§ 793.20 Exclusive engagement in exempt work.

An employee who engages exclusively in a workweek in work which is exempt under section 13(b)(9) is exempt from the Act's overtime requirements for the entire week.

§ 793.21 Exempt and nonexempt work.

Where an employee in the same workweek performs work which is exempt from the overtime requirements of the Act under section 13(b)(9), and also engages in work to which the overtime requirements apply, he is not exempt from overtime provisions of the Act in that week. (See *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, affirmed, 181 F. 2d 697; *Mitchell* v. *Hunt*, 263 F. 2d 913; *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F. Supp. 969; *McComb* v. *del Valle*, 80 F. Supp. 945; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880.) As explained in §793.13, work which does not come within the occupational duties of an announcer, news editor, or chief engineer, or which is not related and incidental thereto, is not exempt work under section 13(b)(9). The mere isolated or occasional performance of insubstantial amounts of such nonexempt work will not defeat the exemption for the employee. Where, however, an employee, in a particular workweek, performs a substantial amount of nonexempt work to which the overtime provisions of the Act are applicable, the employee is not exempt under section 13(b)(9) in that workweek. For administrative purposes an employee who spends 20 percent or more of the hours he works in a workweek in such nonexempt work, will not be considered exempt under section 13(b)(9) in that workweek.

PART 794—PARTIAL OVERTIME EXEMPTION FOR EMPLOYEES OF WHOLESALE OR BULK PETROLEUM DISTRIBUTORS UNDER SECTION 7(b)(3) OF THE FAIR LABOR STANDARDS ACT

Subpart A—General

Sec.

Subpart B—Exemption From Overtime Pay Requirements Under Section 7(b)(3) of the Act

SCOPE AND APPLICATION IN GENERAL

THE ''ENTERPRISE''

''INDEPENDENTLY OWNED AND CONTROLLED LOCAL ENTERPRISE''

ANNUAL GROSS VOLUME OF SALES

SALES MADE WITHIN THE STATE

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

SOURCE: 35 FR 16510, Oct. 22, 1970, unless otherwise noted.

Subpart A—General

§ 794.1 General scope of the Act.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, 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. 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 unless relieved therefrom by some exemption in the Act. Such employers are also required to comply 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 wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 794.2 Purpose of this part.

This part 794 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of section 7(b)(3) of the Act. This section provides a limited partial exemption from the overtime provisions of section 7 of the Act (but not from the minimum wage, child labor, equal pay, or recordkeeping provisions) with respect to employees of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products, if the enterprise meets certain specified conditions. This exemption was added to the Act by the 1966 Amendments, which repealed a complete overtime exemption previously available for employees of such enterprises (section 13(b)(10) of the Act as amended in 1961). It is the purpose of this part to make available in one place the interpretations of the law governing this exemption which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

§ 794.3 Matters discussed in this part.

This part primarily discusses the meaning and application of the section 7(b)(3) exemption. The meaning and application of other provisions of the Fair Labor Standards Act are discussed only to make clear their relevance to the 7(b)(3) exemption and are not considered in detail in this part. Interpretations published elsewhere in this title deal with such subjects as the general coverage of the Act (part 776 of this chapter), methods of payment of wages (part 531, subpart C, of this chapter), computation and payment of overtime compensation (part 778 of this chapter), computation and payment of overtime compensation (part 778 of this

chapter), retailing of goods or services (part 779 of this chapter), hours worked (part 785 of this chapter), and child labor provisions (part 570 of this chapter). Regulations on recordkeeping are contained in part 516 of this chapter, and regulations defining exempt bona fide executive, administrative, and professional employees are contained in part 541 of this chapter. The equal pay provisions are discussed in part 800 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

§ 794.4 Significance of official interpretations.

The interpretations of the law contained in this part are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. 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 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 in the consideration of the exemption discussed. 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 part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 or to any Regional or Area Office of the Division.

§ 794.5 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 (Reorg. Plan 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, 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.

§ 794.6 Reliance on interpretations.

