fishing vessel to have two crews; namely, a fishing crew whose duty it is primarily to fish and to perform other duties incidental thereto and a navigational crew whose duty it is primarily to operate the boat. Where, as is the typical situation, there is but one crew which performs all these functions, the section 13(a)(5) exemption from both the minimum wage and the overtime provisions would apply to its members. For a further explanation of the fishery exemption see part 784 of this chapter.

PART 784—PROVISIONS OF THE FAIR LABOR STANDARDS ACT APPLICABLE TO FISHING AND OPERATIONS ON AQUATIC PRODUCTS

Subpart A—General

INTRODUCTORY

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GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(5) EXEMPTION

FIRST PROCESSING, CANNING, OR PACKING OF MARINE PRODUCTS UNDER SECTION 13(a)(5)

AUTHORITY: Secs. 1–19, 52 Stat. 1060, as amended, 75 Stat. 65; 29 U.S.C. 201–219.

SOURCE: 35 FR 13342, Aug. 20, 1970, unless otherwise noted.

Subpart A—General

INTRODUCTORY

§ 784.0 Purpose.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the meaning and application of sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act, which govern the application of the minimum wage and overtime pay requirements of the Act to employees engaged in fishing and related activities and in operations on aquatic products. It is an objective of this part to make available in one place, the interpretations of law relating to such employment which will guide the Secretary of Labor and the Administrator in carrying out their responsibilities under the Act.

§ 784.1 General scope of the Act.

The Fair Labor Standards Act, as amended, is a Federal statute of general application which establishes minimum wage, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. Employers and employees in enterprises engaged in fishing and related activities, or in operations on aquatic products on shore, need to know how the Act applies to employment in these enterprises so that they may understand their rights and obligations under the law. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard and with specified recordkeeping requirements contained in part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 784.2 Matters discussed in this part.

This part discusses generally the provisions of the Act which govern its application to employers and employees in enterprises and establishments of the fisheries, seafood processing, and related industries. It discusses in some detail those exemption provisions of the Act in sections 13(a)(5) and 13(b)(4) which refer specifically to employees employed in described activities with respect to seafood and other forms of aquatic life.

§ 784.3 Matters discussed in other interpretations.

Interpretations having general application to others subject to the law, as well as to fishermen and seafood canners, processors, or distributors and their employees, have been issued on a number of subjects of general interest. These will be found in other parts of this chapter. Reference should be made to them for guidance on matters which they discuss in detail, which this part does not undertake to do. They include part 776 of this chapter, discussing coverage; part 531 of this chapter, discussing payment of wages; part 778 of this chapter, discussing computation and payment of overtime compensation; part 785 of this chapter, discussing the calculation of hours worked; and part 800 of this chapter, discussing equal pay for equal work. Reference should also be made to subpart G of part 570 of this chapter, which contains the official interpretations of the child labor provisions of the Act.

§ 784.4 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor pertaining to the exemptions provided in sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act of 1938, as amended. It is intended that the positions stated will serve as ''a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it'' (*Skidmore* v. *Swift,* 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act, unless and until they are otherwise directed by authoritative decisions of the courts or conclude upon re-examination of an interpretation that it is incorrect. The interpretations contained herein may be relied upon in accordance with section 10 of the Portal-to-Portal Act (29 U.S.C. 251–262), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 784.5 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (*Mitchell* v. *Zachry,* 362 U.S. 310; *Kirschbaum* v. *Walling,* 316 U.S. 517). Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift,* 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorganization Plan 6 of 1950, 64 Stat. 1263; Gen. Ord. 45 A, May 24, 1950; 15 FR 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

§ 784.6 Interpretations made, continued, and superseded by this part.

On and after publication of this part 784 in the FEDERAL REGISTER, the interpretations contained therein shall be in effect, and shall remain in effect until

they are modified, rescinded, or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as part 784 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met by employers and employees in the application of the Act. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this bulletin may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or to any Regional Office of the Division.

SOME BASIC DEFINITIONS

§ 784.7 Definition of terms used in the Act.

The meaning and application of the provisions of law discussed in this part depend in large degree on the definitions of terms used in these provisions. The Act itself defines some of these terms. Others have been defined and construed in decisions of the courts. In the following sections some of these basic definitions are set forth for ready reference in connection with the part's discussion of the various provisions in which they appear. These definitions and their application are further considered in other interpretative bulletins to which reference is made, and in the sections of this part where the particular provisions containing the defined terms are discussed.

§ 784.8 "Employer," "employee," and "employ."

The Act's major provisions impose certain requirements and prohibitions on every ''employer'' subject to their terms. The employment by an ''employer'' of an ''employee'' is, to the extent specified in the Act, made subject to minimum wage and overtime pay requirements and to prohibitions against the employment of oppressive child labor. The Act provides its own definitions of ''employer,'' ''employee'' and ''employ,'' under which ''economic reality'' rather than ''technical concepts'' determines whether there is employment subject to its terms (*Goldberg* v. *Whitaker House Cooperative,* 366 U.S. 28; *United States* v. *Silk,* 331 U.S. 704; *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722). An ''employer,'' as defined in section 3(d) of the Act, ''includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.'' An ''employee,'' as defined in section 3(e) of the Act, ''includes any individual employed by an employer,'' and ''employ,'' as used in the Act, is defined in section 3(g) to include ''to suffer or permit to work.'' It should be noted, as explained in part 791 of this chapter, dealing with joint employment that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee. It should also be noted that ''employer,'' ''enterprise,'' and ''establishment'' are not synonymous terms, as used in the Act. An employer may have an enterprise with more than one establishment, or he may have more than one enterprise in which he employs employees within the meaning of the Act. Also, there may be different employers who employ employees in a particular establishment or enterprise.

§ 784.9 "Person."

As used in the Act (including the definition of ''enterprise'' set forth below in § 784.10), ''person'' is defined as meaning ''an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons'' (Act, section 3(a)).

§ 784.10 "Enterprise."

The term ''enterprise'' which may, in some situations, be pertinent in determining coverage of this Act to employees employed by employers engaged in the procurement, processing, or distribution of aquatic products, is defined in section 3(r) of the Act, section 3(r) states:

> Enterprise means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

The scope and application of this definition is discussed in part 776 of this chapter.

§ 784.11 "Establishment."

As used in the Act, the term ''establishment'', which is not specially defined therein, refers to a ''distinct physical place of business'' rather than to ''an entire business or enterprise'' which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (*Phillips* v. *Walling*, 324 U.S. 490; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., first session, p. 25). This is the meaning of the term as used in sections 3(r) and 3(s) of the Act.

§ 784.12 "Commerce."

''Commerce'' as used in the Act includes interstate and foreign commerce. It is defined in section 3(b) of the Act to mean ''trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.'' (For the definition of ''State,'' see § 784.15.) The application of this definition and the kinds of activities which it includes are discussed at length in part 776 of this chapter dealing with the general coverage of the Act.

§ 784.13 "Production."

To understand the meaning of ''production'' of goods for commerce as used in the Act it is necessary to refer to the definition in section 3(j) of the term ''produced.'' A detailed discussion of the application of the term as defined is contained in part 776 of this chapter, dealing with the general coverage of the Act. Section 3(j) provides that ''produced'' as used in the Act ''means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.'' (For the definition of ''State'' see § 784.15.)

§ 784.14 "Goods."

The definition in section 3(i) of the Act states that ''goods,'' as used in the Act, means ''goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.'' Part 776 of this chapter, dealing with the general coverage of the Act, contains a detailed discussion of the application of this definition and what is included in it.

§ 784.15 "State."

As used in the Act, ''State'' means ''any State of the United States or the District of Columbia or any Territory or possession of the United States'' (Act, section 3(c)). The application of this definition in determining questions of ''coverage under the Act's definition of ''commerce'' and ''produced'' (see §§ 784.12, 784.13) is discussed in part 776 of this chapter, dealing with general coverage.

§ 784.16 "Regular rate."

As explained in part 778 of this chapter, dealing with overtime compensation, employees subject to the overtime pay provisions of the Act must generally receive for their overtime work in any workweek as provided in the Act not less than one and one-half times their regular rates of pay. Section 7(e) of the Act defines the term ''regular rate'' ''to include all remuneration for employment paid to, or on behalf of, the employee'' except certain payments which are expressly described in and excluded by the statutory definition. This definition, which is discussed at length in part 778 of this chapter, determines the regular rate upon which time and one-half overtime compensation must be computed under section 7(a) of the Act for employees within its general coverage who are not exempt from the overtime provisions under either of the fishery and seafood exemptions provided by sections 13(a)(5) and 13(b)(4) or under some other exemption contained in the Act.

Application of Coverage and Exemptions Provisions of the Act

§ 784.17 Basic coverage in general.

