

Chapter 12

ENTERPRISE COVERAGE – FLSA

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12a THE ENTERPRISE: SECTION 3(r)

12a00 Statutory definition and interpretative bulletin.

- (a) The Fair Labor Standards Act (FLSA or Act) section 3(r) defines the “enterprise,” which is the business unit tested for coverage under section 3(s). Interpretative bulletin (IB) cited at 29 CFR 779.200 through 779.235 contains the official Wage and Hour (WH), or the Wage

Hour Division (WHD), interpretations regarding the principles which determine the activities which are included within an enterprise for purposes of the Act.

- (b) Effective 07/01/1972, the Education Amendments of 1972 amended section 3(r)(2) to include preschools within the coverage of the Act. Section 3(r)(2)(A) as amended reads as follows:

“[I]n connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit)...”

- (c) Effective 05/01/1974, the 1974 Amendments amended section 3(r) to include all public agencies within coverage of the Act. Section 3(r)(2)(c) of the amended Act reads as follows:

“[I]n connection with the activities of a public agency...”

12a01 Common ownership.

- (a) Section 3(r) does not require unified operation if there is common control. Further, common ownership may in certain situations be sufficient to establish the common control required by the Act (*see* 29 CFR 779.215 and 29 CFR 779.222). It does not necessarily follow, however, that the activities which are thus commonly controlled are related and performed through such common control for a common business purpose so as to bring them all within a single enterprise. A determination as to whether or not these tests are met requires that the total situation be considered and that each of the tests be viewed realistically in the context of the others rather than solely in isolation.
- (b) While the facts in each case will be determinative of whether the tests of section 3(r) are met, the following excerpts from recent opinions will serve to illustrate the application of the principles set out in (a) above in situations where common ownership was a factor to be considered.
- (1) A parent corporation, characterized as a holding company or finance and investment group, owns and controls numerous subsidiary corporations. The latter are engaged, respectively, in such diversified activities as retail hardware, animal feed manufacture, building management, mortgage loans, steel container manufacture, and so on. The opinion stated, “[a] holding corporation may be organized and operated for investment purposes and the facts may show in a particular case that the activities of its operating subsidiaries are not actually related activities performed through common control for a common business purpose but are separately performed for different corporate purposes contained in the separate corporate charters. A different situation would be presented, of course, if it appeared that the holding company, under authority of its charter, was in fact performing with its subsidiaries through common control a combination of related activities in which the various corporations are engaged, and that such activities were all related to, and performed for, a unitary business purpose for which the holding company was formed and which is common to all such activities.”

- (2) Two brothers live, respectively, in Cities A and B. They have for several years owned a retail grocery supermarket, as equal partners. This supermarket is operated by a manager who is in active charge of the store. One of the brothers individually purchased an operating grocery store in another town. This store is operated by a full-time manager who makes daily reports to the owner brother. He makes no reports to the other brother. The operation of the two stores is not unified in any way. An issue was raised as to whether the activities of the two stores are related activities performed for a common business purpose. The opinion stated, “[t]he activities in question are related in kind, since they are those of retail stores. The question remains, however, as to whether they are, within the meaning of Sec 3(r), related activities performed through common control for a common business purpose. It is true, as stated in IB 779.212, that the term ‘common business purpose’ as used in Sec 3(r) does not have a narrow concept and is not intended to be limited to a single business establishment or a single type of business. But where, as here, there are related activities having no functional interdependence and they are separately conducted to serve the business purpose of the partnership on the one hand and the business purpose of one brother individually on the other, we are not prepared to say that the requirement of performance ‘through common control’ of ‘related activities’ for a ‘common business purpose’ is sufficiently met.”

12a02 Country and town clubs.

- (a) Country and town clubs, even though nonprofit organizations, which are organized and operated exclusively by and for the pleasure and recreational purposes of a select group of persons specially selected for membership (or their guests), are considered to be operated for a “business purpose” within the meaning of section 3(r). There is no exclusion in the Act for pleasure or recreational clubs and the activities of such clubs do not fall within the “nonprofit educational, religious and eleemosynary” activities set forth in 29 CFR 779.214. The fact that a membership organization is formed for the purpose of providing facilities or services to its members only does not remove it from the sphere of business. *See* 29 CFR 779.317 and FOH 25j06.
- (b) Included in the annual dollar volume (ADV) of such a club enterprise are initiation fees which are paid only once, direct charges for use of club facilities which includes charges for food and beverage, athletic or sporting rental fees, lodging and valet charges, membership dues and assessments paid as a condition of continued membership, and fees paid by members to club professionals for lessons (whether or not accounted for to the club).

12a03 Fraternal orders.

- (a) Like social or recreational clubs, the activities of a national fraternal order and its local lodges usually do not fall within the nonprofit educational, religious, or charitable activities set forth in 29 CFR 779.214. Generally, such orders are considered to be operated for a “business purpose” within the meaning of section 3(r). The ADV of a fraternal order includes gross receipts from membership fees and any insurance business or other commercial-type ventures since such sums are generated for a “business purpose.”
- (b) However, for purposes of determining enterprise coverage, a national fraternal order and its local lodges constitute a single enterprise under the Act *only* if the activities are performed through unified operations or common control for a common business purpose. Where a

local lodge operates as a service and/or social club and the national order has little or no control over its day-to-day operations and also has no interaction with the local lodge regarding activities such as insurance programs or other business ventures, there would be no single enterprise. In such cases, each lodge must be tested separately for purposes of determining enterprise coverage.

12a04 Golf facilities at country clubs operated by professionals.