As previously stated, the interpretations of the law contained in this part are official interpretations. So long as they remain effective and are not modified, amended, rescinded or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (63 Stat. 910, 29 U.S.C. 251 *et seq.*, discussed in part 790 of this chapter). In addition, the Supreme Court has recognized that such interpretations of this Act ''provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it'' and ''constitute a body of experience and

informed judgment to which courts and litigants may properly resort for guidance.'' Further, as stated by the Court: ''Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.'' (*Skidmore* v. *Swift*, 323 U.S. 134).

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

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. 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 by the Fair Labor Standards Amendment of 1966 and which were in effect at the time of such publication 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.

Subpart B—Exemption From Overtime Pay Requirements Under Section 7(b)(3) of the Act

SCOPE AND APPLICATION IN GENERAL

§ 794.100 The statutory provision.

Section 7(b)(3) of the Act provides a partial exemption from the overtime pay requirements of section 7 (but not from the minimum wage, equal pay or child labor requirements) for any employee employed

by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if:

(A) The annual gross volume of sales of such enterprise is less than $1 million exclusive of excise taxes;

(B) More than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) Not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the minimum wage applicable to him under section 6, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

§ 794.101 Intended scope of exemption.

Under section 7(b)(3) of the Act, the intent of the exemption must be given effect in determining the scope of its application to an enterprise and to the employees of an enterprise. The statutory language must be applied to the facts in a manner consistent with the purpose of the exemption as evidenced by its legislative history. This purpose is to relieve the described enterprises from the application of the Act's general overtime pay requirements (in the limited manner specified in the exemption) to employment in their activities of distributing petroleum products. Such employment was stated to be affected by climatic, seasonal, and other pertinent factors characteristic of business operations in the distribution of such products. (See, in this connection, the following documents of 87th Cong., first sess.; H. Rept. No. 75, pp. 26, 27, 36; 105 Congressional Record (daily edition) p. 4519; S. Rept. No. 145, pp. 37, 50; H. Rept. No. 327, p. 18; Hearings before Senate Subcommittee on Labor on S. 256, S. 879, and S. 895, at pp. 411–424; Hearings before House Special Subcommittee on Labor on H.R. 2935, at pp. 422–425 and 627–629; and these documents of the 89th Cong., second sess.; H. Rept. No. 1366, pp. 12, 13, and 43; Cong. Record (daily edition) p. 10745; S. Rept. No. 1487, pp. 32 and 51.)

§ 794.102 Guides for construing exemptions.

It is judicially settled that ''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 employment specified in the statute. Conditions specified in the language of the

Act are ''explicit prerequisities to exemption.'' Accordingly, it is the well-established rule that exemptions from the Act ''are to be narrowly construed against the employer seeking to assert them'' and their applications is limited to those who come ''plainly and unmistakably within their terms and spirit.'' An employer who claims such an exemption has the burden of showing that it applies. See *Wirtz* v. *Lunsford*, 404 F. 2d 693 (C.A. 6); *Addison* v. *Holly Hill*, 322 U.S. 607; *Maneja* v. *Waialua*, 349 U.S. 254; *Phillips* v. *Walling*, 334 U.S. 490; *Arnold* v. *Kanowsky*, 361 U.S. 388; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Walling* v. *General Industries Co.*, 330 U.S. 545.

§ 794.103 Dependence of exemption on engagement in described distribution.

By its terms, section 7(b)(3) provides a partial and contingent exemption from the general overtime pay requirements of the Act applicable to ''any employee * * * employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum product * * *.'' Thus, engagement in the described distribution is an ''explicit prerequisite to exemption'' (*Arnold* v. *Kanowsky*, 361 U.S. 388), as are the other express conditions set forth in the section. A natural reading of the statutory language suggests that the employee as well as the enterprise must be so engaged in order for the exemption to apply (see *Porto Rico Light Co.* v. *Mor*, 253 U.S. 345). To the extent that its employees are engaged in the described distribution, the enterprise is itself so engaged (see *Kirshbaum* v. *Walling*, 316 U.S. 517; and see § 794.104). Also, whenever an enterprise is so engaged, any of its employees will be considered to be ''employed by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products'' if the duties of his employment require him to perform any operations or provide any services in carrying on such activities of his employer, and if the employee is not engaged in a substantial portion of his workweek in other activities which do not provide a basis for exemption under section 7(b)(3). Such an interpretation of the quoted language is believed necessary to give effect to the intended scope of the exemption as explained in § 794.101. Where an enterprise is exclusively engaged in the wholesale or bulk distribution of petroleum products and meets all the other requirements of section 7(b)(3), all of its employees who are paid for their hours of work in accordance with section 6 of the Act and the special pay provisions of section 7(b)(3) (see § 778.602 of this chapter and §§ 794.135 through 794.136) will be exempt from the overtime pay requirements of the Act under the principles stated above. What products are included in the term ''petroleum products'' and what constitutes the ''bulk distribution'' of such products within the meaning of section 7(b)(3) are discussed in §§ 794.132 through 794.133.

