conceptions.''[1] The Court has specifically rejected the technical ''new construction'' concept, as a reliable test for determining coverage under this Act.[2]

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of ''in commerce'' coverage in substantially similar language as they have used in construing the ''production'' phase of coverage. Thus the Act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.[3]

(b) *Engagement in commerce.* The United States Supreme Court has held that the ''in commerce'' phase of coverage extends ''throughout the farthest reaches of the channels of interstate commerce,'' and covers not only construction work physically in or on a channel or instrumentality of interstate commerce but also construction work ''so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.''[4]

(c) *Production of goods for commerce.* The ''production'' phase of coverage includes ''any closely related process or occupation directly essential'' to production of goods for commerce. An employee need not be engaged in activities indispensable to production in order to be covered. Conversely, even indispensable or essential activities, in the sense of being included in the long line of causation which ultimately results in production of finished goods, may not be covered. The work must be both closely related and directly essential to the covered production.[5]

(d) *State and national authority.* Consideration must also be given to the relationship between state and national authority because Congress intended ''to leave local business to the protection of the State.''[6] Activities which superficially appear to be local in character, when isolated, may in fact have the required close or intimate relationship with the area of commerce to which the Act applies. The courts have stated that a project should be viewed as a whole in a realistic way and not broken down into its various phases so as to defeat the purposes of the Act.[7]

(e) *Interpretations.* In his task of distinguishing covered from non-covered employees the Administrator will be guided by authoritative court decisions. To the extent that prior administrative rulings, interpretations, practices and enforcement policies relating to employees in the construction industry are inconsistent or in conflict with the principles stated in this subpart, they are hereby rescinded and withdrawn.

[21 FR 5439, July 20, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

§ 776.23 Employment in the construction industry.

(a) *In general.* The same principles for determining coverage under the Fair Labor Standards Act generally apply to employees in the building and construction industry. As in other situations, it is the employee's activities rather than the employer's business which is the important consideration, and it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in

[1] *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[2] *Mitchell* v. *Vollmer & Co.*, ante.

[3] *Mitchell* v. *Vollmer & Co.*, ante; Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126.

[4] *Mitchell* v. *Vollmer & Co.*, ante; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125.

[5] *Armour & Co.* v. *Wantock*, ante; *Kirschbaum* v. *Walling*, 316 U.S. 417; Cf. *10 E. 40th St. Co.* v. *Callus*, 325 U.S. 578.

[6] *Walling* v. *Jacksonville Paper Co.*, ante; *Kirschbaum* v. *Walling*, ante; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497.

[7] *Walling* v. *Jacksonville Paper Co.*, ante; *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286 (C.A.4); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A.10), certiorari denied 345 U.S. 915; See General Coverage Bulletin, §§ 776.19 (a), (b), and 776.21(b).

interstate commerce or in the production of goods for such commerce.[8]

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the Act for the entire week regardless of the amount of covered activities which are involved. The covered activities must, however, be regular or recurring rather than isolated, sporadic or occasional.[9]

(c) *On covered construction projects.* All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the Act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, enlargement or extension of a covered facility.[10] If the construction project is subject to the Act, all employees who participate in the integrated effort are covered, including not only those who are engaged in work at the site of the construction such as mechanics, laborers, handymen, truckdrivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repair men, but also office, clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial and stock room employees.[11]

(d) *On non-covered construction projects.* (1) A construction project maybe purely local and, therefore, not covered, but some individual employees may nonetheless be covered on independent ground by reason of their interstate activities. Under the principle that coverage depends upon the particular activities of the employee and not on the nature of the business of the employer, individual employees engaged in interstate activities are covered even though their activities may be performed in connection with a non-covered construction project. Thus, the Act is applicable to employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watching or guarding such goods while they are still in transit. For example, laborers on a non-covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work.[12]

(2) Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication are within the scope of the Act, as are employees who are regularly engaged in preparing, handling, or otherwise working on goods which will be sent to other States. This includes the preparation of plans, orders, estimates, accounts, reports and letters for interstate transmittal.

§ 776.24 Travel in connection with construction projects.

The Act also applies to employees who regularly travel across State lines in the performance of their duties, even though the construction project itself

[8] *Mitchell* v. *Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming* v. *Sondeck*, 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum* v. *Walling*, ante; *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932. certiorari denied 329 U.S. 785; *Mitchell* v. *Brown Engineering Co.*, 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1965 (C.A. 8).

[9] See General Coverage Bulletin, §§ 776.2 and 776.4

[10] *Walling* v. *McCrady Const. Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1956 (C.A. 8); *Tobin* v. *Pennington-Winter Const. Co.* ante; *Mitchell* v. *Vollmer & Co.*, ante.

[11] *Mitchell* v. *Brown Engineering Co.*, ante; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, ante; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C.A. 9).

[12] *Clyde* v. *Broderick*, 144 F. (2d) 348 (C.A. 10); *Durnil* v. *J. E. Dunn Construction Co.* 186 F (2d) 27 (C.A. 8), *Donahue* v. *George A. Fuller Co.*, 104 F. Supp. 145; Cf. *Mitchell* v. *Royal Baking Co.*, 219 F. (2d) 532 (C.A. 5).