- (a) Where the golf facilities operated by a professional at a country club are held out as a place where goods and services can be obtained to meet more completely and conveniently the needs and desires of the club's members it expects to service, it would be unrealistic to regard the activities of such facilities as functionally separated from those of the country club as a whole, for purposes of enterprise coverage. Rather, the relationship of the business activities in providing goods and services to the club's members is functionally close and immediately connected with a single business purpose common to the golf facilities and the country club. The Act's definition of "enterprise" contemplates that the activities of "one or more corporate or other organizational units" may be joined in a single enterprise meeting the statutory tests. The effect of the agreement between the country club and the golf professional is to bring about the performance through unified operations of the activities described so that they serve a common business purpose, thus reflecting a situation much like that of companies operating leased departments in stores, which clearly are contemplated by the Act as included in the store enterprise. Therefore, WH would consider that the activities so joined form a single enterprise as defined in section 3(r) of the Act. *See* FOH 12a02(b).
- (b) These golf professionals are not considered independent contractors of the kind referred to in section 3(r) as performing related activities *for* the enterprise, as distinguished from those performing such activities as *participants* in the enterprise. The term "independent contractor" as used in section 3(r) for the purpose of exclusion from the term "enterprise" has reference to an independent business which performs services for other businesses as an established part of its own business operations, and which deals in the ordinary course of its own operations with the enterprise for which it performs services. The exclusion does not extend to the performance of any related activities which, in economic reality, are integral parts of the operation of the enterprise and actually performed through unified operation or under common control with its other related activities for its common business purpose. Not only are such activities not excluded from the enterprise, but the employees of the golf professional would be covered under enterprise coverage to the same extent as other employees of the country club.

12a05 Franchise agreements.

- (a) 29 CFR 779.226 through 779.232 discuss franchise agreements. The following agreement, involving an employment agency, is a further *example* of a situation where a single enterprise was found to exist:
 - (1) The agreement includes an announcement of the intention to form a national chain of such businesses as are conducted by the franchisor and by means of the same trade name, forms, training manuals and distinguishing characteristics (as established by the franchisor) to present a united front and to secure public good will and encourage the use of the franchisor's service on a national basis.

- (2) The franchisee is bound to observe strictly the rules of operation established by the franchisor (who is free to change them at anytime) and to file quarterly a statement of operation and whatever other reports the franchisor may require.
- (3) The franchisor prescribes, by means of a uniform form, the contract which the franchisee shall make with his employees and his clients and the fee to be charged the latter. Advertising presents the franchisor and franchisee as one to the public. Franchisee is barred by the a franchise agreement from entering into the same business for himself or with other firms providing the service for 3 years and his employees for six months after their service ends.
- (4) In addition to the fee paid for the franchise, a uniform percentage of gross receipts is remitted monthly to the franchisor who has access at all times to the books, papers, and records.
- (5) The franchisor has power to enforce the arrangements for its participation and supervision through its right to terminate the franchise if any term of agreement is violated. In the event of a sale of the controlling interest, the franchisor receives a percentage of the sale price to defray costs in training and assistance for the new management.
- (6) All job orders with a starting salary of \$500.00 or more per month must be sent by the franchisee to the franchisor who processes them and distributes them to all franchise offices. If another office succeeds in placing an applicant in the job the fee is split 50-50 between the two franchisee offices.
- (7) The franchisor furnishes roving managers and trouble shooters where needed.

12a06 Banking enterprises.

- (a) In most cases, an enterprise engaged in banking is limited by law to activities which are related to banking and to purposes of a bank. This does not mean, however, that the only activities within a banking enterprise are those which constitute banking in its most narrow sense. Included in the enterprise of a bank, for example, where conducted under unified operation or common control for a common business purpose, would be those real estate operations incidental to a bank's lending money and providing housing for the conduct of its business. Thus, the operation of the bank building or other buildings acquired as an incident to its banking operation, even though such buildings are occupied by tenants other than the bank, would be within the banking enterprise. The operation by the bank itself or a subsidiary corporation of a parking lot or garage in conjunction with such a building for the purpose of providing parking accommodations for customers of the bank and the building tenants would likewise be included. *See* 29 CFR 779.206(b).

12b SECTION 3(s): GENERAL

12b00 Statutory provisions.

- (a) Section 3(s) of the Act as amended in 1974 defines the term "enterprise engaged in commerce or in the production of goods for commerce" as "an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees

handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person....” The Act further specifies that, “[a]ny establishment which has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume (AGV) of sales of any enterprise for the purpose of this subsection.”

- (b) Pending issuance of a revised coverage bulletin, 29 CFR 779.240 through 779.243 continue as valid interpretations of the phrase in section 3(s): “...or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person....” The reference in section 3(s) as amended in 1974 to enterprises having “employees engaged in commerce or in the production of goods for commerce,” as in the case of the prior reference in the Act as amended in 1961 to enterprises in the activities of which “employees are so engaged,” simply means that the employment of employees individually covered in the traditional sense will also constitute a basis for determining that the enterprise itself is engaged in “commerce or the production of goods for commerce.” The usual tests for such individual coverage apply.
- (c) The language of section 3(s) of the 1966 Amendments, “...including employees handling, selling, or otherwise working on goods...” was changed in the 1974 Amendments to “...or employees handling, selling or otherwise working on goods or materials....” By changing the word “including” to “or,” Congress indicated its intention to reflect more clearly that this is an additional basis of coverage. The 1974 Amendments also added the words “or materials” to make clear the congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer’s business, *e.g.*, the soap used by a laundry.
- (d)
- (1) The 1977 amendments established a new section 3(s)(2) for coverage of enterprises comprised *exclusively* of one or more retail or service establishments and whose AGV of sales or business done (exclusive of the usual excise taxes) is not less than:
- \$275,000.00 effective 07/01/1978
 - \$325,000.00 effective 07/01/1980
 - \$362,500.00 effective 01/01/1982
- (2) Section 3(s) was further amended in 1977 to require that those retail or service enterprises which were subject to section 6(a)(1) on 06/30/1978, and which were removed from coverage under section 3(s)(2) because the AGV is less than the sales volume tests, must (if the AGV does not fall below \$250,00.00) pay its employees not less than the minimum wage *in effect on the day before coverage was lost*. Such newly uncovered retail or service enterprises are required to pay overtime.

12b01 Enterprise employee test.