Except as otherwise provided in specific exemptions, the minimum wage, overtime pay, and child labor standards of the Act are generally applicable to employees who engage in specified activities concerned with interstate or foreign commerce. The employment of oppressive child labor in or about establishments producing goods for such commerce is also restricted by the Act. The monetary and child labor standards of the Act are also generally applicable to other employees, not specifically exempted, who are employed in specified enterprises engaged in such commerce or in the production of goods for such commerce. The employer must observe the monetary standards with respect to all such employees in his employ except those who may be denied one or both of these benefits by virtue of some specific exemption provision of the Act, such as section 13(a)(5) or 13(b)(4). It should be noted that enterprises having employees subject to these exemptions may also have other employees who may be exempt under section 13(a)(1) of the Act, subject to conditions specified in regulations, as employees employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman. The regulations governing these exemptions are set forth and explained in part 541 of this chapter.

§ 784.18 Commerce activities of employees.

The Fair Labor Standards Act has applied since 1938 to all employees, not specifically exempted, who are engaged (a) in interstate or foreign commerce or (b) in the production of goods for such commerce, which is defined to include any closely related process or occupation directly essential to such production (29 U.S.C. 206(a), 207(a); and see §§ 784.12 to 784.15 for definitions governing the scope of this coverage). In general, employees of businesses concerned with fisheries and with operations on seafood and other aquatic products are engaged in interstate or foreign commerce, or in the production of goods for such commerce, as defined in the Act, and are subject to the Act's provisions except as otherwise provided in sections 13(a)(5) and 13(b)(4) or other express exemptions. A detailed discussion of the activities in commerce or in the production of goods for commerce which will bring an employee under the Act is contained in part 776 of this chapter, dealing with general coverage.

§ 784.19 Commerce activities of enterprise in which employee is employed.

Under amendments to the Fair Labor Standards Act employees not covered by reason of their personal engagement in interstate commerce activities, as

explained in § 784.18, are nevertheless brought within the coverage of the Act if they are employed in an enterprise which is defined in section 3(s) of the Act as an enterprise engaged in commerce or in the production of goods for commerce. Such employees, if not exempt from minimum wages and overtime pay under section 13(a)(5) or exempt from overtime pay under section 13(b)(4), will have to be paid in accordance with the monetary standards of the Act unless expressly exempt under some other provision. This would generally be true of employees employed in enterprises and by establishments engaged in the procurement, processing, marketing, or distribution of seafood and other aquatic products, where the enterprise has an annual gross sales volume of not less than $250,000. Enterprise coverage is more fully discussed in part 776 of this chapter, dealing with general coverage.

§ 784.20 Exemptions from the Act's provisions.

The Act provides a number of specific exemptions from the general requirements previously described. Some are exemptions from the overtime provisions only. Several are exemptions from both the minimum wage and the overtime requirements of the Act. Finally, there are some exemptions from all three—minimum wage, overtime pay, and child labor requirements. An examination of the terminology in which the exemptions from the general coverage of the Fair Labor Standards Act are stated discloses language patterns which reflect congressional intent. Thus, Congress specified in varying degree the criteria for application of each of the exemptions and in a number of instances differentiated as to whether employees are to be exempt because they are employed by a particular kind of employer, employed in a particular type of establishment, employed in a particular industry, employed in a particular capacity or occupation or engaged in a specified operation. (See 29 U.S.C. 203(d); 207 (b), (c), (i); 213 (a), (b), (c), (d). And see *Addison* v. *Holly Hill*, 322 U.S. 607; *Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278; *Mitchell* v. *Stinson*, 217 F. 2d (210). In general there are no exemptions from the child labor requirements that apply in enterprises or establishments engaged in fishing or in operations on aquatic products (see part 570, subpart G, of this chapter). Such enterprises or establishments will, however, be concerned with the exemption from overtime pay in section 13(b)(4) of the Act for employees employed in specified ''on-shore'' operations (see § 784.101), and the exemption from minimum wages and overtime pay provided by section 13(a)(5) for employees employed in fishing, fish-farming, and other specified ''off-shore'' operations on aquatic products. These exemptions, which are subject to the general rules stated in § 784.21, are discussed at length in subpart B of this part 784.

§ 784.21 Guiding principles for applying coverage and exemption provisions.

It is clear that Congress intended the Fair Labor Standards Act to be broad in its scope. ''Breadth of coverage is vital to its mission'' (*Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497). An employer who claims an exemption under the Act has the burden of showing that it applies (*Walling* v. *General Industries Co.*, 330 U.S. 545; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290: *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, approved in *Mitchell* v. *Myrtle Grove Packing Co.*, 350 U.S. 891; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52). Conditions specified in the language of the Act are ''explicit prerequisites to exemption'' (*Arnold* v. *Kanowsky*, 361 U.S. 388). In their application, the purpose of the exemption as shown in its legislative history as well as its language should be given effect. However, ''the details with which the exemptions in this Act have been made preclude their enlargement by implication'' and ''no matter how broad the exemption, it is meant to apply only to'' the specified activities (*Addison* v. *Holly Hill*, 322 U.S. 607; *Maneja* v. *Waialua*, 349 U.S. 254). Exemptions provided in the Act ''are to be narrowly construed against the employer seeking to assert them'' and their application limited to those who

come ''plainly and unmistakably within their terms and spirit.'' This construction of the exemptions is necessary to carry out the broad objectives for which the Act was passed (*Phillips* v. *Walling*, 324 U.S. 490; *Mitchell* v. *Kentucky Finance Co.*, supra; *Arnold* v. *Kanowsky*, supra; *Calaf* v. *Gonzales*, 127 F. 2d 934; *Bowie* v. *Gonzales*, 117 F. 2d 11; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52).

Subpart B—Exemptions Provisions Relating to Fishing and Aquatic Products

THE STATUTORY PROVISIONS

§ 784.100 The section 13(a)(5) exemption.

Section 13(a)(5) grants an exemption from both the minimum wage and the overtime requirements of the Act and applies to ''any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee.''

§ 784.101 The section 13(b)(4) exemption.

Section 13(b)(4) grants an exemption only from the overtime requirements of the Act and applies to ''any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof.''

LEGISLATIVE HISTORY OF EXEMPTIONS

§ 784.102 General legislative history.

(a) As orginally enacted in 1938, the Fair Labor Standards Act provided an exemption from both the minimum wage requirements of section 6 and the overtime pay requirements of section 7 which was made applicable to ''any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by products thereof'' (52 Stat. 1060, sec. 13(a)(5)).

(b) In 1949 the minimum wage was extended to employees employed in canning such products by deleting the word ''canning'' from the above exemption, adding the parenthetical phrase ''(other than canning)'' after the word ''processing'' therein, and providing a new exemption in section 13(b)(4), from overtime pay provisions only, applicable to ''any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof''. All other employees included in the original minimum wage and overtime exemption remained within it (63 Stat. 910).

(c) By the Fair Labor Standards Amendments of 1961, both these exemptions were further revised to read as set forth in §§ 784.100 and 784.101. The effect of this change was to provide a means of equalizing the application of the Act as between canning employees and employees employed in other processing, marketing, and distributing of aquatic products on shore, to whom minimum wage protection, formerly provided only for canning employees, was extended by this action. The 1961 amendments, however, left employees employed in fishing, in fish farming, and in related occupations concerned with procurement of aquatic products from nature, under the existing exemption from minimum wages as well as overtime pay.

§ 784.103 Adoption of the exemption in the original 1938 Act.

Although in the course of consideration of the legislation in Congress before passage in 1938, provisions to exempt employment in fisheries and

aquatic products activities took various forms, section 13(a)(5), as drafted by the conference committee and finally approved, followed the language of an amendment adopted during consideration of the bill by the House of Representatives on May 24, 1938, which was proposed by Congressman Bland of Virginia. He had earlier on the same day, offered an amendment which had as its objective the exemption of the ''fishery industry,'' broadly defined. The amendment had been defeated (83 Cong. Rec. 7408), as had an amendment subsequently offered by Congressman Mott of Oregon (to a pending amendment proposed by Congressman Coffee of Nebraska) which would have provided an exemption for ''industries engaged in producing, processing, distributing, or handling * * * fishery or seafood products which are seasonal or perishable'' (83 Cong. Rec. 7421–7423). Against this background, when Congressman Bland offered his amendment which ultimately became section 13(a)(5) of the Act he took pains to explain: ''This amendment is not the same. In the last amendment I was trying to define the fishery industry. I am now dealing with those persons who are exempt, and I call the attention of the Committee to the language with respect to the employment of persons in agriculture * * * I am only asking for the seafood and fishery industry that which has been done for agriculture.'' It was after this explanation that the amendment was adopted (83 Cong. Rec. 7443). When the conference committee included in the final legislation this provision from the House bill, it omitted from the bill another House provision granting an hours exemption for employees ''in any place of employment'' where the employer was ''engaged in the processing of or in canning fresh fish or fresh seafood'' and the provision of the Senate bill providing an hours exemption for employees ''employed in connection with'' the canning or other packing of fish, etc. (see *Mitchell* v. *Stinson,* 217 F. 2d 210; *McComb* v. *Consolidated Fisheries*, 75 F. Supp. 798). The indication in this legislative history that the exemption in its final form was intended to depend upon the employment of the particular employee in the specified activities is in accord with the position of the Department of Labor and the weight of judicial authority.