§ 794.104 Enterprises engaged in described distribution and in other activities.

An enterprise may be engaged in the wholesale or bulk distribution of petroleum products, within the meaning of section 7(b)(3), without being exclusively so engaged. Such engagement may be only one of the several related activities, performed through unified operation or common control for a common business purpose, which constitute the enterprise (see § 794.106) under section 3(r) of the Act. If engaging in such distribution is a regular and significant part of its business, an enterprise which meets the other tests for exception under section 7(b)(3) will be relieved of overtime pay obligations with respect to employment of its employees in such distribution activities, in accordance with the intended scope (see § 794.101) of the exemption. The same will be true with respect to employment of its employees in those related activities which are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. There is no requirement that engaging in such activities constitute any particular percentage of the enterprises's business. However, in the case of an enterprise engaged in other activities as well as in the wholesale or bulk distribution of petroleum products (including related

activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), an employee employed in such other activities of the enterprise is not engaged in employment which the exemption was intended to reach (see § 794.101). Such an employee is not brought within the exemption by virtue of the fact that the enterprise by which he is employed is engaged with other employees in the distribution activities described in section 7(b)(3). This accords with the judicial construction of other exemptions in the Act which are similarly worded. See *Connecticut Co.* v. *Walling*, 154 F. 2d 522, Certiorari denied, 329 U.S. 667; *Northwest Airlines* v. *Jackson,* 185 F. 2d 74; *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52; *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, aff'd 131 F. 2d 249.

§ 794.105 Other requirements for exemption.

The limited overtime pay exemption provided by section 7(b)(3) applies to any employee compensated in accordance with its terms who is ''employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products'' as explained in §§ 794.103 through 794.104 if the enterprise which employs him meets all of the following requirements: (a) It is a ''local'' enterprise; (b) it is ''independently owned and controlled''; (c) it has an annual gross volume of sales of less than $1 million exclusive of excise taxes; (d) it makes more than 75 percent of its annual dollar volume of sales within the State in which it is located; and (e) not more than 25 percent of such annual dollar volume of sales is to customers who are engaged in the bulk distribution of petroleum products for resale. In order to determine whether all these requirements are met, it is necessary to know what constitutes the ''enterprise'' to which reference is made, the meaning of ''the wholesale or bulk distribution of petroleum products'' in which engagement is required as a prerequisite to exemption, what is meant by a ''local'' enterprise and what characterizes it as ''independently owned and controlled'', and the criteria for application of the dollar volume tests. These matters will be discussed in some detail in the sections following.

THE ''ENTERPRISE''

§ 794.106 Statutory definition of "enterprise."

The term ''enterprise'' is defined in section 3(r) of the Act. That definition (insofar as it affects a wholesale or bulk petroleum distributor) is as follows:

> ''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: *Provided,* That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

§ 794.107 "Establishment" distinguished.

The ''enterprise'' referred to in the section 7(b)(3) exemption is to be distinguished from an ''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. (See *Phillips* v. *Walling,* 324 U.S. 490; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027; 95 Congressional Record 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., first session, p. 25.) It will be noted from the definition of ''enterprise'' in section 3(r), as

set forth in § 794.106, that the activities of the enterprise may be ''performed in one or more establishments,'' and section 7(b)(3) specifies that the enterprises to which its exemption requirements are applicable will include ''an enterprise with more than one bulk storage establishment.''

§ 794.108 Scope of enterprise must be known before exemption tests can be applied.