- (a) In order for all employees of an enterprise to be covered on an enterprise basis under amended section 3(s), at least some of the employees employed in the activities which constitute the enterprise must be engaged in commerce or in producing goods for commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. Thus, where the enterprise has some employees so engaged, it is not necessary that two or more employees in each establishment be individually covered. The requirement is that the *enterprise* has some employees who are individually covered *or* engaged in handling, selling, or otherwise working on goods *or materials* that have been moved in or produced for commerce by any person. Although two or more employees so engaged may be sufficient to satisfy this requirement, it is important to establish, if possible, that the number of such employees is substantial or that it represents a significant portion of the employees in the enterprise.
- (b) It is not necessary that the enterprise have two or more employees engaged in the named activities every week since this test as with other requirements for enterprise coverage under section 3(s) is applied on an annual basis. Thus, this requirement will be met if such employees are engaged in the named activities on a regular and recurrent basis. The requirement will not be met, however, where the enterprise has employees engaged only in an insubstantial amount of the named activities on isolated or sporadic occasions.
- (c) It is not necessary that the employees engaged in the activities described in section 3(s) be nonexempt. Thus, for example, the test will be met where one or more of the employees is exempt from section 6 or 7 so long as they are engaged in the named activities. Likewise, so long as the enterprise “has” such employees employed in its activities, it is not necessary that such employees perform their duties in an establishment of the enterprise.

12b02 Application of amended section 3(s) to mixed or hybrid enterprises.

- (a) A single enterprise within the meaning of section 3(r) may in some cases be engaged in various activities which, although related and for a common business purpose, so differ in character and function as to constitute a mixed or hybrid enterprise and thus involve the possible application of more than one of the tests under section 3(s). For example, a manufacturing enterprise may also engage in construction. In such situations, the application of the test of section 3(s) shall be made as follows:
 - (1) If the hybrid enterprise consists only of a combination of activities which are named in sections 3(s)(3) through 3(s)(5) as activities of the enterprise therein described (with respect to which there is no ADV test), all employees employed in the hybrid enterprise shall be considered covered on an enterprise basis under section 3(s).
 - (2) If the hybrid enterprise consists of some combination of activities named as those in which enterprises covered under sections 3(s)(3) through 3(s)(5) are engaged, together with other activities not so named, the employees employed in the hybrid enterprise shall be considered covered on an enterprise basis under section 3(s), if the ADV test of section 3(s)(1) is met by the hybrid enterprise.
 - (3) In the case of any hybrid enterprise consisting of a combination of activities named as those in which enterprises covered under sections 3(s)(3) through 3(s)(5) are engaged, together with other activities not so named, whose ADV is less than \$250,000.00 exclusive of the specified taxes, the facts shall be developed and the

matter submitted to the regional solicitor (RSOL) for opinion with respect to coverage of the employees employed in the enterprise in activities not named in sections 3(s)(3) through 3(s)(5) as activities of the enterprises covered thereby. In any such case, however, enterprise coverage extends at least to those employees employed in the hybrid enterprise in activities named in sections 3(s)(3) through 3(s)(5) as activities of the enterprises therein described.

12b03 **“Goods or materials” under section 3(s).**

Employees will be considered to be handling, selling, or otherwise working on “goods or materials” that have been moved in or produced for commerce by any person within the meaning of section 3(s), if what they are handling, selling, or working on constitutes “goods or materials” which have been so moved or produced. “Goods” are defined in section 3(i) of the Act. The fact that the interstate movement of the goods or materials handled or worked on by the employees does not begin until after, or has ended before, their work is performed can provide no basis for concluding that their activities do not relate to “goods or materials” within the meaning of section 3(s). Congress has specifically recognized that demand for a product affects interstate inflow of “goods or materials” quite as surely as production for commerce affects outflow. Thus the language “goods or materials,” as used in section 3(s), includes trucks, equipment, replacement parts, supplies, stock-in-trade, finished or raw materials, and other “goods or materials” that have been moved in or produced for commerce.

12b04 **Excise taxes.**

- (a) *See* 29 CFR 779.261 through 779.264. The extent to which state excise taxes on tobacco are levied at the retail level depends upon the law of the particular state. In cases where enterprise coverage hinges on the question of state excise taxes on tobacco, all the facts regarding such taxes shall be submitted through channels to the RSOL for an opinion.
- (b) The price of auto license plates does not represent a separately stated tax imposed at the retail level for the use of highways. Thus, no part of the sale price of auto license plates can qualify as excise taxes levied at the retail level.

12b05 **“Sales” for purposes of section 3(s) annual gross volume test.**

- (a) The definition of a “sale” in section 3(k) and the discussion in 29 CFR 779.259 of income which is included in the AGV of sales for purposes of sections 3(s)(1) and (2) will in most cases provide sufficient guidance to determine whether the AGV tests of section 3(s) are met. In some cases, however, it may not be possible to determine on the basis of current interpretative material whether certain income or transactions are considered as “sales” (or “business”) for purposes of section 3(s). In such cases, and where enterprise coverage hinges on the question, all the facts regarding such income and transactions shall be submitted through channels to the RSOL for an opinion.
- (b) The interpretations set forth below are specific determinations regarding certain “sales” (or “business”) of particular establishments and industries. When referring to these determinations it must be kept in mind that the listings do not include all “sales” of the named establishments and industries.

(1) *Insurance companies*

The total premium income received from all policies in a given year constitute “sales” and are included in that year’s AGV of sales without regard to the year in which the policy was originally sold.

(2) *Banks and financial institutions*

Interest from loans and stock dividends are included in the AGV of sales.

(3) *Automobile license bureaus or tag agencies*

The gross price of auto license plates sold by privately operated auto tag agencies or license bureaus is included in the ADV. *See* FOH 12b04(b) and FOH 21ca07.

(4) *Real estate, financial, and property management firms*

The total rental receipts received by real estate, financial, and property management firms from buildings which they own are included in the AGV of sales for purposes of section 3(s)(1). With respect to properties which such firms manage but do not own, only the gross fee or gross commission received for services rendered would be included in the AGV of sales. In connection with other related activities, such as the sale of property and property insurance, the annual sales volume is measured by gross receipts and not by commission payments.

12c ENTERPRISES UNDER SECTION 3(s)(1)

12c00 Statutory provisions.

Section 3(s)(1) of the Act brings within coverage any employee employed in an enterprise whose AGV of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated).

12c01 Excise taxes.

