

§ 779.313 Requirements summarized.

The statutory definition of the term “retail or service establishment” found in section 13(a)(2), clearly provides that an establishment to be a “retail or service establishment”: (a) Must engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale. These requirements are discussed below in §§ 779.314 through 779.341.

MAKING SALES OF GOODS AND SERVICES
“RECOGNIZED AS RETAIL”

§ 779.314 “Goods” and “services” defined.

The term “goods” is defined in section 3(i) of the Act and has been discussed above in § 779.14. The Act, however, does not define the term “services.” The term “services,” therefore, must be given a meaning consistent with its usage in ordinary speech, with the context in which it appears and with the legislative history of the exemption as it explains the scope, the purposes and the objectives of the exemption. Although in a very general sense every business might be said to perform a service it is clear from the context and the legislative history that all business establishments are not making sales of “services” of the type contemplated in the Act; that is, services rendered by establishments which are traditionally regarded as local retail service establishments such as the restaurants, hotels, barber shops, repair shops, etc. (See §§ 779.315 through 779.320.) It is to these latter services only that the term “service” refers.

§ 779.315 Traditional local retail or service establishments.

The term “retail” whether it refers to establishments or to the sale of goods or services is susceptible of various interpretations. When used in a specific law it can be defined properly only in terms of the purposes and objectives and scope of that law. In enacting the section 13(a)(2) exemption, Congress had before it the specific object of exempting from the minimum

wage and overtime requirements of the Act employees employed by the traditional local retail or service establishment, subject to the conditions specified in the exemption. (See statements of Rep. Lucas, 95 Cong. Rec. pp. 11004 and 11116, and of Sen. Holland, 95 Cong. Rec. pp. 12502 and 12506.) Thus, the term “retail or service establishment” as used in the Act denotes the traditional local retail or service establishment whether pertaining to the coverage or exemption provisions.

§ 779.316 Establishments outside “retail concept” not within statutory definition; lack first requirement.

The term “retail” is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions. The same is true of an electric power company selling electrical energy to private consumers. As to establishments of such businesses, therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term “retail or service establishment” is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a “retail concept” cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. (95 Cong. Rec. pp. 1115, 1116, 12502, 12506, 21510, 14877, and 14889; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290; *Phillips Co. v. Walling*, 324 U.S. 490; *Kirschbaum Co. v. Walling*, 316 U.S. 517; *Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945; *Goldberg v. Roberts* 291 F. 2d 532 (CA-9); *Wirtz v. Idaho Sheet Metal Works*, 335 F. 2d 952 (CA-9), affirmed in 383 U.S. 190; *Telephone Answering Service v. Goldberg*, 290 F. 2d 529 (CA-1).) It is plain, therefore, that the term “retail or service establishment” as used in the Act does not encompass establishments in industries lacking a “retail concept”. Such establishments not having been traditionally regarded

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as retail or service establishments cannot under any circumstances qualify as a “retail or service establishment” within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. Industry usage of the term “retail” is not in itself controlling in determining when business transactions are retail sales under the Act. Judicial authority is quite clear that there are certain goods and services which can never be sold at retail. (*Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz v. Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

§ 779.317 Partial list of establishments lacking “retail concept.”

There are types of establishments in industries where it is not readily apparent whether a retail concept exists and whether or not the exemption can apply. It, therefore, is not possible to give a complete list of the types of establishments that have no retail concept. It is possible, however, to give a partial list of establishments to which the retail concept does not apply. This list is as follows:

Accounting firms.
Adjustment and credit bureaus and collection agencies (*Mitchell v. Rogers d.b.a. Commercial Credit Bureau*, 138 F. Supp. 214 (D. Hawaii); *Mill v. United States Credit Bureau*, 1 WH Cases 878, 5 Labor Cases par. 60,992 (S.D. Calif.).
Advertising agencies including billboard advertising.
Air-conditioning and heating systems contractors.
Aircraft and aeronautical equipment; establishments engaged in the business of dealing in.
Airplane crop dusting, spraying and seeding firms.
Airports, airport servicing firms and fixed base operators.
Ambulance service companies.
Apartment houses.
Armored car companies.
Art; commercial art firms.
Auction houses (*Fleming v. Kenton Whse.*, 41 F. Supp. 255).
Auto-wreckers’ and junk dealers’ establishments (*Bracy v. Luray*, 138 F. 2d 8 (CA-4); *Edwards v. South Side Auto Parts* (Mo. App.) 180 SW 2d 1015. (These typically sell for resale.)

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Automatic vending machinery; establishments engaged in the business of dealing in.
Banks (both commercial and savings).
Barber and beauty parlor equipment; establishments engaged in the business of dealing in.
Blacksmiths; industrial.
Blue printing and photostating establishments.
Booking agencies for actors and concert artists.
Bottling and bottling equipment and canning machinery; establishments engaged in the business of dealing in.
Broadcasting companies.
Brokers, custom house; freight brokers; insurance brokers, stock or commodity brokers.
Building and loan associations.
Building contractors.
Burglar alarms; establishments engaged in furnishing, installing and repairing for commercial establishments (*Walling v. Thompson*, 65 F. Supp. 686 (S.D. Calif.)).
Burial associations (*Gilreath v. Daniel* (C.A. 8), 19 WH Cases 370).
Butchers’ equipment; establishments engaged in the business of dealing in.
Chambers of Commerce.
Chemical equipment; establishments engaged in the business of dealing in.
Clubs and fraternal organizations with a select or restricted membership.
Common and contract carriers; establishments engaged in providing services, fuel, equipment, or other goods or facilities for the operation of such carriers (*Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, rehearing denied 383 U.S. 963; *Wirtz v. Steepleton General Tire Co., Inc.* 383 U.S. 190, rehearing denied 383 U.S. 963; *Boutell v. Whaling*).
Common carrier stations and terminals.
Construction contractors.
Contract Post Offices.
Credit companies, including small loan and personal loan companies (*Mitchell v. Kentucky Finance Co.*, 359 U.S. 290).
Credit rating agencies.
Dentists’ offices.
Dentists supply and equipment establishments.
Detective agencies.
Doctors’ offices.
Dry cleaners (see 95 Cong. Rec., p. 12503 and § 779.337 (b) of this part).
Drydock companies.
Drydock
Dye houses, commercial (*Walling v. Kerr*, 47 F. Supp. 852 (E.D. Pa)).
Duplicating, addressing, mailing, mail listings, and letter stuffing establishments (*Goldberg v. Roberts d.b.a. Typing and Mailing Unlimited*, 15 WH Cases 100, 42 L.C. par. 31,126 (CA-9; *Durkin v. Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Hanzley v. Hooven Letters*, 44 N.Y.S. 2d 398 (City Ct. N.Y. 1943).