The scope of the ''enterprise'' as defined by section 3(r) of the Act must be ascertained before it is possible to apply the tests for exemption contained in section 7(b)(3) which are based on the dollar volume of sales of the ''enterprise''. The activities included in the enterprise must be known, and any activities not a part of the enterprise must be excluded before the dollar volume of sales derived from the activities of the enterprise can be computed.

§ 794.109 Statutory basis for inclusion of activities in enterprise.

The ''enterprise'' for purposes of enterprise coverage under section 3(s) and the exemption provision in section 7(b)(3), is defined in section 3(r) (§ 794.106) in terms of the activities in which it is engaged. All the ''related activities'' which are ''performed * * * by any person or persons for a common business purpose'' are included if they are performed ''either through unified operation or common control.'' This is true even if they are performed by more than one person, or in more than one establishment or by more than one corporate or other organizational unit. The definition specifically includes as a part of the enterprise, departments of an establishment operated through leasing arrangements. These statutory criteria are discussed in more detail in subsequent sections.

§ 794.110 Activities excluded from the enterprise by the statute.

The circumstances under which certain activities will be excluded from the ''enterprise'' referred to in the Act are made clear by the definition quoted in § 794.106. The definition distinguishes between the related activities performed through unified operation and common control for a common business purpose by the participants in the enterprise, and activities which are related to these activities but are performed for the enterprise by a bona fide independent contractor (for example, an independent accounting or auditing firm). The latter activities are expressly excluded from the ''enterprise'' as defined. In addition, the definition contains a proviso detailing certain circumstances under which a retail or service establishment under independent ownership will not lose its status as a separate and distinct enterprise by reason of certain franchise and other arrangements which it may enter into with others. This proviso, the effect of which is more fully explained in parts 776 and 779 of this chapter, may be important to wholesale or bulk distributors of petroleum products in determining whether the effect of particular arrangements which they may make with retailers of their products will be to include activities of the latter with their own activities in the same enterprise for purposes of the Act.

§ 794.111 General characteristics of the statutory enterprise.

As defined in the Act, the term ''enterprise'' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise, however, is not necessarily coextensive with the entire business activities of an employer. The enterprise may consist of a single establishment which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers. On the other hand, a single employer may operate more than one enterprise. The Act treats as separate enterprises different businesses which are unrelated to each other and lack any common business purpose, even if they are operated by the same employer.

''INDEPENDENTLY OWNED AND CONTROLLED LOCAL ENTERPRISE''

§ 794.112 Only independent and local enterprises qualify for exemption.

The legislative history of the exemption (§ 794.101) shows that the proponents of an amendment to provide the relief which it grants from the overtime pay provisions of the Act were organizations of independent local merchants who did not as a rule engage extensively in interstate operations such as those typical of major oil companies, and who functioned primarily at the local level in distributing petroleum products at wholesale or in bulk. As a result the exemption provided by the Act, like that requested, was limited to enterprises which are ''local'' (§ 794.113) and are ''independently owned and controlled'' (§§ 794.114–794.118).

§ 794.113 The enterprise must be "local."

It is clear from the language of section 7(b)(3) that the exemption which it provides is available to an enterprise only if it is a ''local enterprise''. The other tests of exemption must also, of course be met. A ''local'' enterprise is not defined in the Act, and the word ''local'', which appears in a different context elsewhere in the Act (see clause (2) of the last sentence of section 3(r) and sections 13(b)(7), 13(b)(11)), is likewise given no express definition. There is no fixed legal meaning of the term ''local''; it is usually a flexible and comparative term whose meaning may vary in different contexts. As used here, certain guides are available from the context in which it is used, the legislative history surrounding adoption of section 7(b)(3), and the law of which it forms a part. A ''local'' enterprise engaged in the wholesale or bulk distribution of petroleum products is clearly intended to embrace the kind of enterprise operated by the merchants who requested the amendment; that is, one which provides farmers, homeowners, country merchants, and others in its locality with petroleum products in bulk quantities or at wholesale. The language of section 7(b)(3) makes it clear also that the enterprise will not be regarded as other than ''local'' merely because it has more than one bulk storage establishment. On the other hand, the section makes it equally clear that ordinarily an enterprise which is not located within a single State is not a local enterprise of the kind to which the exemption will apply. This follows from the express requirement that more than 75 percent of the enterprise's annual dollar volume of sales must be made ''within the State in which such enterprise is located.'' The legislative history provides further evidence of this intent. At the hearings before the Senate Labor Subcommittee a proponent of the amendment which eventually was enacted in somewhat different language (sec. 13(b)(10) of the Act which was repealed by the 1966 Amendments to the Act and replaced by section 7(b)(3)), stated with respect to the significance of the word ''local'':