§ 784.104 The 1949 amendments.

In deleting employees employed in canning aquatic products from the section 13(a)(5) exemption and providing them with an exemption in like language from the overtime provisions only in section 13(b)(4), the conferees on the Fair Labor Standards Amendments of 1949 did not indicate any intention to change in any way the category of employees who would be exempt as ''employed in the canning of'' the aquatic products. As the Supreme Court has pointed out in a number of decisions, ''When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended 63 Stat. 920'' (*Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290). In connection with this exemption the conference report specifically indicates what operations are included in the canning process (see § 784.142). In a case decided before the 1961 amendments to the Act, this was held to ''indicate that Congress intended that only those employees engaged in operations physically essential in the canning of fish, such as cutting the fish, placing it in cans, labelling and packing the cans for shipment are in the exempt category'' (*Mitchell* v. *Stinson*, 217 F. 2d 210).

§ 784.105 The 1961 amendments.

(a) The statement of the Managers on the Part of the House in the conference report on the Fair Labor Standards Amendments of 1961 (H. Rept. No. 327, 87th Cong., first session, p. 16) refers to the fact that the changes made in sections 13(a)(5) and 13(b)(4) originated in the Senate amendment to the House bill and were not in the bill as passed by the House. In describing the Senate provision which was retained in the final legislation, the Managers stated that it ''changes the exemption in the act for'' the operations transferred to section 13(b)(4) from section 13(a)(5) ''from a minimum wage and overtime exemption to an overtime only exemption.'' They further stated: ''The present complete exemption is retained

for employees employed in catching, propagating, taking, harvesting, cultivating, or farming fish and certain other marine products, or in the first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by such an employee.'' In the report of the Senate committee on the provision included in the Senate bill (S. Rept. No. 145, 87th Cong., first session, p. 33), the committee stated: ''The bill would modify the minimum wage and overtime exemption in section 13(a)(5) of the Act for employees engaged in fishing and in specified activities on aquatic products.'' In further explanation, the report states that the bill would amend this section ''to remove from this exemption those so-called on-shore activities and leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products, including first processing, canning, or packing at sea performed as an incident to fishing operations, as well as employment in loading and unloading such products for shipment when performed by any employee engaged in these procurement operations.'' It is further stated in the report that ''persons who are employed in the activities removed from the section 13(a)(5) exemption will have minimum wage protection but will continue to be exempt from the Act's overtime requirements under an amended section 13(b)(4). The bill will thus have the effect of placing fish processing and fish canning on the same basis under the Act. There is no logical reason for treating them differently and their inclusion within the Act's protection is desirable and consistent with its objectives.''

(b) The language of the Managers on the Part of the House in the conference report and of the Senate committee in its report, as quoted above, is consistent with the position supported by the earlier legislative history and by the courts, that the exemption of an employee under these provisions of the Act depends on what he does. The Senate report speaks of the exemption ''for employees engaged in fishing and in specified activities'' and of the ''activities now enumerated in this section.'' While this language confirms the legislative intent to continue to provide exemptions for employees employed in specified activities rather than to grant exemption on an industry, employer, or establishment basis (see *Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278), the report also refers with apparent approval to certain prior judicial interpretations indicating that the list of activities set out in the exemption provisions is intended to be ''a complete catalog of the activities involved in the fishery industry'' and that an employee to be exempt, need not engage directly in the physical acts of catching, processing, canning, etc. of aquatic products which are included in the operation specifically named in the statute (*McComb* v. *Consolidated Fisheries Co.*, 174 F. 2d 74). It was stated that an interpretation of section 13(a)(5) and section 13(b)(4) which would include within their purview ''any employee who participates in activities which are necessary to the conduct of the operations specifically described in the exemptions'' is ''consistent with the congressional purpose'' of the 1961 amendments. (See Sen. Rep. No. 145, 87 Cong., first session, p. 33; Statement of Representative Roosevelt, 107 Cong. Rec. (daily ed.) p. 6716, as corrected May 4, 1961.) From this legislative history the intent is apparent that the application of these exemptions under the Act as amended in 1961 is to be determined by the practical and functional relationship of the employee's work to the performance of the operations specifically named in section 13(a)(5) and section 13(b)(4).

PRINCIPLES APPLICABLE TO THE TWO EXEMPTIONS

§ 784.106 Relationship of employee's work to the named operations.

It is clear from the language of section 13(a)(5) and section 13(b)(4) of the Act, and from their legislative history as discussed in §§ 784.102–784.105, that the exemptions which they provide are applicable only to those employees who are ''employed in'' the named operations. Under the Act as amended in 1961 and in accordance with the evident

legislative intent (see § 784.105), an employee will be considered to be ''employed in'' an operation named in section 13(a)(5) or 13(b)(4) where his work is an essential and integrated step in performing such named operation (see *Mitchell* v. *Myrtle Grove Packing Co.*, 350 U.S. 891, approving *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245; *Mitchell* v. *Stinson*, 217 F. 2d 210), or where the employee is engaged in activities which are functionally so related to a named operation under the particular facts and circumstances that they are necessary to the conduct of such operation and his employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended (*Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278; see also *Waller* v. *Humphreys*, 133 F. 2d 193 and *McComb* v. *Consolidated Fisheries Co.*, 174 F. 2d 74). Under these principles, generally an employee performing functions without which the named operations could not go on is, as a practical matter, ''employed in'' such operations. It is also possible for an employee to come within the exemption provided by section 13(a)(5) or section 13(b)(4) even though he does not directly participate in the physical acts which are performed on the enumerated marine products in carrying on the operations which are named in that section of the Act. However, it is not enough to establish the applicability of such an exemption that an employee is hired by an employer who is engaged in one or more of the named operations or that the employee is employed by an establishment or in an industry in which operations enumerated in section 13(a)(5) or section 13(b)(4) are performed. The relationship between what he does and the performance of the named operations must be examined to determine whether an application of the above-stated principles to all the facts and circumstances will justify the conclusion that he is ''employed in'' such operations within the intendment of the exemption provision.

§ 784.107 Relationship of employee's work to operations on the specified aquatic products.

It is also necessary to the application of the exemptions that the operation of which the employee's work is a part be performed on the marine products named in the Act. Thus the operations described in section 13(a)(5) must be performed with respect to ''any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life.'' The operations enumerated in section 13(b)(4) must be performed with respect to ''any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any by-product thereof''. Work performed on products which do not fall within these descriptions is not within the exemptions (*Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278; *Walling* v. *Haden*, 153 F. 2d 196).

§ 784.108 Operations not included in named operations on forms of aquatic "life."

Since the subject matter of the exemptions is concerned with ''aquatic forms of animal and vegetable life,'' the courts have held that the manufacture of buttons from clam shells or the dredging of shells to be made into lime and cement are not exempt operations because the shells are not living things (*Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866). Similarly, the production of such items as crushed shell and grit, shell lime, pearl buttons, knife handles, novelties, liquid glue, isinglass, pearl essence, and fortified or refined fish oil is not within these exemptions.

§ 784.109 Manufacture of supplies for named operations is not exempt.

Employment in the manufacture of supplies for the named operations is not employment in the named operations on aquatic forms of life. Thus, the exemption is not applicable to the manufacture of boxes, barrels, or ice by a seafood processor for packing or shipping its seafood products or for use of the ice in its fishing vessels. These operations, when performed by an independent manufacturer, would likewise not be exempt (*Dize* v. *Maddix*, 144 F. 284 (C.A. 4), affirmed 324 U.S. 667, and approved on this point in *Farmers' Reservoir Co.* v. *McComb*, 337 U.S. 755).

§ 784.110 Performing operations both on nonaquatic products and named aquatic products.

By their terms, sections 13(a)(5) and 13(b)(4) provide no exemption with respect to operations performed on any products other than the aquatic products named in these subsections (see § 784.107). Accordingly, neither of the exemptions is applicable to the making of any commodities from ingredients only part of which consist of such aquatic products, if a substantial amount of other products is contained in the commodity so produced (compare *Walling* v. *Bridgeman-Russell Co.,* 6 Labor Cases 61, 422, 2 WH Cases 785 (D. Minn.) and *Miller* v. *Litchfield Creamery Co.*, 11 Labor Cases 63, 274, 5 WH Cases 1039 (N.D. Ind.), with *Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278). Thus, the first processing, canning, or processing of codfish cakes, clam chowder, dog food, crab cakes, or livestock food containing aquatic products is often not exempt within the meaning of the relevant exemptions.