For purposes of sections 3(s)(1) and (2), excise taxes, if any, levied by United States (U.S.), state, or local governments will be excluded in computing the ADV of sales made or business done provided they are levied at the retail level and separately stated. *See* 29 CFR 779.261 through 779.264 and FOH 12b04.

12c02 “Business done” defined.

- (a) The 1966 Amendments added the phrase “or business done” to the term “annual gross volume of sales made” in section 3(s)(1) to reflect more clearly the economic test of business size previously expressed in the Act in terms of “annual gross volume of sales.” It is intended by this test to measure the size of an enterprise for purposes of enterprise coverage in terms of the ADV in dollars (exclusive of specified taxes) of the business transactions of the enterprise, regardless of whether such transactions are “sales” in a technical sense. Based on language contained in the Congressional Reports, the measure is intended to be applied to business transactions with the customers of the enterprise, or with the persons who purchase property or services of any kind through transactions with the enterprise, in terms

of the gross price they pay for whatever they obtain as a result of the transaction; no intent appears to measure “business done” by adding to such amounts the sums paid out by the enterprise as business expenses. For example, gross dollar volume from “business done” will include the gross amounts paid by the tenants or users as consideration for the leasing or rental of property to them by the enterprise. On the other hand, expenditures made by the enterprise such as rental payments, mortgage payments, interest payments on loans, and accounts payable will be excluded in computing gross volume of sales made and business done.

- (b) In applying section 3(s)(1), the ADV of an enterprise is deemed to include the gross volume of the “sales” which it makes, as defined in section 3(k) of the Act (*see* 29 CFR 779.259), and/or the gross volume of its “business done” as explained in (a) above; that is, the gross dollar volume of any other business activity in which the enterprise engaged which can similarly be measured on a dollar basis.

12c03 Architectural and consulting engineering firms.

Independent architectural or consulting engineering firms which provide such architectural and engineering services to others as consulting and designing, developing plans and specifications, surveying in the field, and providing personnel at construction job sites to see that the work is carried out in accordance with the plans and specifications are considered to be engaged in the business of providing such services rather than in “the business of construction or reconstruction, or both” within the meaning of section 3(s)(3). Thus, such firms are tested for purposes of enterprise coverage under section 3(s)(1).

12d RETAIL AND SERVICE ENTERPRISES: SECTION 3(s)(2)

12d00 Statutory provisions.

- (a) The 1977 Amendments amended section 3(s) effective 01/01/1978, to include a new section 3(s)(2). Section 3(s)(1) was amended by adding the following after “and begin February 1, 1969, is an enterprise”:

“other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2)...”

Section 3(s)(2) now reads:

“is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 13(a)(2), and whose annual gross volume of sales made or business done is not less than \$250,000.00 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than \$275,000.00 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than \$325,000.00 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than \$362,500.00 (exclusive of excise taxes at the retail level which are separately stated);”

- (b) Section 3(s) was further amended by adding the following “grandfather clause” to the end of the section:

“Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 6(a)(1), and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 7. A violation of the preceding sentence shall be considered a violation of section 6 or 7 as the case may be.”

- (c) The Amendments of 1977 made a number of changes in the FLSA which concern enterprises comprised exclusively of one or more retail or service establishments. These amendments:

- (1) changed the ADV test for coverage under new section 3(s)(2),
- (2) increased the minimum wage,
- (3) increased the monthly dollar test for tipped employees under section 3(t), and
- (4) decreased the tip credit under section 3(m) of the Act.

These changes may be illustrated as follows:

Period	ADV test	Minimum wage	Tip credit		Tipped Employee
			Cash	Credit	
01/01/1977 – 12/31/1977	\$250,000	\$2.30	\$1.15	\$1.15 (50%)	\$20/month
01/01/1978 – 06/30/1978	\$250,000	\$2.65	\$1.33	\$1.32 (50%)	\$30/month
07/01/1978 – 12/31/1978	\$275,000	\$2.65	\$1.33	\$1.32 (50%)	\$30/month
01/01/1979 – 12/31/1979	\$275,000	\$2.90	\$1.60	\$1.30 (45%)	\$30/month
01/01/1980 – 06/30/1980	\$275,000	\$3.10	\$1.86	\$1.24 (40%)	\$30/month
07/01/1980 – 12/31/1980	\$325,000	\$3.10	\$1.86	\$1.24 (40%)	\$30/month
01/01/1981 – 12/31/1981	\$325,000	\$3.35	\$2.01	\$1.34 (40%)	\$30/month
01/01/1982 – Forward	\$362,000	\$3.35	\$2.01	\$1.34 (40%)	\$30/month

- (d) Unless otherwise exempt, employees of “grandfathered” retail or service enterprises are subject to overtime for hours worked in excess of 40 in a workweek.

12d01 Effect of changes in the annual dollar volume on section 3(s)(2) enterprises.

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(a) Enterprises not 3(s)(2)-covered on 06/30/1978

Some effects of changes in the ADV under section 3(s)(2) on coverage of retail or service enterprises are illustrated below. *See* FOH 21a01.

- (1) A new retail or service enterprise beginning business after 06/30/1978 *is not covered* until its ADV reaches the applicable statutory amount contained in section 3(s)(2) (\$362,500.00 effective 01/01/1982).
- (2) If such an enterprise had an ADV of less than \$250,000.00 on 06/30/1978, it was not a covered section 3(s)(2) enterprise. This lack of coverage under section 3(s)(2) continues if the enterprise never attains an ADV which would cover it under section 3(s)(2) (\$362,500.00 since 01/01/1982).
- (3) However, if such an enterprise's ADV increases so that it equals or exceeds the \$362,500.00 ADV test currently in effect, the enterprise must begin paying minimum wage and overtime at the time coverage becomes applicable.
- (4) If the ADV later falls below \$362,500.00, the enterprise would not be covered and would remain so until the ADV again increases to the \$362,500.00 level at which time the enterprise would again be covered under section 3(s)(2).