> * * * the language which we have suggested in the proposed amendment ''locally owned and controlled establishments'', I admit that can point up some trouble and make some work for lawyers.
>
> We, however, in our endeavor to show our sincerity of only trying to cover local intrastate establishments, went overboard on this language.
>
> You will note that 75 percent of our business has to be performed in one State. I think that ''locally owned and controlled establishments'' language should better read ''independently owned and controlled local enterprises or establishment.'' (Sen. Hearings on amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 416.)

The same witness also quoted from the Congressional Record of August 18, 1960, the discussion in the course of the consideration of the amendments to the Act by the Senate during the 86th Congress, second session, as follows:

> These wholesale and bulk distributors of petroleum products, commonly referred to as oil jobbers, are primarily local businessmen who acquire these products from their suppliers' bulk terminal in the State in which the jobber does business and sell these products to service stations, farmers, and homeowners in the State in which they maintain their place of business * * * I am advised that 98.3 percent of all the oil jobbers in the United States sell their products only in the State in which their place of business is located thus qualifying by any definition as

local merchants. (Sen. Hearings on amendments to the Fair Labor Standards Act 87th Cong., first session, pp. 415–416.)

It thus appears that the word ''local'' was intended to confine the exemption to enterprises of such local merchants. The enterprise need not, of course, conduct all of its business within the State in which it is physically located, since the exemption specifically provides that it may make a portion of its sales outside the State in which it is located.

§ 794.114 The enterprise must be "independently owned and controlled."

Another requirement for exemption under section 7(b)(3) is that the enterprise must be ''independently owned and controlled''. Since this requirement is in the conjunctive, it must be established that the enterprise which is engaged in the wholesale or bulk distribution of petroleum products is both independently owned and independently controlled. (*Wirtz* v. *Lunsford*, 404 F. 2d 693 (C.A. 6).) At the hearing before the Senate Labor Subcommittee, when the amendment was proposed which eventually was incorporated in the Act as section 13(b)(10) by the 1961 amendments (later repealed by the 1966 amendments to the Act and replaced by section 7(b)(3)), a spokesman for proponents of the amendment made the following statement, which bears on this requirement for exemption:

> The designation ''independent'' as applied to an oil jobber means that he owns his own office, bulk storage, and delivery facilities; pays his own personnel, and in all respects conducts his business as any other independent businessman.
>
> It also means that the jobber is not a subsidiary of nor controlled by any so-called major oil company, although the jobber may sell the branded products of such a company.
>
> Some jobbers own service stations which they lease to independent dealers and a small percentage of jobbers may operate one or more service stations with their own salaried personnel. (Senate Hearings on the Amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 411.)

It appears, therefore, that the purpose of the requirement limiting the exemption to the enterprises which are ''independently owned and controlled,'' is to confine the exemption to those petroleum jobbers who own their own facilities and equipment and who are not subsidiaries nor controlled by any producer, refinery, terminal supplier or so-called major oil company. (See *Wirtz* v. *Lunsford*, cited above.) The fact that the petroleum jobber sells a branded product of a major oil company will not, of itself, affect the status of his enterprise as one which is ''independently owned and controlled''. So also the fact that the jobber owns gasoline service stations, which he leases or which he operates himself, will not affect the status of his enterprise as being ''independently owned and controlled''.

§ 794.115 "Independently owned."