§ 784.111 Operations on named products with substantial amounts of other ingredients are not exempt.

To exempt employees employed in first processing, canning, or processing products composed of the named commodities and a substantial amount of ingredients not named in the exemptions would be contrary to the language and purposes of such exemptions which specifically enumerate the commodities on which exempt operations were intended to be performed. Consequently, in such situations all operations performed on the mixed products at and from the time of the addition of the foreign ingredients, including those activities which are an integral part of first processing, canning, or processing are nonexempt activities. However, activities performed in connection with such operations on the named aquatic products prior to the addition of the foreign ingredients are deemed exempt operations under the applicable exemption. Where the commodity produced from named aquatic products contains an insubstantial amount of products not named in the exemption, the operations will be considered as performed on the aquatic products and handling and preparation of the foreign ingredients for use in the exempt operations will also be considered as exempt activities.

§ 784.112 Substantial amounts of nonaquatic products; enforcement policy.

As an enforcement policy in applying the principles stated in §§ 784.110 and 784.111, if more than 20 percent of a commodity consists of products other than aquatic products named in section 13(a)(5) or 13(b)(4), the commodity will be deemed to contain a substantial amount of such nonaquatic products.

§ 784.113 Work related to named operations performed in off- or dead-season.

Generally, during the dead or inactive season when operations named in section 13(a)(5) or 13(b)(4) are not being performed on the specified aquatic forms of life, employees performing work relating to the plant or equipment which is used in such operations during the active seasons are not exempt. Illustrative of such employees are those who repair, overhaul, or recondition fishing equipment or processing or canning equipment and machinery during the off-season periods when fishing, processing, or canning is not going on. An exemption provided for employees employed ''in'' specified operations is plainly not intended to apply to employees employed in other activities during periods when the specified operations are not being carried on, where their work is functionally remote from the actual conduct of the operations for which exemption is provided and is unaffected by the natural factors which the Congress relied on as reason for exemption. The courts have recognized these principles. See *Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Maisonet* v. *Central Coloso*, 6 Labor Cases (CCH) par. 61,337, 2 WH Cases 753 (D. P.R.); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S.D. Calif.), and *Heaburg* v. *Independent Oil Mill Inc.*, 46 F. Supp. 751 (W.D. Tenn.). On the other hand, there may be situations where employees performing certain preseason or postseason activities immediately

prior or subsequent to carrying on operations named in sections 13(a)(5) or section 13(b)(4) are properly to be considered as employed ''in'' the named operations because their work is so close in point of time and function to the conduct of the named operations that the employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended. Depending on the facts and circumstances, this may be true, for example, of employees who perform such work as placing boats and other equipment in condition for use at the beginning of the fishing season, and taking the necessary protective measures with respect to such equipment which are required in connection with termination of the named operations at the end of the season. Where such work is integrated with and is required for the actual conduct of the named operations on the specified aquatic forms of life, and is necessarily performed immediately before or immediately after such named operations, the employees performing it may be considered as employed in the named operations, so as to come within the exemption. It should be kept in mind that the relationship between the work of an employee and the named operations which is required for exemption is not necessarily identical with the relationship between such work and the production of goods for commerce which is sufficient to establish its general coverage under the Act. Thus, repair, overhaul, and reconditioning work during the inactive season which does not come within the exemption is nevertheless closely related and directly essential to the production of goods for commerce which takes place during the active season and, therefore, is subject to the provisions of the Act (*Farmers' Reservoir Co.* v. *McComb*, 337 U.S. 755; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597, cert., den., 328 U.S. 858).

§ 784.114 Application of exemptions on a workweek basis.

The general rule that the unit of time to be used in determining the application of the exemption to an employee is the workweek (see *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Mitchell* v. *Hunt*. 263 F. 2d 913; *Puerto Rico Tobacco Marketing Co-op. Ass'n.* v. *McComb*, 181 F. 2d 697). Thus, the workweek is the unit of time to be taken as the standard in determining the applicability to an employee of section 13(a)(5) or section 13(b)(4) (*Mitchell* v. *Stinson*, supra). An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at an hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted. If in any workweek an employee does only exempt work he is exempt from the wage and hours provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in one workweek and not the next (see *Mitchell* v. *Stinson*, supra). But the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is on the employer (see *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245).

§ 784.115 Exempt and noncovered work performed during the workweek.

The wage and hours requirements of the Act do not apply to any employees during any workweek in which a portion of his activities falls within section 13(a)(5) if no part of the remainder of his activities is covered by the Act. Similarly, the overtime requirements are inapplicable in any workweek in which a portion of an employee's activities falls within section 13(b)(4) if no part of the remainder of his activities is covered by the Act. Covered activities for purposes of the above statements mean engagement in commerce, or in the production of goods for commerce, or in an occupation closely related or directly essential to such production or employment in an enterprise engaged in commerce or in the

production of goods for commerce, as explained in §§ 784.17 through 784.19.

§ 784.116 Exempt and nonexempt work in the same workweek.

Where an employee, during any workweek, performs work that is exempt under section 13(a)(5) or 13(b)(4), and also performs nonexempt work, some part of which is covered by the Act, the exemption will be deemed inapplicable unless the time spent in performing nonexempt work during that week is not substantial in amount. For enforcement purposes, nonexempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work (see *Mitchell* v. *Stinson*, 217 F. 2d 210). Where exempt and nonexempt work is performed during a workweek by an employee and is not or cannot be segregated so as to permit separate measurement of the time spent in each, the employee will not be exempt (see *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245; *Walling* v. *Public Quick Freezing and Cold Storage Co.*, 62 F. Supp. 924).

§ 784.117 Combinations of exempt work.

The combination of exempt work under sections 13(a)(5) and 13(b)(4), or one of these sections with exempt work under another section of the Act, is permitted. Where a part of an employee's covered work in a workweek is exempt under section 13(a)(5) and the remainder is exempt under another section which grants an exemption from the minimum wage and overtime provisions of the Act, the wage and hours requirements are not applicable. If the scope of the exemption is not the same, however, the exemption applicable to the employee is that provided by whichever exemption provision is more limited in scope unless, of course, the time spent in performing work which is nonexempt under the broader exemption is not substantial. For example, an employee may devote part of his workweek to work within section 13(b)(4) and the remainder to work exempt from both the minimum wage and overtime requirements under another section of the Act. In such a case he must receive the minimum wage but is not required to receive time and one-half for his overtime work during that week (C.F. *Mitchell* v. *Myrtle Grove Packing Co.*, 350 U.S. 891; *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245). Each activity is tested separately under the applicable exemption as though it were the sole activity of the employee for the whole workweek in question. Unless the employee meets all the requirements of each exemption a combination exemption would not be available.

General Character and Scope of the Section 13(a)(5) Exemption

§ 784.118 The exemption is intended for work affected by natural factors.

As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained (83 Cong. Rec. 7408, 7443; S. Rep. No. 145, p. 33 on H.R. 3935, 87th Cong., first session; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866).

§ 784.119 Effect of natural factors on named operations.

The various activities enumerated in section 13(a)(5)—the catching, taking, propagating, harvesting, cultivating, or farming of aquatic forms of animal or vegetable life as well as ''the going to and returning from work'' are materially controlled and affected by the natural elements. Similarly, the activities of ''first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations'' are subject to the natural factors mentioned above. The ''loading and unloading'' of such aquatic products when performed at sea are also subject to the natural forces.

§ 784.120 Application of exemption to "offshore" activities in general.

The expression ''offshore activities'' is used to describe the category of named operations pertaining to the acquisition from nature of aquatic forms of animal and vegetable life. As originally enacted in 1938, section 13(a)(5) exempted not only employees employed in such ''offshore'' or ''trip'' activities but also employees employed in related activities on shore which were similarly affected by the natural factors previously discussed (see § 784.103, and *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52). However, the intent of the 1961 amendments to the Act was to remove from the exemption the so-called onshore activities and ''leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products'' (S. Rep. 145, 87th Cong., first session, p. 33). Despite its comprehensive reach (see §§ 784.105 and 784.106), the exemption, like the similar exemption is the Act for agriculture, is ''meant to apply only'' to the activities named in the statute (see *Maneja* v. *Waialua*, 349 U.S. 254; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755).

§ 784.121 Exempt fisheries operations.

Employees engaged in the named operations, such at ''catching'' or ''taking,'' are clearly exempt. As indicated in § 784.106, employees engaged in activities that are ''directly and necessarily a part of'' an enumerated operation are also exempt (*Mitchell* v. *Trade Winds, Inc.*, 289 F. 2d 278). The ''catching, taking, propagating, harvesting, cultivating, or farming'' of the various forms of aquatic life includes not only the actual performance of the activities, but also the usual duties inherent in the occupations of those who perform the activities. Thus, the fisherman who is engaged in ''catching'' and ''taking'' must see to it that his lines, nets, seines, traps, and other equipment are not fouled and are in working order. He may also have to mend or replace his lines or nets or repair or construct his traps. Such activities are an integral part of the operations of ''catching'' and ''taking'' of an aquatic product.

