

§ 780.404

29 CFR Ch. V (7-1-10 Edition)

from this language that it is the activities of the employee rather than those of his employer which ultimately determine the application of the exemption. Thus the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities. But the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer.

§ 780.404 Activities of the employer considered in some situations.

Although the activities of the individual employee, as distinguished from those of his employer, constitute the ultimate test for applying the exemption, it is necessary in some instances to examine the activities of the employer. For example, in resolving the status of the employees of an irrigation company for purposes of the agriculture exemption, the U.S. Supreme Court, found it necessary to consider the nature of the employer's activities (*Farmers Reservoir Co. v. McComb*, 337 U.S. 755).

THE IRRIGATION EXEMPTION

§ 780.405 Exemption is direct and does not mean activities are agriculture.

The exemption provided in section 13(b)(12) for irrigation activities is a direct exemption which depends for its application on its own terms and not on the meaning of "agriculture" as defined in section 3(f). This exemption was added by an amendment to section 13(a)(6) in 1949 to alter the effect of the decision of the U.S. Supreme Court in *Farmers Reservoir Company v. McComb*, 337 U.S. 755, so as to exclude the type of employees involved in that case from certain requirements of the Act. Congress chose to accomplish this result, not by expanding the definition of agriculture in section 3(f), but by adding a further exemption. In view of this approach, it can well be said that Congress agreed with the Supreme Court's holding that such workers are not employed in agriculture. (*Goldberg v. Crowley Ridge Assn.*, 295 F. 2d 7.) Irriga-

tion workers who are employed in any workweek exclusively by a farmer or on a farm in irrigation work which meets the requirement of performance as an incident to or in conjunction with the primary farming operations of such farmer or such farm, as previously explained, are considered as employed in agriculture under section 3(f) and may qualify for the minimum wage and overtime exemption under section 13(a)(6) or for the overtime exemption provided agricultural workers under section 13(b)(12). Where they are not so employed, they are not considered as agricultural workers (*Farmers Reservoir Co. v. McComb*, supra), but may qualify for the overtime exemption under section 13(b)(12) relating to irrigation work if their duties and the irrigation system on which they work come within the express language of the statute. Where this is the case, it is not material whether the employees are employed in agriculture.

§ 780.406 Exemption is from overtime only.

This exemption applies only to the overtime provisions of the Act and does not affect the minimum wage, child labor, recordkeeping, and other requirements of the Act. The minimum wage rate applicable to employees employed in connection with supplying and storing water for agricultural purposes whose exemption from the minimum wage requirements was removed by the 1966 amendments is that provided by section 6(b) of the Act.

§ 780.407 System must be nonprofit or operated on a share-crop basis.

The exemption does not apply to employees employed in the described operations on facilities of any irrigation system unless the ditches, canals, reservoirs, or waterways in connection with which their work is done meet the statutory requirement that they either be not owned or operated for profit, or be operated on a share-crop basis. The employer is paid on a share-crop basis when he receives, as his total compensation, a share of the crop of the farmers serviced.