Ownership of the enterprise may be vested in an individual petroleum jobber, or a partnership, or a corporation, so long as such ownership is not shared by a major oil company, or other producer, refiner, distributor or supplier of petroleum products, so as to affect the independent ownership of the enterprise. As noted in § 794.114, an enterprise will not be considered independently owned where it does not own its own office, bulk storage, and delivery facilities. The enterprise may also not be considered ''independently owned'' where it does not own its stock-in-trade. (See *Wirtz* v. *Lunsford*, 404 F.2d 693 (C.A. 6).) It is recognized that, in the ordinary course of business dealings, an independently owned enterprise may purchase its goods on credit and this, of course, will not affect its characterization as being ''independently owned'' within the meaning of the exemption. However, there may well be a question as to whether the enterprise is ''independently owned'' where the enterprise receives its petroleum products on consignment and the supplier lays claim to the ownership of the account receivable. Of possible relevance also is the intent evident in the statutory language to provide exemption only for an enterprise which can meet the specified tests which depend on ''the sales of such enterprise.'' The determination in such cases, as in other cases involving questions of independent ownership, will necessarily depend on all the facts.

§ 794.116 "Independently * * * controlled."

As explained in § 794.114, the enterprise in addition to being independently owned must also be ''independently controlled.'' The test here is whether the individual, partnership, or corporation which owns the enterprise also controls the enterprise as an independent businessman, free of control by any so-called major oil company or other person engaged in the petroleum business. Control by others may be evidenced by ownership; but control may exist in the absence of any ownership. For example where an enterprise engaged in the wholesale or bulk distribution of petroleum products enters into franchise or other arrangements which have the effect of restricting the products it distributes, the prices it may charge, or otherwise controlling the activities of the enterprise in those respects which are the common attributes of an independent businessman, these facts may establish that the enterprise is not ''independently controlled'' as required by the exemption under section 7(b)(3). (*Wirtz* v. *Lunsford,* 404 F. 2d 693 (C.A. 6).)

§ 794.117 Effect of franchises and other arrangements.

Whether a franchise or other contractual arrangement affects the status of the enterprise as ''an independently owned and controlled * * * enterprise,'' depends upon all the facts including the terms of the agreements and arrangements between the parties as well as the other relationships that have been established. The term ''franchise'' is not susceptible of precise definition. While it is clear that in every franchise a business surrenders some rights, it is equally clear that every franchise does not necessarily deprive an enterprise of its character as an independently owned and operated business. This matter was the subject of legislative consideration in connection with other provisions of the 1961 amendments to the Act. The Senate Report on the amendments, in discussing the effects of franchises and similar arrangements on the scope of the ''enterprise'' under section 3(r) of the Act, stated as follows:

> There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, ''Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?''
>
> * * * * *
>
> In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the ''franchised'' establishment the essential prerogative of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, rights or concession. (S. Rep. 145, 87th Cong., first session, p. 42.)

Thus there may be a number of different types of arrangements established in such cases and the determination as to whether the arrangements have the effect of depriving the enterprise of its independent ownership or control will necessarily depend on all the facts. The fact that the distributor hires and controls the employees engaged in distribution of the product does not establish the requisite independence of the distributor; it is only one factor to be considered (*Wirtz* v. *Lunsford,* 404 F. 2d 693 (C.A. 6).) Ultimately the determination of the precise scope of such arrangements and their effect upon the independent ownership and control of the enterprise under section 7(b)(3), as well as on the question whether such arrangements result in creating a larger enterprise, rests with the courts.

§ 794.118 Effect of unrelated activities.

The term ''independently owned and controlled'' has reference to independence of ownership and control by others. Accordingly, the fact that the petroleum jobber may himself engage in other businesses which are not related to the enterprise engaged in the wholesale or bulk distribution of petroleum products, will not affect the question whether the petroleum enterprise is independently owned or controlled. For example, the fact that the wholesale or

bulk petroleum distributor also owns or controls a wholly sep- arate tourist lodge enterprise or job printing business will not affect the status of his enterprise engaged in the wholesale or bulk distribution of petroleum products as an ''independently controlled'' enterprise.

ANNUAL GROSS VOLUME OF SALES

§ 794.119 Dependence of exemption on sales volume of the enterprise.