§ 784.122 Operations performed as an integrated part of fishing.

Certain other activities performed on a fishing vessel in connection with named operations are, functionally and as a practical matter, directly and necessarily a part of such operations. For example, maintenance work performed by members of the fishing crew during the course of the trip on the fishing boat would necessarily be a part of the fishing operation, since the boat itself is as much a fishing instrument as the fishing rods or nets. Similarly, work required on the vessel to keep in good operating condition any equipment used for processing, canning, or packing the named aquatic products at sea is so necessary to the conduct of such operations that it must be considered a part of them and exempt.

§ 784.123 Operations performed on fishing equipment.

On the principle stated in § 784.122 the replacement, repair, mending, or construction of the fisherman's equipment performed at the place of the fishing operation would be exempt. Such activities performed in contemplation of the trip are also within the exemption if the work is so closely related both in point of time and function to the acquisition of the aquatic life that it is really a part of the fishing operation or of ''going to * * * work.'' For example, under appropriate facts, the repair of the nets, or of the vessel, or the building of fish trap frames on the shore immediately prior to the opening of the fishing season would be within the exemption. Activities at the termination of a fishing trip which are similarly related in time and function to the actual conduct of fishing operations or ''returning from work'' may be within the exemption on like principles. Similarly, the fact that the exemption is intended generally for ''offshore'' activities does not mean that it may not apply to employment in other activities performed on shore which are so integrated with the conduct of actual fishing operations and functionally so necessary thereto that the employment is, in practical effect, directly and necessarily a part of the fishing operations for which the exemption is intended. In such circumstances the exemption will

apply, for example, to an employee employed by a vessel owner to watch the fishing vessel, its equipment, and the catch when it comes to port, checks the mooring lines, operate bilge pumps and heating and cooling systems on the vessel, and assist in the loading and unloading of the fishing equipment and the catch. Work of the kinds referred to may be exempt when performed by the fisherman himself or necessary to the conduct of the fishing organization. However, the exemption would not apply to employees of a manufacturer of supplies or to employees of independent shops which repair boats and equipment. (*Dize* v. *Maddix*, 144 F. 2d 584, affirmed 324 U.S. 697.)

§ 784.124 Going to and returning from work.

The phrase ''including the going to and returning from work'' relates to the preceding named operations which pertain to the procuring and appropriation of seafood and other forms of aquatic life from nature. The expression obviously includes the time spent by fishermen and others who go to and from the fishing grounds or other locations where the aquatic life is reduced to possession. If going to work requires fishermen to prepare and carry the equipment required for the fishing operation, this would be included within the exemption. In performing such travel the fishermen may be required to row, guide or sail the boat or otherwise assist in its operation. Similarly, if an employee were digging for clams or other shellfish or gathering seaweed on the sand or rocks it might be necessary to drive a truck or other vehicle to reach his destination. Such activities are exempt within the meaning of this language. However, the phrase does not apply to employees who are not employed in the activities involved in the acquisition of aquatic animal or vegetable life, such as those going to or returning from work at processing or refrigerator plants or wholesale establishments.

§ 784.125 Loading and unloading.

The term ''loading and unloading'' applies to activities connected with the removal of aquatic products from the fishing vessel and their initial movement to markets or processing plants. The term, however, is not without limitation. The statute by its clear language makes these activities exempt only when performed by any employee employed in the procurement activities enumerated in section 13(a)(5). This limitation is confirmed by the legislative history of the 1961 amendments which effectuated this change in the application of this term (S. Rep. 145, 87th Cong., first session, p. 33). Consequently, members of the fishing crew engaged in loading and unloading the catch of the vessel to another vessel at sea, or at the dockside would be engaging in exempt activities within the meaning of section 13(a)(5). On the other hand, dock workers performing the same kind of tasks would not be within the exemption.

§ 784.126 Operation of the fishing vessel.

In extending the minimum wage to seamen on American vessels by limiting the exemption from minimum wages and overtime provided by section 13(a)(12) of the Act to ''any employee employed as a seaman on a vessel other than an American vessel'', and at the same time extending the minimum wage to ''onshore'' but not ''offshore'' operations concerned with aquatic products, the Congress, in the 1961 amendments to the Act, did not indicate any intent to remove the crews of fishing vessels engaged in operations named in section 13(a)(5) from the exemption provided by that section. The exemption provided by section 13(a)(12), above noted, and the general exemption in section 13(b)(6) from overtime for ''any employee employed as a seaman'' (whether or not on an American vessel) apply, in general to employees, working aboard vessels, whose services are rendered primarily as an aid to navigation. It appears, however, that it is not the custom or practice in the fishing industry for a fishing vessel to have two crews; namely, a fishing crew whose duty it is primarily to fish and to perform other duties incidental thereto and a navigational crew whose duty it is primarily to operate the boat. Where, as is the typical situation, there is but one crew which performs all these functions, the section 13(a)(5)

exemptions would apply to its members. For a further explanation of the seaman's exemption, see part 783 of this chapter.

§ 784.127 Office and clerical employees under section 13(a)(5).

Office and clerical employees, such as bookkeepers, stenographers, typists, and others who perform general office work of a firm engaged in operating fishing boats are not for that reason within the section 13(a)(5) exemption. Under the principles stated in § 784.106, their general office activities are not a part of any of the named operations even when they are selling, taking, and putting up orders, on recording sales, taking cash or making telephone connections for customer or dealer calls. Employment in the specific activities enumerated in the preceding sentence would ordinarily, however, be exempt under section 13(b)(4) since such activities constitute ''marketing'' or ''distributing'' within the meaning of that exemption (see § 784.153). In certain circumstances, office or clerical employees may come within the section 13(a)(5) exemption. If, for example, it is necessary to the conduct of the fishing operations that such employees accompany a fishing expedition to the fishing grounds to perform certain work required there in connection with the catch, their employment under such circumstances may, as a practical matter, be directly and necessarily a part of the operations for which exemption was intended, in which event the exemption would apply to them.

First Processing, Canning, or Packing of Marine Products Under Section 13(a)(5)

§ 784.128 Requirements for exemption of first processing, etc., at sea.

A complete exemption from minimum and overtime wages is provided by section 13(a)(5) for employees employed in the operations of first processing, canning, or packing of marine products at sea as an incident to, or in conjunction with ''such'' fishing operations—that is, the fishing operations of the fishing vessel (S. Rep. 145, 87th Cong., first session, p. 33). To qualify under this part of the exemption, there must be a showing that: (a) The work of the employees is such that they are, within the meaning of the Act, employed in one or more of the named operations of first processing, canning or packing, (b) such operations are performed as an incident to, or in conjunction with, fishing operations of the vessel, (c) such operations are performed at sea, and (d) such operations are performed on the marine product specified in the statute.

§ 784.129 "Marine products".

The marine products which form the basis of the exemption are the ''fish, shellfish, crustaceas, sponges, seaweeds, or other aquatic forms of animal and vegetable life'' mentioned in section 13(a)(5). The exemption contemplates aquatic products currently or recently acquired and in the form obtained from the sea, since the language of the exemption clearly indicates the named operations of first processing, canning, or packing must be performed ''at sea'' and ''as an incident to or in conjunction with'', fishing operations. Also, such ''marine products'' are limited to aquatic forms of ''life.''

§ 784.130 "At sea."

The ''at sea'' requirement must be construed in context and in such manner as to accomplish the statutory objective. The section 13(a)(5) exemption is for the ''catching, taking, propagating, harvesting,'' etc., of ''aquatic forms of animal and vegetable life.'' There is no limitation as to where these activities must take place other than, as the legislative history indicates, that they are ''offshore'' activities. Since the purpose of the 1961 amendments is to exempt the ''first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations,'' it would frustrate this objective to give the phrase ''at sea'' a technical or special meaning. For example, to define ''at sea'' to include only bodies of water subject to the ebb and flow of the tides or to saline waters would exclude the Great Lakes which obviously would not comport with the legislative intent. On the other hand, one performing the named activities of

first processing, canning, or packing within the limits of a port or harbor is not performing them ''at sea'' within the meaning of the legislative intent although the situs of performance is subject to tidewaters. In any event it would not appear necessary to draw a precise line as to what constitutes ''at sea'' operations, for, as a practical matter, such first processing, canning, or packing operations are those closely connected with the physical catching of the fish and are performed on the fishing vessel shortly or immediately following the ''catching'' and ''taking'' of the fish.

§ 784.131 "As an incident to, or in conjunction with", fishing operations.