(b) Enterprises 3(s)(2)-covered on 06/30/1978

Some effects of changes in the ADV of a section 3(s)(2) enterprise which is "grandfathered" under section 3(s) are illustrated below:

- (1) Enterprise coverage under the grandfather clause at the end of section 3(s) *cannot* be asserted unless the enterprise was covered on 06/30/1978. The language of section 3(s) expressly requires that *in order to be grandfathered* an enterprise *must have been covered on 06/30/1978*.
- (2) By way of illustration, if, during the period 07/01/1978 to 06/30/1980, a retail enterprise had an ADV of at least \$275,000.00, and its ADV subsequently falls below \$275,000.00 (but remains at least \$250,000.00), the minimum wage effective for that enterprise reverts to \$2.65 an hour (the minimum wage in effect on the day before the statutory ADV increased to \$275,000.00). This minimum wage remains in effect for the enterprise until its ADV falls below \$250,000.00, or until its ADV once again reaches a statutory ADV level which requires payment of a higher minimum wage. This is illustrated below:

06/30/1977	ADV \$250,000	Minimum wage \$2.65
09/01/1978	ADV \$275,000	Minimum wage \$2.65
01/01/1979	ADV \$275,000	Minimum wage \$2.90
07/01/1980	ADV \$250,000	Minimum wage \$2.65
03/31/1981	ADV \$325,000	Minimum wage \$3.35

03/31/1982 ADV \$245,000 Not covered

The enterprise remains removed from coverage until it again reaches the section 3(s)(2) statutory ADV currently in effect:

03/31/1983 ADV \$325,000 Not covered

03/31/1984 ADV \$362,500 Minimum wage \$3.35 beginning 04/01/1984

- (3) To further illustrate, if the ADV of a retail or service enterprise (which was covered on 06/30/1978) was \$300,000.00 on 07/01/1980, and the enterprise became non-covered because of the increase in the statutory standard on that date (\$325,000.00), it would be required to continue to pay a minimum wage of \$3.10 per hour until such time as the ADV of the enterprise met a later statutory level (\$325,000.00 from 07/01/1980 to 12/31/1981; \$362,500.00 after 12/31/1981). At such time as the ADV of the enterprise reached the later statutory level, it would be required to pay the minimum wage in effect at that time (\$3.35 per hour since 12/31/1980).

Once its ADV has risen to a later statutory level, the enterprise would be required to continue to pay the applicable minimum wage until such time as its ADV falls below that level. Thereafter, it would be required to pay (1) whatever minimum wage was applicable “on the day before the statutory change took effect,” and (2) proper overtime. For example, if an enterprise having an ADV of \$362,500.00 fell to an ADV of \$300,000.00, its applicable minimum wage would become \$3.10 an hour, which was the statutory minimum wage in effect on 06/30/1980, the day before the statutory ADV level rose to \$325,000.00.

If on the other hand, the ADV of the enterprise falls below \$250,000.00, it would cease to be covered until such time as its ADV rose to at least the current level of \$362,500.00.

- (c) Certain special problems which have arisen from the application of the grandfather clause are as follows:

- (1) A hotel or motel enterprise which is grandfathered under section 3(s)(2) cannot pay overtime based on the old partial overtime exemption formerly contained in section 13(b)(8) notwithstanding the fact that section 13(b)(8) was in effect at the time the enterprise was grandfathered. Section 3(s) states that a retail or service enterprise which is grandfathered shall pay its employees in accordance with section 7. There is no implication that any exemptions which were repealed are to apply currently to grandfathered enterprises because the exemption may have been applicable on 06/30/1978, or thereafter.
- (2) Retail or service enterprises which are grandfathered under section 3(s)(2) cannot take a tip credit higher than that currently in effect (40 percent).

There is nothing in the legislative history to indicate that the higher tip credits which were available to employers prior to 01/01/1979 or 01/01/1980 are currently to be made available to grandfathered enterprises.

For example, if \$3.10 continues to be the minimum wage applicable to a grandfathered enterprise, the employer would be entitled to a tip credit not to exceed 40 percent of \$3.10, that is, \$1.24 per hour. Section 3(m), as amended, effective 01/01/1980.

12d02 Application of child labor to retail and service enterprises under amended section 3(s).

For purposes of child labor (CL), enterprise coverage will continue to be asserted with respect to employees of retail and service enterprises which have minimum wage obligations as a result of the grandfather clause, but which no longer meet the higher dollar tests of section 3(s)(2). Although section 3(s) does not expressly provide for the retention of enterprise coverage with regard to CL for previously covered section 3(s)(2) enterprises, there is no evidence that Congress intended such coverage to be eliminated.

12d03 Gasoline service station enterprises under section 3(s)(2).

A gasoline service station enterprise comprised *exclusively* of one or more retail or service establishments is subject to section 3(s)(2) coverage and must be tested for ADV as any other retail or service enterprise (*see* FOH 12d01).

12e LAUNDRY AND CLEANING ENTERPRISES: SECTION 3(s)(3)

12e00 Statutory provisions.

- (a) Section 3(s)(3) of the Act brings within coverage employees employed in an enterprise which “is engaged in laundering, cleaning, or repairing clothing or fabrics.” (There is no ADV test for such enterprises.)
- (b) Since enterprise coverage as defined in section 3(s) of the Act includes “employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person,” the requirement that some employees in the enterprise engage in the named activities will be satisfied, for example, where some employees in the enterprise handle or work with supplies received from outside the state such as bleaches, soaps, or packaging materials such as cartons and wrapping paper.

12e01 Establishment whose activities are included in section 3(s)(3) enterprises.

For purposes of section 3(s)(3) the activities performed in or by the following establishments are considered to be included in an enterprise which is engaged in laundering, cleaning, or repairing clothing or fabrics:

- (1) Central laundry or dry cleaning establishments
- (2) Laundry or dry cleaning establishments (generally known in the trade as valet shops or will-call or pickup and delivery stations) which, receive from and return to their customers clothing or fabrics for laundering, cleaning, or repairing at a central laundry or dry cleaning establishment
- (3) Coin-operated laundries (laundromats)
- (4) Self-service cleaners

In such cases the possibility of a family owned and operated establishment should not be overlooked (*see* FOH 12b00).

12e02 Shoe repair shops.