It is a requirement of the section 7(b)(3) exemption that the annual gross volume of sales of the enterprise must be less than $1 million exclusive of excise taxes. This dollar volume test is separate and distinct from the $250,000 annual gross volume (of sales made or business done) test in section 3(s)(1) of the Act. This latter test is for the purpose of determining coverage as an enterprise engaged in commerce or in the production of goods for commerce; whereas the $1 million test is for limiting the 7(b)(3) exemption to enterprises with annual sales of less than that amount.

§ 794.120 Meaning of "annual gross volume of sales."

The annual gross volume of sales of an enterprise consists of its gross receipts from all types of sales during a 12-month period (§ 794.122). The gross volume derived from all sales transactions is included, and will embrace among other things receipts from service, credit, or similar charges. However, credits for goods returned or exchanged (as distinguished from ''tradeins''), rebates, discounts, and the like are not ordinarily included in the annual gross volume of sales. In determining whether the million dollar limit on annual gross sales volume is or is not exceeded, the sales volume from all the related activities which constitute the enterprise must be included; the dollar volume of the entire business in all establishments is added together. Thus, the gross volume of sales will include the receipts from sales made by any gasoline service stations of the enterprise, as well as the sales made by any other establishments of the enterprise. These principles and their application are considered in more detail in parts 776 and 779 of this chapter, which contain general discussions of ''annual gross volume'' as used in other provisions of the Act.

§ 794.121 Exclusion of excise taxes.

The computation of the annual gross volume of sales of the enterprise for purposes of section 7(b)(3) is made ''exclusive of excise taxes.'' It will be noted that the excise taxes excludable under section 7(b)(3) are not, like those referred to in section 3(s)(1) and section 13(a)(2), limited to those ''at the retail level which are separately stated.'' Under section 7(b)(3), therefore, all excise taxes which are included in the sales price may be excluded in computing the annual gross volume of the enterprise.

§ 794.122 Ascertainment of "annual" gross sales volume.

The annual gross volume of sales of an enterprise engaged in the wholesale or bulk distribution of petroleum products consists of its gross dollar volume of sales during a 12-month period. Where a computation of annual gross volume of sales is necessary to determine the status of the enterprise under section 7(b)(3) of the Act, it must be based on the most recent prior experience which it is practicable to use.

§ 794.123 Method of computing annual volume of sales.

(a) Where the enterprise, during the portion of its current income tax year up to the end of the current payroll period, has already had a gross volume of sales in excess of the amount specified in the statute, it is plain that its annual gross volume of sales currently is in excess of the statutory amount.

(b) Where the enterprise has not yet in such current year exceeded the statutory amount in its gross volume of sales, but has had, in the most recently ended year used by it for income tax purposes, a gross volume of sales in excess of the amount specified in the Act, the enterprise will be deemed to have an annual gross volume of sales in excess of such statutory amount, unless use of the method set forth in paragraph (c) of this section establishes a gross annual volume less than the statutory amount.

(c) When it is necessary to make a computation of the annual gross volume of sales of the enterprise the following method shall be used: At the beginning of each calendar quarter (Jan. 1–Mar. 31; Apr. 1–June 30; July 1–Sept. 30; Oct. 1–Dec. 31), the gross receipts from all of its sales during the annual period (12 calendar months) which immediately precedes the current calendar quarter, is totaled. In this manner the employer, by calculating the sales of his enterprise, will know whether or not the dollar volume tests have been met for the purpose of complying with the law in the workweeks ending in the current calendar quarter.

§ 794.124 Computations on a fiscal year basis.

Some enterprises operate on a fiscal year, consisting of an annual period different from the calendar year, for income tax or sales or other accounting purposes. Such enterprises in applying the method of computation in § 794.123(c) may use the four quarters of the fiscal period instead of the four quarters of the calendar year. Once adopted, the same basis must be used in subsequent calculations.

§ 794.125 Grace period of 1 month for compliance.

Where it is not practicable to compute the annual gross volume of sales under § 794.123 or § 794.124 in time to determine obligations under the Act for the current quarter, an enterprise may use a 1-month grace period. If this 1-month grace period is used, the computations made under those sections will determine its obligations under the Act for the 3-month period commencing 1 month after the end of the preceding calendar or fiscal quarter. Once adopted the same basis must be used for each successive 3-month period.

§ 794.126 Computations for a new business.