The statutory language makes clear that the ''first processing, canning, or packing,'' unlike the other named operations of ''catching, taking, propagating, harvesting, cultivating, or farming'' are not exempt operations in and of themselves. They are exempt only when performed ''as an incident to, or in conjunction with such fishing operations'' (see *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755). It is apparent from the context that the language ''such fishing operations'' refers to the principal named operations of ''catching, taking, propagating, harvesting, cultivating, or farming'' as performed by the fishermen or fishing vessel (compare *Bowie* v. *Gonzales,* 117 F. 2d 11). Therefore to be ''an incident to, or in conjunction with such fishing operations'', the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is made abundantly clear by the legislative history. In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

> For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the ''first processing, canning, or packing'' of marine products ''at sea as an incident to, or in conjunction with such fishing operations.'' The purpose of this additional provision is to make certain that the Act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. *Mitchell* v. *Hunt,* 263 F. 2d 913; *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755).

§ 784.132 The exempt operations.

The final requirement is that the employee on the fishing vessel must be employed in ''the first processing, canning or packing'' of the marine products. The meaning and scope of these operations when performed at sea as an incident to the fishing operations of the vessel are set forth in §§ 784.133 to 784.135. To be ''employed in'' such operations the employee must, as previously explained (see §§ 784.106 and 784.121), be engaged in work which is clearly part of the named activity.

§ 784.133 "First processing."

Processing connotes a change from the natural state of the marine product and first processing would constitute the first operation or series of continuous operations that effectuate this change. It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which ordinarily immediately follow these operations, would also constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of ''freezing'', as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such

preliminary operations as cleaning, washing, and grading of the marine products, though not exempt as first processing since they effect no change, would be exempt as part of first processing when done in preparation for the first processing operation described above including freezing. The same would be true with respect to the removal of the waste products resulting from the above described operations on board the fishing vessel.

§ 784.134 "Canning."

The term ''canning'' was defined in the legislative history of the 1949 amendments (House (Conference) Report No. 1453, 81st Cong., first session; 95 Cong. Rec. 14878, 14932–33). These amendments made the ''canning'' of marine products or byproducts exempt from overtime only under a separate exemption (section 13(b)(4), and subject to the minimum wage requirements of the Act (see § 784.136 *et seq.*). The same meaning will be accorded to ''canning'' in section 13(a)(5) as in section 13(b)(4) (see § 784.142 *et seq.*) subject, of course, to the limitations necessarily imposed by the context in which it is found. In other words, although certain operations as described in § 784.142 *et seq.* qualify as canning, they are, nevertheless, not exempt under section 13(a)(5) unless they are performed on marine products by employees of the fishing vessel at sea as an incident to, or in conjunction with the fishing operations of the vessel.

§ 784.135 "Packing."

The packing of the various named marine products at sea as an incident to, or in conjunction with, the fishing operations of the vessel is an exempt operation. The term ''packing'' refers to the placing of the named product in containers, such as boxes, crates, bags, and barrels. Activities such as washing, grading, sizing, and placing layers of crushed ice in the containers are deemed a part of packing when performed as an integral part of the packing operation. The packing operation may be a simple or complete and complex operation depending upon the nature of the marine product, the length of time out and the facilities aboard the vessel. Where the fishing trip is of short duration, the packing operation may amount to no more than the simple operation, of packing the product in chipped or crushed ice in wooden boxes, as in the case of shrimp, or placing the product in wooden boxes and covering with seaweed as in the case of lobsters. Where the trips are of long duration, as for several weeks or more, packing the operations on fishing vessels with the proper equipment sometimes are integrated with first processing operations so that together these operations amount to readying the product in a marketable form. For example, in the case of shrimp, the combined operations may consist of the following series of operations—washing, grading, sizing, placing 5-pound boxes already labeled for direct marketing, placing in trays with other boxes, loading into a quick freezer locker, removing after freezing, emptying the box, glazing the contents with a spray of fresh water, replacing the box, putting them in 50-pound master cartons and finally stowing in refrigerated locker.

General Character and Scope of the Section 13(a)(4) Exemption

§ 784.136 "Shore" activities exempted under section 13(b)(4).

Section 13(b)(4) provides an exemption from the overtime but not from the minimum wage provisions of the Act for ''any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing'' aquatic forms of animal and vegetable life or any byproducts thereof. Orginally, all these operations were contained in the exemption provided by section 13(a)(5) but, as a result of amendments, first ''canning'', in 1949, and then the other operations in 1961, were transferred to section 13(b)(4). (See the discussion in §§ 784.102 to 784.105.) These activities are ''shore'' activities and in general have to do with the movement of the perishable aquatic products to a nonperishable state or to points of consumption (S. Rept. 145, 87th Cong., first session, p. 33).

§ 784.137 Relationship of exemption to exemption for "offshore" activities.

The reasons advanced for exemption of employment in ''shore'' operations, now listed in section 13(b)(4), at the time of the adoption of the original exemption in 1938, had to do with the difficulty of regulating hours of work of those whose operations, like those of fishermen, were stated to be governed by the time, size, availability, and perishability of the catch, all of which were considered to be affected by natural factors that the employer could not control (see 83 Cong. Rec. 7408, 7422, 7443). The intended limited scope of the exemption in this respect was not changed by transfer of the ''shore'' activities from section 13(a)(5) to section 13(b)(4). The exemption of employment in these ''shore'' operations may be considered, therefore, as intended to implement and supplement the exemption for employment in ''offshore'' operations provided by section 13(a)(5), by exempting from the hours provisions of the Act employees employed in those ''shore'' activities which are necessarily somewhat affected by the same natural factors. These ''shore'' activities are affected primarily, however, by fluctuations in the supply of the product or by the necessity for consumption or preservation of such products before spoilage occurs (see *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; cf. *McComb* v. *Consolidated Fisheries*, 174 F. 2d 74).

§ 784.138 Perishable state of the aquatic product as affecting exemption.

(a) Activities performed after conversion of an aquatic product to a nonperishable state cannot form the basis for application of the section 13(b)(4) exemption unless the subsequent operation is so integrated with the performance of exempt operations on the aquatic forms of animal and vegetable life mentioned in the section that functionally and as a practical matter it must be considered a part of the operations for which exemption was intended. The exemption is, consequently, not available for the handling or shipping of nonperishable products by an employer except where done as a part of named operations commenced on the product when it was in a perishable state. Thus, employees of dealers in or distributors of such nonperishable products as fish oil and fish meal, or canned seafood, are not within the exemption. Similarly, there is no basis for application of the exemption to employees employed in further processing of or manufacturing operations on products previously rendered nonperishable, such as refining fish oil or handling fish meal in connection with the manufacture of feeds. Further specific examples of application of the foregoing principle are given in the subsequent discussion of particular operations named in section 13(b)(4).

(b) In applying the principle stated in paragraph (a) of this section, the Department has not asserted that the exemption is inapplicable to the performance of the operations described in section 13(b)(4) on frozen, smoked, salted, or cured fish. The Department will continue to follow this policy until further clarification from the courts.

§ 784.139 Scope of exempt operations in general.

Exemption under section 13(b)(4), like exemption under section 13(a)(5), depends upon the employment in the actual activities named in the section, and an employee performing a function which is not necessary to the actual conduct of a named activity, as explained in § 784.106, is not within the exemption. It is also essential to exemption that the operations named in section 13(b)(4) be performed on the forms of aquatic life specified in the section and not on other commodities a substantial part of which consists of materials or products other than the named aquatic products. Application of these principles has been considered generally in the earlier discussion, and further applications will be noted in the following sections and in the subsequent discussion of particular operations mentioned in the section 13(b)(4) exemption.

§ 784.140 Fabrication and handling of supplies for use in named operations.

(a) As noted in § 784.109, the exemption for employees employed ''in'' the named operations does not extend to

an employee by reason of the fact that he engages in fabricating supplies for the named operations. Employment in connection with the furnishing of supplies for the processing or canning operations named in section 13(b)(4) is not exempt as employment ''in'' such named operations unless the functional relationship of the work to the actual conduct of the named operations is such that, as a practical matter, the employment is directly and necessarily a part of the operations for which exemption is intended. Employees who meet the daily needs of the canning or processing operations by delivering from stock, handling, and working on supplies such as salt, condiments, cleaning supplies, containers, etc., which must be provided as needed if the named operations are to continue, are within the exemption because such work is, in practical effect, a part of the operations for which exemption is intended. On the other hand, the receiving, unloading, and storing of such supplies during seasons when the named operations are not being carried on for subsequent use in the operations expected to be performed during the active season, are ordinarily too remote from the actual conduct of the named operations to come within the exemption (see §784.113), and are not affected by the natural factors (§784.137) which were considered by the Congress to constitute a fundamental reason for providing the exemption. Whether the receiving, unloading, and storing of supplies during periods when the named operations are being carried on are functionally so related to the actual conduct of the operations as to be, in practical effect, a part of the named operations and within the exemption, will depend on all the facts and circumstances of the particular situation and the manner in which the named operations are carried on. Normally where such activities are directed to building up stock for use at a relatively remote time and there is no direct integration with the actual conduct of the named operations, the exemption will not apply.