The activities performed by a shoe repair establishment are not considered to constitute engagement in “laundering, cleaning, or repairing clothing or fabrics” for purposes of section 3(s)(3).

12e03 Laundry operations by hotels, motels, or restaurants.

- (a) Employees of a hotel, motel, or restaurant engaged in performing laundering, cleaning, or repairing of clothing or fabrics will be covered on an enterprise basis under section 3(s)(3) if there are in the hotel, motel, or restaurant enterprise employees “engaged in commerce or in the production of goods for commerce, including employees handling... by any person.” However, a section 13(a)(2) exemption may still apply to other employees of the hotel, motel, or restaurant who are not engaged in such laundry operations if the test of that exemption are met. *See* FOH 21cL01.
- (b) Generally, enterprise coverage under section 3(s)(3) applies to employees of a hotel, motel, or restaurant who regularly and recurrently perform laundering, cleaning, or repairing of clothing or fabrics in the laundry or dry cleaning portion of the establishment. Thus, for example, employees who regularly and recurrently perform the actual laundering work or who work in a pickup station or in a coin-operated laundry operated by the hotel will be considered as engaged in laundering for purposes of section 3(s)(3). On the other hand, a bellhop who merely picks up and returns clothing to be laundered or dry cleaned or a maid who merely handles linens incident to the making or unmaking of beds would not be considered as so engaged.

12e04 Diaper services.

The activities of the typical diaper service, *i.e.*, the rental of laundered baby diapers, is considered the laundering of fabrics for purpose of section 3(s)(3). Its operation is no different from that of a laundry which specializes in renting laundered uniforms, towels, and linens.

12f CONSTRUCTION ENTERPRISES: SECTION 3(s)(4)

12f00 Statutory provisions.

Section 3(s)(4) brings within the general coverage of the Act employees employed in an enterprise which “is engaged in the business of construction or reconstruction or both.”

12f01 Painting, sandblasting, and tuckpointing.

Painting, sandblasting, and tuckpointing are part of the construction industry and are clearly a construction or reconstruction activity where performed as an integral part of a definite construction or reconstruction job, such as the renovation, remodeling, rehabilitation, or reconstruction of existing structures or the construction of new structures. In addition, *contract* painting, even though part of the ordinary maintenance of an existing structure, is

generally regarded as a part of the construction industry when performed by an employer engaged in the business of painting, and would be considered “construction or reconstruction” for purposes of section 3(s)(4).

12f02 Installation as a construction activity.

- (a) Certain business, such as establishments engaged in the sale of plumbing and heating equipment, electrical fixtures and supplies, irrigation equipment, and fencing and siding, in addition to selling goods, also install the goods which are sold. In determining whether such installation constitutes engagement in “construction or reconstruction” for purposes of section 3(s)(4), it is necessary to consider the general characteristics of the entire transaction. *At least in situations where one or more of the following conditions are present* the installation will normally be considered as engagement in construction or reconstruction:
- (1) The cost of installation is substantial in relation to the sale of the goods.
 - (2) The installation involves substantial structural changes, extensive labor, planning, or the use of specialized equipment.
 - (3) The goods are being installed in conjunction with the construction, renovation, remodeling, or reconstruction of a home or other structure.
 - (4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.
- (b) By way of example of the principals involved, if the installation requires only minor carpentry, plumbing, or electrical work (as may be the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, in the absence of any of the criteria listed in FOH 12f02(a) above, such installation will not normally be considered as “construction or reconstruction.”
- (c) In determining the cost of installation in relation to the sale price of the goods pursuant to FOH 12f02(a)(1) above and 29 CFR 779.321, the difference between the total price paid by the purchaser for the installed job and the price charged him for the materials used is the cost (to the purchaser) of installation.

12f03 Roofing, guttering, and spouting.

The installation, repair, or replacement of roofing, guttering, and spouting in conjunction with new or existing buildings are considered construction or reconstruction activities within the meaning of section 3(s)(4).

12f04 Water well drilling.

The drilling of water wells is a construction activity within the meaning of section 3(s)(4).

12f05 Installation of draperies.

The installation of draperies in new buildings is not considered a construction activity for purposes of section 3(s)(4).

12f06 Landscaping as a construction activity.

In some sales agreements between builders and individual home buyers, the buyer contracts for a package arrangement whereby the completed home includes the landscaping. In those cases where the general builder by contract or agreement subcontracts the landscaping, the subcontractor is contributing toward the actual construction of the completed home as contemplated by the sales agreement. In such situations the activities of the landscaper, including the planting of nursery products, the grading and seeding of lawns, and construction of retaining walls, are closely identified with building the homes and are considered to be “construction” for purposes of applying section 3(s)(4).

12f07 Floor covering firms.

- (a) The installation of hardwood floors, wall tile, and floor tile is “construction or reconstruction” for purposes of section 3(s)(4), whether performed in conjunction with original construction or as a part of a remodeling or repair operation. Additionally, contracts for relaying or refinishing floors on insurance jobs (such as repair work due to fire or water damage) would be contracts for “reconstruction” in the ordinary case.
- (b) Where such a firm lays carpeting or linoleum (as a contractor or subcontractor) as part of the construction or reconstruction of a building, the activities may properly be classified as “construction or reconstruction.” However, the laying of carpeting or linoleum in existing premises may not be considered “construction or reconstruction” when done merely to meet a customer’s request for covering or renewing a floor since the actual construction work involved in such an operation is normally *de minimis*.

12f08 Architectural and consulting engineering firms.

Separate and independent architectural and consulting engineering firms are tested for enterprise coverage under section 3(s)(4) only where their own operations, as distinguished from those of other enterprises engaged directly in construction to which their services related, constitute engagement in “the business of construction or reconstruction, or both.”

12g HOSPITALS AND RELATED INSTITUTIONS, AND EDUCATIONAL INSTITUTIONS: SECTION 3(s)(5)

12g00 Statutory provisions.

- (a) Section 3(s)(5) brings within the coverage of the Act employees employed in an enterprise which “is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).”

- (b) Effective 07/01/1972, the Education Amendments of 1972 amended section 3(s)(5) to include preschools within the coverage of the Act. Section 3(s)(5) as amended reads as follows:

“[I]s engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)....”

