

Wage and Hour Division, Labor

§ 779.348

ENGAGING IN MANUFACTURING AND PROCESSING ACTIVITIES; SECTION 13(a)(4)

§ 779.345 Exemption provided in section 13(a)(4).

The section 13(a)(4) exemption (see § 779.301) exempts any employee employed by a retail establishment which meets the requirements for exemption under section 13(a)(2), even though the establishment makes or processes on its own premises the goods that it sells, provided, that more than 85 percent of such establishment's annual dollar volume of sales of the goods so made or processed is made within the State in which the establishment is located, and other prescribed tests are met.

§ 779.346 Requirements for exemption summarized.

An establishment to qualify for exemption under section 13(a)(4) must be an exempt retail establishment under section 13(a)(2); that is, 75 percent of its annual dollar volume of sales of goods must not be for resale, 75 percent of its annual dollar volume of sales of goods must be recognized as retail in its industry, over 50 percent of its annual dollar volume of sales of goods must be made within the State in which the establishment is located, and its annual dollar volume of sales must be under \$250,000. In addition, the establishment must meet the following three tests:

(a) The establishment must be recognized as a retail establishment in the particular industry.

(b) The goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods.

(c) More than 85 percent of the establishment's annual dollar volume of sales of the goods which it makes or processes must be made within the State in which the establishment is located. (See Act, section 13(a)(2); H. Rept. No. 1453, 81st Cong. first session, p. 27; *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388.)

§ 779.347 Exemption limited to "recognized retail establishment"; factories not exempt.

The section 13(a)(4) exemption requires the establishment to be recognized as a retail establishment in the particular industry. This test limits the exemption to retail establishments only, and excludes factories as such and establishments to which the retail concept does not apply. In other words this test requires that the establishment as a whole be recognized as a retail establishment although it makes or processes at the establishment the goods it sells. Typical of the establishments which may be recognized as retail establishments under the exemption are custom tailor shops, candy shops, ice cream parlors, bakeries, drug stores, optometrist establishments, retail ice plants and other local retail establishments which make or process the goods they sell and meet the other tests for exemption. Clearly factories as such are not "recognized retail establishments" and would not be eligible for this exemption. (See 95 Cong. Rec. pp. 11001, 11200, 11216, and 14942.)

§ 779.348 Goods must be made at the establishment which sells them.

(a) Further to make certain that the exemption applies to retail establishments only and not to factories, an additional requirement of the exemption is that the goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods. The exemption does not apply to an establishment which makes or processes goods for sale to customers who will go to other places to buy them. Thus an establishment that makes or processes any goods which the employer will sell from another establishment, is not exempt. If the establishment making the goods does not sell such goods but makes them for the purpose of selling them at other establishments the establishment making the goods is a factory and not a retail establishment.

(b) Where the making or processing of the goods takes place away from the selling establishment, the section 13(a)(4) requirement that both the making or processing and selling take