for all of the joint employers must be combined. The joint employers are responsible, both individually and jointly, for compliance with the FLSA and MSPA, including paying at least the equivalent of minimum wage for all hours worked and paying overtime for all hours worked over 40 during a workweek.

(e) When the analysis does *not* indicate horizontal joint employment

If the employers act entirely independently of each other and are completely disassociated with respect to an employee who works for both of them, each employer may disregard all work performed by the employee for the other when determining its own responsibilities under the FLSA and MSPA.

(f) Horizontal joint employment may be found in MSPA cases

Although horizontal joint employment is addressed in the FLSA joint employment regulation, it may also exist in MSPA cases. In such MSPA cases, the FLSA regulation provides guidance for determining whether there is joint employment. The FLSA regulation's guidance may be useful in a MSPA case where, for instance, two growers employ the same workers and there is evidence that one grower is controlled by the other. In this case, the joint employment analysis would rely on the FLSA regulation's guidance to determine if the two growers are associated and share control of the workers because of their association.

[01/03/2017]

10f04 <u>Vertical joint employment.</u>

(a) Intermediary employer

The term "intermediary employer" refers to an employer, such as a staffing agency, subcontractor, or FLC, who provides labor or workers to another employer.

(b) Possible joint employer

The term "possible joint employer" refers generally to the other entity that contracts with the intermediary employer to obtain labor, such as the end-employer, higher-tier contractor, client of the staffing agency, grower, or agricultural association.

(c) Consider first whether an employment relationship exists between the intermediary employer and the possible joint employer

The existence of a vertical joint employment relationship depends, as an initial matter, on whether the intermediary employer itself is an independent contractor or an employee of the possible joint employer. Where the intermediary employer is itself (or himself or herself if the intermediary is an individual) an employee of the possible joint employer, no joint employment inquiry is necessary or appropriate because the possible joint employer is the one employer of both the intermediary employer and the workers. Where the intermediary

employer is not an employee (but is an independent contractor) of the possible joint employer or the question is a close one, a vertical joint employment analysis may be necessary.

29 CFR 500.20(h)(4)

[07/07/2017]

(d) Focus on the nature of the relationship between the worker and the possible joint employer

When assessing a possible vertical joint employment relationship, the focus is on whether the employee of the intermediary employer is also employed by the possible joint employer. This analysis is an employment relationship analysis, and, under the FLSA and MSPA, the analysis must examine, as matter of economic reality, the degree of the employee's economic dependence on the possible joint employer. As discussed below, the MSPA joint employment regulation provides seven economic realities factors to apply in vertical joint employment cases.

(e) Joint employment economic realities factors from the MSPA regulation

The MSPA joint employment regulation provides seven economic realities factors to guide the analysis whether the worker is economically dependent on the possible joint employer in vertical joint employment cases. These factors should not to be applied as a checklist, and no single factor determines the outcome. Additional evidence relevant to the economic realities may be considered. The weight given to each factor individually and in total depends on all of the facts and circumstances of the case. The factors themselves are not the analysis; instead, they are guides to answering the ultimate question of economic dependency. The factors should also be applied with the understanding that the MSPA defines the scope of the employment relationship very broadly. The seven factors are:

(1) *Directing, controlling, or supervising the work performed*

This factor examines whether the possible joint employer has the power, either alone or through control of the intermediary employer, to direct, control, or supervise the employee or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties).

To the extent that the work performed by the employee is controlled or supervised by the possible joint employer beyond reasonable oversight to ensure contract performance, such control suggests that the employee is economically dependent on the possible joint employer. The possible joint employer's control can be indirect (*i.e.*, exercised through the intermediary) and still be sufficient to indicate economic dependence by the employee. Additionally, the possible joint employer need not exercise more control than, or the same control as, the intermediary to exercise sufficient control to indicate economic dependence by the employee.

Where the possible joint employer's control or supervision is less because the employee's work is routine or occurs off-site, the lack of control or supervision may not be indicative of a lack of economic dependency on the possible joint employer.

(2) *Controlling employment conditions*

This factor explores whether the possible joint employer has the power, either alone or in addition to the intermediary employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rate or method of payment for the employee.

To the extent that the possible joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control suggests that the employee is economically dependent on the possible joint employer. Again, the possible joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.

(3) *Permanency and duration of relationship*

This factor looks at the degree of permanency and duration of the relationship of the parties, in the context of the particular work performed.

An indefinite, permanent, full-time, or long-term relationship by the employee with the possible joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue. For example, if the work in the industry is by its nature seasonal, intermittent, or part-time, such industry practice should be considered when analyzing the permanency and duration of the employee's relationship with the possible joint employer.