Prior to 07/01/1972, employees of preschools were not covered under section 3(s)(5).

- (c) On 06/24/1976, the U.S. Supreme Court in the case of *National League of Cities. et al. v. Usery* held that the minimum wage and overtime provisions of the FLSA do not apply to state and local government employees engaged in activities which are an integral part of traditional government services. See FOH 59d. The Court expressly found that the following activities were among those to which these provisions do not apply: “schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation.” Additionally, there are certain activities clearly reserved for state and local governments which the Department of Labor (DOL) will regard as no longer subject to minimum wage and overtime (*e.g.*, the courts, legislatures and other governing bodies, tax assessor’s office). The Court’s decision does not discuss activities which might be regarded as nontraditional such as state liquor stores, and utility and transit services. The majority opinion does state that the minimum wage and overtime provisions could apply to a state’s operation of a railroad. Questions which cannot be resolved because of uncertainty as to whether the function is traditional should be developed and referred to the RSOL for an opinion.
- (d) The Court’s decision deals only with the minimum wage and overtime provisions of the FLSA. It is WH’s position that the decision does not affect the application of the equal pay (EP) (regarding the Equal Pay Act of 1963) and CL provisions of the FLSA or of the Age Discrimination in Employment Act (ADEA) to employees of state and local governments, and that the provisions continue to apply.

12g01 Hospital defined.

- (a) The FLSA does not define a hospital. However, the term “hospital” refers to those establishments commonly known as hospitals which primarily engaged in the offering of medical and surgical services to patients who generally remain at the establishments either overnight, for several days, or for extended periods. Clinics and dispensaries are not included within the term “hospital” unless operated by a hospital in the hospital establishment.
- (b) Based on considerations of the standards and findings of other agencies and authoritative sources, it is the position of WH that any establishment described in (a) above, which meets any of the following three tests, should be recognized as a hospital for purposes of the FLSA:
- (1) Any establishment recognized by the U.S. Department of Health, Education, and Welfare as a hospital for Medicare.

- (2) Any establishment accredited by the Joint Commission on Accreditation of Hospitals. This commission is located in Chicago, IL and is composed of representatives from the American Medical Association, the American Hospital Association, the American College of Physicians, and the American College of Surgeons. Its function is to establish standards for hospital operations and to ensure continued adherence to these standards.
- (3) Any establishment which:
- a. is primarily engaged in providing, by or under the supervision of physicians,
 1. diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons; or
 2. rehabilitation services for the rehabilitation of injured, disabled, or sick persons; or
 - b. is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons; or
 - c. is primarily engaged in providing, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis;
 - d. *and*, in addition to meeting one of the above requirements, also satisfies the following requirements:
 1. maintains clinical records on all patients; and
 2. has bylaws in effect with respect to its staff of physicians; and
 3. has a requirement that every patient must be under the care of a physician; and
 4. provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; and
 5. in the case of an institution in any state in which state or applicable local law provides for the licensing of hospitals,
 - A. is licensed pursuant to such law; or
 - B. is approved, by the agency of such state or locality responsible for licensing hospitals, as meeting the standards established for such licensing.

12g02 **Institutions primarily engaged in the care of the sick, the aged, the mentally ill, or individuals with disabilities residing on the premises defined.**

Such an institution (other than a hospital) is an institution primarily engaged in (*i.e.*, more than 50 percent of the income is attributable to) providing domiciliary care to individuals who reside on the premises and who, have a disability or, if suffering from sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital. Such institutions are not limited to nursing homes, whether licensed or not licensed, but include those institutions generally known as nursing homes, rest homes, convalescent homes, homes for the elderly, and the like. *See* FOH 25i and FOH 12g12.

12g03 **Preschools defined.**

Effective 07/01/1972, a preschool is any enterprise (as defined in sections 3(r) and 3(s) of the Act) which provides for the care and protection of infants or preschool children outside their own homes during any portion of a 24-hour day. The term “preschool” includes any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or development services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, and kindergartens. Head Start programs and any similar facility primarily engaged in the care and protection of preschool children.

12g04 **Elementary school defined.**

FLSA section 3(v) defines such a school as “a day or residential school which provides elementary education, as determined under [s]tate law.”

12g05 **Secondary school defined.**

FLSA section 3(w) defines such a school as “a day or residential school which provides secondary education, as determined under [s]tate law.”

12g06 **Veterinary hospitals.**

The word “hospital,” as used in the Act, refers to an institution (*see* FOH 12f01) for the care of sick, wounded, infirm, or aged *persons*. A veterinary hospital for the care of animals is not considered to be a hospital within the meaning of section 3(s)(5). Consequently, employees of a veterinary hospital will be covered on an enterprise basis only if the veterinary hospital meets the tests of sections 3(s)(1) or (2), whichever is applicable (*see* FOH 21a01(d)).

12g07 **Head Start programs.**

Employees of Head Start programs are covered under section 3(s)(5).

12g08 **University and college employee: coverage.**

- (a) The enterprise operating a private institution of higher education normally consists of that institution’s administrative and academic offices, custodial and maintenance functions and facilities, physical plant, and real estate. Many universities occupy more than one campus and many others have a number of separate schools or departments in separate geographical units. All the constituent elements relating to one or more campuses, schools, or departments, the operation of which is related and performed through unified operations or

common control for a common business purpose, would be considered a single enterprise for purpose of sections 3(r) and 3(s)(5). Insofar as the operation of schools and related institutions is concerned, the term “common business” encompasses those activities, whether performed by one or more persons, corporations, or other organizational units, which are directed to the same objective or objectives in which the enterprise is interested.

- (b) Pending interpretations by the courts, WH will take no position as to the application of the Act to housekeepers, food service employees, or cleaning personnel who work *exclusively* in a faculty residence hall or, in the case of a parochial school, in a convent where teaching sisters live.

12g09 University and college fraternity and sorority house: coverage.

