

§ 779.337

are also engaged in the business of building contractors or speculative builders. Building materials for the carrying on of the employer's contracting or speculative building business often are supplied by the employer himself from or through his building materials establishment. In the analysis of the sales of the building materials establishment for the purpose of determining the qualification of such establishment as a "retail or service establishment" all transfers of stock made by the employer from or through his building materials establishment to his building business for the construction, maintenance or repair of commercial property or any other property not excepted in section 3 (n) of the Act will be considered as sales made by such establishment for resale.

GENERAL TESTS OF EXEMPTION UNDER SECTION 13(a)(2)

§ 779.337 Requirements of exemption summarized.

(a) An establishment which is a "retail or service establishment" within the Act's statutory definition of that term (See discussion in §§ 779.312 to 779.336) must, to qualify as an exempt retail or service establishment under section 13(a)(2) of the Act (See § 779.301), meet both of the following tests:

(1) More than 50 percent of the retail or service establishment's total annual dollar volume of sales must be derived from sales of goods or services (or both) which are made within the State in which the establishment is located; and

(2) Either:

(i) The retail or service establishment must not be in an enterprise of the type described in section 3(s), or

(ii) If the retail or service establishment is in an enterprise of the type described in 3(s), it has an annual volume of sales (exclusive of excise taxes at the retail level which are separately stated) of less than \$250,000.

(b) The language of the statute in section 13(a)(2) expressly excludes from the exemption an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school de-

scribed in section 3(s)(4) of the Act. No exemption for these is provided under this section even if the establishment meets the tests set forth in paragraph (a) of this section. (See § 779.338(b).) With respect to laundering and dry-cleaning establishments, which Congress found to lack a retail concept (See § 779.317) and had provided with a separate exemption in former section 13(a)(3) of the Act, repealed by the 1966 amendments, this exclusion simply clarifies the congressional intent to cover employees in such work under section 3(s)(2) of the present Act and to make sure that no exemption under 13(a)(2) will be construed so as to defeat the purpose of repealing the prior special exemption.

§ 779.338 Effect of 1961 and 1966 amendments.

(a) The 1961 amendments to the Fair Labor Standards Act narrowed the exemption for retail or service establishments by permitting section 13(a)(2) to be applied only to an establishment which was not in a covered enterprise, or (if it was in such an enterprise) which had an annual gross volume of sales of less than \$250,000 (exclusive of specified taxes). There were certain exemptions to this general principle. These exceptions were set out in section 13(a)(2)(ii) and (iii). The establishments enumerated therein were exempt whether or not they were in a covered enterprise and regardless of the annual dollar volume of sales. They were: Hotels, motels, restaurants, motion picture theaters, seasonally operated amusement or recreational establishments, hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. These establishments were exempt if they met the basic 50 percent in State sales test and the 75 percent retail sales test of section 13(a)(2). The 1966 amendments to the Act repealed sections 13(a)(2)(ii) and (iii). Now to be exempt under section 13(a)(2) hotels, motels, and restaurants must meet the same tests as other retail or service establishments (see § 779.337). Seasonal