(4) *Repetitive and rote nature of work*

This factor examines the extent to which the services rendered by the employee are repetitive, rote tasks requiring skills which are acquired with relatively little training.

To the extent that the employee's work for the possible joint employer is repetitive and rote or involves skills requiring little training, that evidence indicates that the employee is economically dependent on the possible joint employer.

(5) *Integral to business*

This factor explores whether the activities performed by the employee are an integral part of the possible joint employer's overall business operation.

If the employee's work is an integral part of the possible joint employer's business, that evidence suggests that the employee is economically dependent on the possible joint employer. An employee's work does not have to be important to be integral to the business, and the employee's work can be integral even if there are many others who do the same work. An employee's work can be integral if the employee plays a role in producing a good or providing a service that the potential joint employer is in business to produce or provide. Whether the work is integral to the grower's business has long been a hallmark of determining whether an employment relationship exists.

(6) *Work performed on premises*

CHAPTER 10 TABLE OF CONTENTS

This factor looks at whether the work is performed on the possible joint employer's premises.

The employee's performance of the work on premises owned or controlled by the possible joint employer indicates that the employee is economically dependent on the possible joint employer. The possible joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the possible joint employer, as the lessor, controls the premises. Also, if the employee works on the premises of customers or clients of the possible joint employer, that evidence suggests that the possible joint employer controls where the work is performed and that the employee is economically dependent on the possible joint employer.

(7) *Performing administrative functions commonly performed by employers*

This factor explores whether the possible joint employer undertakes any responsibilities in relation to the employee which are commonly performed by employers, such as preparing or making payroll records, preparing or issuing pay checks, paying Federal Insurance Contributions Act (FICA) taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools, equipment, or materials required for the job (taking into account the amount of investment).

To the extent that the possible joint employer performs any of the above or similar administrative functions for the employee, that evidence suggests economic dependence by the employee on the possible joint employer.

As mentioned above, not all of the factors need to be met for there to be vertical joint employment. In particular, there may be little evidence in a case that the possible joint employer undertakes responsibilities in relation to the workers that are commonly performed by employers. After all, the possible joint employer engages the intermediary employer to perform those responsibilities for it. Any lack of evidence on this factor should not preclude a finding of joint employment where the facts taken as a whole indicate that the workers are economically dependent on the possible joint employer.

(f) When the analysis indicates vertical joint employment

If the employee is economically dependent on both the intermediary employer and the possible joint employer(s), then joint employment exists. The joint employers are responsible, both individually and jointly, for compliance with the FLSA and MSPA, including paying at least the equivalent of minimum wage for all hours worked and paying overtime for all hours worked over 40 during a workweek under the FLSA and paying the promised wage under the MSPA.

(g) When the analysis does *not* indicate vertical joint employment

If the analysis shows that the employee is not economically dependent on both the intermediary employer and the possible joint employer, then vertical joint employment does not exist. As such, only the intermediary is liable for compliance with the FLSA and MSPA as those laws relate to the employee.

[01/03/2017]

CHAPTER 10 TABLE OF CONTENTS

10f05 **Joint employment and enterprise coverage are different.**

The joint employment analysis in the FLSA is distinct from determining whether two or more employers are a single enterprise covered by the FLSA. Although some facts that support a finding that two employers are a covered enterprise may also support a finding that they are joint employers, the two analyses are different. Therefore, a single enterprise may be found involving two separate establishments if those establishments exhibit unified operation or common control for a common business purpose (*see* 29 CFR 779.200 -.235 and FOH 12a), but those establishments will be joint employers only if the analysis discussed above indicates that there is joint employment.

[01/03/2017, 07/07/2017]

10f06 **Joint employment and individual liability are different.**

The joint employment analysis in the FLSA is not applicable when determining whether an individual owner or officer of an entity is also the employer of the entity's employees and individually liable under the FLSA. Sometimes, the individual and the entity are said to jointly employ the employees; however, courts generally apply a different test than the joint employment analyses discussed above when determining whether an individual is an employer. Because there is already an employment relationship between the business and the employee, whether the individual business owner or officer is also liable as an employer depends on whether, as a matter of economic reality, the individual has operational control over the employees, and examines whether the individual has the power to hire and fire them, supervise and control their work schedules and conditions of employment, determine their rate and method of payment, and maintain their employment records.

[01/03/2017]

10f07 **Joint employment and joint responsibility under the MSPA are different.**

Many MSPA requirements are applicable to the person or entity responsible for the matter at issue, even without an employment relationship between that person or entity and the affected farmworkers. When any person not otherwise exempt from the MSPA recruits, solicits, hires, employs, furnishes, or transports workers, that person is required to comply with the applicable protective provisions of the MSPA.

[01/03/2017]

CHAPTER 10 TABLE OF CONTENTS