- (a) Many universities and colleges have on their campuses fraternity and sorority houses that provide dormitory and dining hall facilities for students (members). In order to provide these services such organizations may employ such personnel as house directors or house mothers, cooks, maids, etc. These employees are generally paid from revenues derived from the charges to members for items such as room, board, and dues. In the ordinary case these organizations are controlled and operated by the national and local chapter organization and the degree of supervision and control by the educational establishment is likely to be quite casual and nominal. As a general rule the WHD does not consider the operation of these fraternity and sorority houses as a part of the college or university enterprise within the meaning of sections 3(r) and 3(s)(5).
- (b) There may be instances where the facts demonstrate that certain activities, such as the provision of student meals and lodging in the fraternity and sorority houses, are part of the university enterprise, as could be the case, for example, where the university owns the houses or exercises a high degree of supervision and control. In such doubtful situations a careful study of the fraternity or sorority charter provisions and the university rules applicable to such houses would be essential in making a determination.
- (c) While the general rule excludes student meal and lodging activities in fraternity and sorority houses from enterprises coverage under section 3(s)(5), the possible application of section 3(s)(1) to the fraternity or sorority enterprise should not be overlooked.

12g10 Barber colleges and beauty schools.

Barber colleges and beauty schools are not considered to be “institutions of higher education” for purposes of section 3(s)(5).

12g11 Institutions of higher education.

- (a) Although the term “institutions of higher education” contained in sections 3(r)(1) and 3(s)(5) is not defined in the FLSA, the ordinary meaning of the phrase is that they are institutions *above* the secondary level, such as colleges or universities; junior colleges; professional schools of engineering, law, library science, social work; etc. Generally, an institution of higher education is an educational institution which:
 - (1) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate; *and*

- (2) is legally authorized within a state to provide a program of education beyond high school; *and*
- (3) provides an educational program for which it normally awards a bachelor's degree, or provides not less than a 2-year program which is acceptable for full credit toward such a degree, or offers a 2-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge.

12g12 Institutions for the residential care of emotionally disturbed persons.

For enforcement purposes, a private institution for the residential care of emotionally disturbed persons would come within the coverage of section 3(s)(5) of the Act if more than 50 percent of its residents have been admitted by a qualified physician, psychiatrist, or psychologist. For purposes of the 50 percent test, the term "admitted" includes evaluations of mental or emotional disturbance by a qualified physician, psychiatrist, or psychologist either subsequent to admission to the institution or preceding admission and being the cause for referral.

12g13 Driving schools.

Establishments engaged as a business in instructing and teaching motor vehicle driving are not bona fide educational establishments or institutions for purposes of section 3(s)(5) or 29 CFR 541.215.

12g14 Community living centers and halfway houses for individuals with intellectual or developmental disabilities.

For enforcement purposes, a private institution for individuals with intellectual or developmental disabilities, sometimes called a community living center or a halfway house, would come within the coverage of section 3(s)(5) of the Act if more than 50 percent of its residents have an intelligence quotient (IQ) of 69 or less as determined on the basis of a valid test administered by a qualified professional *and* a reasonable degree of care is being provided. An IQ of 69 or below is considered intellectually or developmentally disabled. "Care" may include such services as waking up residents in the morning to see that they get breakfast in time to leave for work, picking some up at night after work, special counseling, instruction in money management and health matters, and generally keeping an eye on them and listening to problems. *See* FOH 12g02 and FOH 12g12.

12g15 "Care" of the aged and infirm.

- (a) Many establishments variously referred to as retirement hotels, retirement apartments, homes for..., senior citizens retirement homes, and the like provide residences and other services for older persons. In order to determine whether such an establishment may qualify as an "institution primarily engaged in the care of the ... aged ...," one of the key questions is whether "care" is provided.

- (b) The word “care” as it is used in section 3(s)(5) is subject to a broad interpretation and encompasses routine custodial services and attention. Institutions which care for the aged, (as well as other institutions which care for the sick, or for the mentally ill or individuals with disabilities), can vary from extremely well-serviced establishments to those of a custodial type of servicing. Where an establishment must take full responsibility of any nursing home or hospital care a resident requires, this constitutes “care” of the resident. However, it does not necessarily follow that to be a home for the aged, the establishment must be a nursing home or otherwise medically oriented. If the aged occupants, in addition to receiving food, shelter, and laundry, must be closely watched because their senile condition necessitates their being supervised and guided, even though they receive no medical attention, they may, depending upon all the facts, be receiving “care” for the aged within the meaning of section 3(s)(5). *See* FOH 12g02, FOH 12g12, and FOH 12g14.
- (c) On the other hand, some apartment hotels and retirement homes that cater to retirees and other elderly persons who are completely ambulatory and in reasonably good health are not considered institutions primarily engaged in the care of the aged who reside on the premises. Even though such an establishment may furnish certain special services, as for example, emergency pull bells in the bathroom connected to a public address system in the office and a registered nurse on duty for an hour each day to aid tenants if they need help in taking required medication, these services may, depending upon all the facts, be just a part of a deluxe service furnished by the establishment and such establishments would not be covered under section 3(s)(5).

12g16 **Day care homes: family owned and operated.**

Certain day care homes are not covered on an enterprise basis because they are family owned and operated (*see* last sentence of section 3(s)). Typically a mother who is already caring for her own children will care for other parents’ children in her residence without the aid of any regular employees other than her immediate family. Such residences are distinct establishments for purposes of the Act and are excluded from enterprise coverage by the last sentence of section 3(s) notwithstanding that such homes may be in some way affiliated with a covered enterprise.

12g17 **Maternity homes for unwed mothers.**

Private nonprofit institutions providing residential care for unwed mothers are not covered by the enterprise provisions of the FLSA, provided that the maternity home is not operated in conjunction with a hospital, covered institution, or school within the meaning of sections 3(r) and 3(s) of the Act. There may be employees covered on an “individual” basis, however.

12g18 **Institutions for neglected and dependent children.**

Private nonprofit institutions providing care for neglected and dependent children are not covered by the enterprise provisions of the FLSA, provided that such institution is not operated in conjunction with a hospital, covered institution, or school within the meaning of sections 3(r) and 3(s) of the Act. However, there may be employees who are covered on an “individual” basis.