(b) It may be that employees are engaged in the same workweek in performing exempt and nonexempt work. For example, a shop machinist engaged in making a new part to be used in the repair of a machine currently used in canning operations would be doing exempt work. If he also in the same workweeks makes parts to be used in a manufacturing plant operated by his employer, this work, since it does not directly or necessarily contribute to the conduct of the canning operations, would be nonexempt work causing the loss of the exemption if such work occupied a substantial amount (for enforcement purposes, more than 20 percent) of the employee's worktime in that workweek (see §784.116 for a more detailed discussion).

§784.141 Examples of nonexempt employees.

An employer who engaged in operations specified in section 13(b)(4) which he performs on the marine products and byproducts described in that section may operate a business which engages also in operations of a different character or one in which some of the activities carried on are not functionally necessary to the conduct of operations named in section 13(b)(4). In such a business there will ordinarily be, in addition to the employees employed in such named operations, other employees who are nonexempt because their work is concerned entirely or in substantial part with carrying on activities which constitute neither the actual engagement in the named operations nor the performance of functions which are, as a practical matter, directly and necessarily a part of their employer's conduct of such named operations. Ordinarily, as indicated in §784.156, such nonexempt employees will not be employed in an establishment which is exclusively devoted by the employer to the named operations during the period of their employment. It is usually when the named operations are not being carried on, or in places wholly or partly devoted to other operations, that employees of such an employer will be performing functions which are not so necessarily related to the conduct of the operations named in section 13(b)(4) as to come within the exemption. Typical illustrations of the occupations in which such nonexempt workers may be found

(although employment in such an occupation does not necessarily mean that the worker is nonexempt) are the following: General office work (such as maintaining employment, social security, payroll and other records, handling general correspondence, etc., as distinguished from ''marketing'' or ''distributing'' work like that described in §784.155), custodial, maintenance, watching, and guarding occupations; furnishing food, lodging, transportation, or nursing services to workers; and laboratory occupations such as those concerned with development of new products. Such workers are, of course, not physically engaged in operations named in section 13(b)(4) in the ordinary case, and they are not exempt unless they can be shown to be ''employed in'' such operations on other grounds. But any of them may come within the exemption in a situation where the employer can show that the functions which they perform, in view of all the facts and circumstances under which the named operations are carried on, are actually so integrated with or essential to the conduct of the named operations as to be, in practical effect directly and necessarily a part of the operations for which exemption was intended. Thus, for example, if canning operations described in section 13(b)(4) are carried on in a location where the canning employees cannot obtain necessary food unless the canner provides it, his employment of culinary employees to provide such food is functionally so necessary to the conduct of the canning operations that their work is, as a practical matter, a part of such operations, and the exemption will apply to them. On like principle, the exemption may apply to a watchman whose services are required during performance of the named operations in order to guard against spontaneous combustion of the products of such operations and other occurrences which may jeopardize the conduct of the operations.

''CANNING''

§ 784.142 Meaning and scope of "canning" as used in section 13(b)(4).

Section 13(b)(4) exempts any employee employed in the canning of aquatic forms of animal or vegetable life or byproducts thereof from the overtime requirements of the Act. As previously stated, it was made a limited exemption by the Fair Labor Standards Amendments of 1949. The legislative history of this section in specifically explaining what types of activities are included in the term ''canning'' and the antecedents from which this section evolved make it clear that the exemption applies to those employees employed in the activities that Congress construed as being embraced in the term and not to all those engaged in the fish canning industry (*Mitchell* v. *Stinson*, 217 F. 2d 214). Congress defined Report No. 1453, 81st Cong., first session 95 Cong. Rec. 14878, 14932–33) as follows:

> Under the conference agreement ''canning'' means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. It also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers. Also included are subsequent operations such as the labeling of the cans or other cases or boxes whether such subsequent operations are performed as part of an uninterrupted or interrupted process. It does not include the placing of such products or byproducts thereof in cans or other containers that are not hermetically sealed as such an operation is ''processing'' as distinguished from ''canning'' and comes within the complete exemption contained in section 13(a)(5).

Of course, the processing other than canning, referred to in the last sentence quoted above, is now like canning, in section 13(a)(5).

§ 784.143 "Necessary preparatory operations."

All necessary preparatory work performed on the named aquatic products as an integral part of a single uninterrupted canning process is subject to section 13(b)(4) (see *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, approved in *Mitchell* v. *Myrtle Grove Packing Co.*, 350 U.S. 891). Such activities conducted as essential and integrated steps in the continuous and uninterrupted process

of canning are clearly within the definition of ''canning'' as contemplated by Congress and cannot be viewed in isolation from the canning process as a whole. Exempt preparatory operations include the necessary weighing, cleaning, picking, peeling, shucking, cutting, heating, cooling, steaming, mixing, cooking, carrying, conveying, and transferring to the containers the exempt aquatic products (see *Mitchell* v. *Stinson*, 217 F. 2d 214). But the preparatory operations do not include operations specified in section 13(a)(5) pertaining to the acquisition of the exempt products from nature. Therefore, if a canner employs fishermen or others to catch, take, harvest, cultivate or farm aquatic animal and vegetable life, section 13(a)(5) and not section 13(b)(4) would apply to these particular operations.

§ 784.144 Preliminary processing by the canner.

The mere fact that operations preparatory to canning are physically separated from the main canning operations of hermetically sealing and sterilizing or pasteurizing would not be sufficient to remove them from the scope of section 13(b)(4). Where preparatory operations such as the steaming or shucking of oysters are performed in an establishment owned, operated, or controlled by a canner of seafood as part of a process consisting of continuous series of operations in which such products are hermetically sealed in containers and sterilized or pasteurized, all employees who perform any part of such series of operations on any portion of such aquatic products for canning purposes are within the scope of the term ''canning.''

§ 784.145 Preliminary processing by another employer as part of "canning."

If the operations of separate processors are integrated in producing canned seafood products all employees of such processors who perform any part of the described continuous series of operations to accomplish this result would be ''employed in the canning of'' such products. Moreover, preliminary operations performed in a separately owned processing establishment which are directed toward the particular requirements of a cannery pursuant to some definite arrangement between the operators of the two establishments would generally appear to be integrated with the cannery operations within the meaning of the above principles, so that the employees engaged in the preliminary operations in the separate establishment would be employed in ''canning'' within the meaning of section 13(b)(4) of the Act. Whether or not integration exists in a specific case of this general nature will depend, of course, upon all the relevant facts and circumstances in such case.

§ 784.146 "Subsequent operations."

Canning, within the meaning of the exemption, includes operations performed after hermetic sealing of the cans or other containers, such as labeling of them and placing of them in cases or boxes, which are required to place the canned product in the form in which it will be sold or shipped by the canner. This is so whether or not such operations immediately follow the actual canning operations as a part of an uninterrupted process. Storing and shipping operations performed by the employees of the cannery in connection with its canned products, during weeks in which canning operations are going on, to make room for the canned products coming off the line or to make storage room, come within the exemption. The fact that such activities relate in part to products canned during the previous weeks or seasons would not affect the application of the exemption, provided canning operations such as hermetic sealing and sterilizing, or labeling, are currently being carried on.

§ 784.147 Employees "employed in" canning.

All employees whose activities are directly and necessarily a part of the canning of the specified aquatic forms of life are within the exemption provided by section 13(b)(4). Thus, employees engaged in handling the fish or seafood, placing it into the cans, providing steam for cooking it or operating the machinery that seals the cans or the equipment that sterilizes the canned

product are engaged in exempt activities. In addition, can loft workers, those engaged in removing and carrying supplies from the stock room for current use in canning operations, and employees whose duty it is to re-form cans, when canning operations are going on, for current use, are engaged in exempt activities. Similarly, the repairing, oiling, or greasing during the active season of canning machinery or equipment currently used in the actual canning operations are exempt activities. The making of repairs in the production room such as to the floor around the canning machinery or equipment would also be deemed exempt activities where the repairs are essential to the continued canning operations or to prevent interruptions in the canning operations. These examples are illustrative but not exhaustive. Employees engaged in other activities which are similarly integrated with and necessary to the actual conduct of the canning operations will also come within the exemption. Employees whose work is not directly and necessarily a part of the canning operations are not exempt. See §§ 784.106, 784.140, and 784.141.

PROCESSING, FREEZING, AND CURING

§ 784.148 General scope of processing, freezing, and curing activities.

Processing, freezing, and curing embrace a variety of operations that change the form of the ''aquatic forms of animal and vegetable life.'' They include such operations as filleting, cutting, scaling, salting, smoking, drying, pickling, curing, freezing, extracting oil, manufacturing meal or fertilizer, drying seaweed preparatory to the manufacture of agar, drying and cleaning sponges (*Feming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52).

