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Nonprofit food distributor may be subject to FLSA

A nonprofit agency engaged in the acquisition of grocery products for distribution to food banks and other organizations seeking to ameliorate hunger may be engaged in interstate commerce and subject to the wage and hour requirements of the federal Fair Labor Standards Act. A federal District Court in Florida has refused the agency's motion to dismiss the case.

An employee complained that she was not paid adequate wages because she had to start work at 7:30 each morning but was not paid for work performed prior to 8:00. The agency moved to dismiss the complaint on the ground that it was not covered by the FLSA.

The FLSA provides coverage under both an individual test and an enterprise test. An individual is covered if he or she regularly and directly participates in the actual movement of persons or goods in interstate commerce. An enterprise is covered if the entity is engaged in interstate commerce or in the production of goods for interstate commerce and has income of more than \$500,000.

In this case, the employee claimed that she sorted and inspected goods that had moved in interstate commerce, but the Court said that merely handling goods that had moved in interstate commerce was not sufficient to obtain coverage and she did not claim that the goods returned to the stream of interstate commerce after she sorted them. Therefore, it said, she did not plead facts sufficient to bring her with the individual coverage.

But she did claim that the agency bids on prices to purchase pallets of food from out of state companies, transports the goods it buys to its own facility, and charges the organizations that receive its "donations." "In engaging in that competition, the payment of substandard wages would undoubtedly give Defendant an unfair advantage against other organizations that bid on the products," the Court said. "This is one means of 'unfair method of competition' that the FLSA was enacted to prevent."

The Court also noted that the agency charged a fee for its "donations." "Courts have frequently considered whether nonprofits charged a fee for its services to be relevant in assessing the organization's commercial activities," it said. (*Villafana v. Feeding South Florida*, S.D. FL, No. 13-60760, 6/12/13.)