§ 784.149 Typical operations that may qualify for exemption.

Such operations as transporting the specified aquatic products to the processing plant; moving the products from place to place in the plant; cutting, trimming, eviscerating, peeling, shelling, and otherwise working on the products; packing the products; and moving the products from the production line to storage or to the shipping platform are typical of the operations in processing plants which are included in the exemption. Removal of waste, such as clam and oyster shells, operation of processing and packing machinery, and providing steam and brine for the processing operations (see *Mitchell* v. *Trade Winds Inc.*, 289 F. 2d 278, explaining *Waller* v. *Humphreys*, 133 F. 2d 193) are also included. As for the application of the exemption to office, maintenance, warehouse, and other employees, see the discussion in § 784.106 *et seq.*, and §§ 784.140 and 784.141.

§ 784.150 Named operations performed on previously processed aquatic products.

It will be noted that section 13(b)(4) refers to employees employed in ''processing'' the named aquatic commodities and not just to ''first processing'' as does the provision in section 13(a)(5) for such processing at sea. Accordingly, if the aquatic products, though subjected to a processing operation, are still in a perishable state, the subsequent performance of any of the enumerated operations on the still perishable products will be within the exemption no matter who the employer performing the exempt operations may be. He may be the same employer who performed the prior processing or other exempt operation, another processor, or a wholesaler, as the case may be. As noted in § 784.138(b), the Department has not questioned the applicability of the foregoing rule where the operation is performed on frozen, salted, smoked, or cured fish.

§ 784.151 Operations performed after product is rendered nonperishable.

As indicated in § 784.138, after the character of the aquatic products as taken from nature has been altered by the performance of the enumerated operations so as to render them nonperishable (e.g., drying and cleaning sponges) section 13(b)(4) provides no exemption for any subsequent operations on the preserved products, unless the subsequent operation is performed as an integrated part of the operations named in the exemption which are performed by an employer on aquatic commodities described in section 13(b)(4)

after receiving them in the perishable state. In the case of an employer who is engaged in performing on perishable aquatic forms of life specified in section 13(b)(4) any operations named in that section which result in a nonperishable product, the employment of his employees in the storing, marketing, packing for shipment, or distributing of nonperishable products resulting from such operations performed by him (including products processed during previous weeks or seasons) will be considered to be an integrated part of his operations on the perishable aquatic forms of life during those workweeks when he is actively engaged in such operations. The employees employed by him in such work on the nonperishable products are, accordingly, within the exemption in such workweeks.

§ 784.152 Operations performed on byproducts.

The principles stated in the two preceding sections would also be applicable where the specified operations are performed on perishable byproducts. Any operation performed on perishable fish scraps, an unsegregated portion of which is to be canned, would come within the canning (not the processing) part of the exemption. Fish-reduction operations performed on the inedible and still perishable portions of fish resulting from processing or canning operations, to produce fish oil or meal, would come within the processing part of the exemption. Subsequent operations on the oil to fortify it would not be exempt, however, since fish oil is nonperishable in the sense that it may be held for a substantial period of time without deterioration.

MARKETING, STORING, PACKING FOR SHIPMENT, AND DISTRIBUTING

§ 784.153 General scope of named operations.

The exemption from the overtime pay requirements provided by section 13(b)(4) of the Act extends to employees ''employed in the * * * marketing * * * storing, packing for shipment, or distributing of any kind of'' perishable aquatic product named in the section. An employee's work must be functionally so related to the named activity as to be, in practical effect, a part of it, and the named activity must be performed with respect to the perishable aquatic commodities listed in section 13(b)(4), in order for the exemption to apply to him. The named activities include the operations customarily performed in the marketing, storing, packing for shipment, or distributing of perishable marine products. For example, an employee engaged in placing perishable marine products in boxes, cartons, crates, bags, barrels, etc., preparatory to shipment and placing the loaded containers on conveyances for delivery to customers would be employed in the ''packing for shipment'' of such products. Salesmen taking orders for the perishable aquatic products named in the section would be employed in the ''marketing'' of them. Employees of a refrigerated warehouse who perform only duties involved in placing such perishable marine products in the refrigerated space, removing them from it, and operating the refrigerating equipment, would be employed in ''storing'' or ''distributing'' such products, depending on the facts. On the other hand, employees of a public warehouse handling aquatic products which have been canned or otherwise rendered nonperishable, or handling perishable products which contain substantial amount of ingredients not named in section 13(b)(4), would not be within the exemption. Office, clerical, maintenance, and custodial employees are not exempt by reason of the fact that they are employed by employers engaged in marketing, storing, packing for shipment, or distributing seafood and other aquatic products. Such employees are exempt only when the facts of their employment establish that they are performing functions so necessary to the actual conduct of such operations by the employer that, as a practical matter, their employment is directly and necessarily a part of the operations intended to be exempted (see, for some examples, § 784.155).

§ 784.154 Relationship to other operations as affecting exemption.

Employment in marketing, storing, distributing, and packing for shipment of the aquatic commodities described

in section 13(b)(4) is, as such, exempted from the overtime pay provisions of the Act. This means that the employees actually employed in such operations on the named commodities are within the exemption without regard to the intimacy or remoteness of the relationship between their work and processing operations also performed on the commodities, so long as any prior processing has not rendered the commodity nonperishable (as in the case of a canned product) and therefore removed it from the category of marine products referred to by section 13(b)(4). If the commodity has previously been rendered nonperishable, the marketing, storing, distributing, or packing for shipment of it by an employee can come within the exemption only if the activity is one performed by his employer as an integrated part of a series of the named operations which commenced with operations on the perishable marine products to which section 13(b)(4) refers. Some examples of this situation are given in §§ 784.146 and 784.151.

§ 784.155 Activities performed in wholesale establishments.

The section 13(b)(4) exemption for employment in ''marketing * * * storing, or distributing'' the named aquatic products or byproducts, as applied to the wholesaling of fish and seafood, affords exemption to such activities as unloading the aquatic product at the establishment, icing or refrigerating the product and storing it, placing the product into boxes, and loading the boxes on trucks or other transportation facilities for shipment to retailers or other receivers. Transportation to and from the establishment is also included (*Johnson* v. *Johnson & Company, Inc.*, N.D. Ga., 47 F. Supp. 650). Office and clerical employees of a wholesaler who perform general office work such as posting to ledgers, sending bills and statements, preparing tax returns, and making up payrolls, are not exempt unless these activities can be shown to be functionally necessary, in the particular fact situation, to the actual conduct of the operations named in section 13(b)(4). Such activities as selling, taking, and putting up orders, recording sales, and taking cash are, however, included in employment in ''marketing'' or ''distributing'' within the exemption. Employees of a wholesaler engaged in the performance of any of the enumerated operations on fresh fish or fish products will be engaged in exempt work. However, any such operations which they perform on aquatic products which have been canned or otherwise rendered nonperishable are nonexempt in accordance with the principles stated in §§ 784.138 and 784.154.

Application of Section 13(b)(4) in Certain Establishments

§ 784.156 Establishments exclusively devoted to named operations.

As noted in § 784.106 and elsewhere in the previous discussion, the section 13(b)(4) exemption depends on employment of the employee in the operations named in that section and does not apply on an establishment basis. However, the fact that an establishment is exclusively devoted to operations specified in section 13(b)(4) is, in the absence of evidence to the contrary, an indication that the employees employed there are employed in the named operations either directly or through the performance of functions so necessary to conducting the operations that the employment should, in practical effect, be considered a part of the activity intended to be exempted. Where this is the case, it is consistent with the legislative intent to avoid segmentation and treat all employees of the establishment in the same manner (see Sen. Rep. No. 145, 87th Cong. first session, p. 33). Accordingly, where it can be demonstrated that an establishment is, during a particular workweek, devoted exclusively to the performance of the operations named in section 13(b)(4), on the forms of aquatic life there specified, any employee of the establishment who is employed there during such workweek will be considered to be employed in such operations and to come within the exemption if there are no other facts pertinent to his employment that require a particular examination of the functions which he performs in connection with the conduct of the named operations.

If, however, there are any facts (for example, the employment of the same employee at the establishment or the engagement by other employees in like duties there during periods when none of the named operations are being carried on) which raise questions as to whether he is actually engaged in the exempt activities, it will be necessary to scrutinize what he is actually doing during the conduct of the operations named in section 13(b)(4) in order to determine the applicability of the exemption to him. This is necessary because an employee who would not otherwise be within the exemption such as a carpenter doing repair work during the dead season, does not become exempt as ''employed in'' one of the named activities merely because the establishment begins canning or processing fish.

PART 785—HOURS WORKED

Subpart A—General Considerations

Subpart B—Principles for Determination of Hours Worked

Subpart C—Application of Principles

Subpart D—Recording Working Time

Subpart E—Miscellaneous Provisions