When a new business is commenced the employer will necessarily be unable for a time to determine its annual dollar volume on the basis of a full 12-month period as described in §§ 794.123 and 794.124. In many cases, it is readily apparent that the enterprise will or will not have the requisite annual dollar volume specified in the Act. For example, the new business may be so large that it is clear from the outset that the business will exceed the $1 million test of the exemption. In other cases, where doubt exists, the gross receipts of the new business during the first quarter year in which it has been in operation will be taken as representative of its annual dollar volume tests for purposes of determining its status under section 7(b)(3) of the Act in workweeks falling in the following quarter-year period. Similarly, for purposes of determining its status under the Act in workweeks falling within ensuing quarter-year periods, the gross receipts of the new business for the completed quarter-year periods will be taken as representative of its annual dollar volume in applying the annual volume tests of the Act. After the new business has been in operation for a full calendar or fiscal year, the analysis can be made by the methods described in §§ 794.123 and 794.124.

Sales Made Within the State

§ 794.127 Exemption conditioned on making 75 percent of sales within the State.

A further requirement of the section 7(b)(3) exemption is that more than 75 percent of the sales of the enterprise engaged in the wholesale or bulk distribution of petroleum products (measured by annual dollar volume) must be made ''within the State in which such enterprise is located.'' This means that over 75 percent of the annual dollar volume of sales must be from sales to customers within the same State in which the enterprise is located. If 25 percent or more of its sales volume is from sales to customers outside the State of its location, the requirement is not met and the enterprise cannot qualify for exemption.

§ 794.128 Sales made to out-of-State customers.

Whether the sale of goods or services is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character.

On the one hand, sales made to the casual cash-and-carry customer (such as at a gasoline station owned or operated by the enterprise), who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and therefore, is not a sale made ''within the State'' in which the enterprise is located, if delivery of the goods is made outside that State, or if the relationship with the customer is such as to indicate his out-of-State character. Such a relationship would exist, for example, where an out-of-State company in the regular course of dealing picks up the petroleum products at the bulk storage station of the enterprise and transports them out of the State in its own trucks.

§ 794.129 Sales "made within the State" not limited to noncovered activity.

Sales to customers located in the same State as the establishment are sales made ''within the State'' even though such sales may constitute activity within the interstate commerce coverage of the Act, as where the sale (a) is made pursuant to prior orders from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's orders; or (c) is made to a customer for his use in interstate or foreign commerce or in the production of goods for such commerce.

SALES MADE TO OTHER BULK DISTRIBUTORS

§ 794.130 Not more than 25 percent of sales may be to customers engaged in bulk distribution of petroleum products for resale.

As a further requirement for exemption, section 7(b)(3) limits to not more than 25 percent (measured by annual dollar volume) the sales which an enterprise engaged in the wholesale or bulk distribution of petroleum products may make to customers who are engaged in the bulk distribution of such products for resale. It should be noted that this limitation does not depend on whether the goods sold by the enterprise to such customers are sold by it for resale, or on whether the goods sold to such customers are petroleum products. It is whether the customer is engaged in selling petroleum products for resale that is controlling. A sale of any goods must be included in this 25 percent limitation so long as it is made to a customer who, as described in section 7(b)(3), can be characterized as one ''engaged in the bulk distribution of such products for resale''. It should be also noted that this provision does not in any way limit the sales which the enterprise may make to customers who are not engaged in the bulk distribution of petroleum products for resale. Thus, there is no limitation on the sales the enterprise may make to gasoline service stations which sell such products for resale but do no engage in the ''bulk distribution'' of the products so sold, or to any other customers except those specified in the exemption in section 7(b)(3). Who is a ''customer engaged in the bulk distribution of such products for resale'' is discussed in §§ 794.131–794.133.

§ 794.131 "Customer * * * engaged in bulk distribution".

A sale to a customer of an enterprise engaged in the wholesale or bulk distribution of petroleum products will be considered to come within the 25 percent limitation for purposes of the exemption under section 7(b)(3) if it is made to a ''customer who is engaged in the bulk distribution of such products for resale''. The identity of such customers is generally well known in the

trade. For example, this would generally include other petroleum jobbers, brokers, wholesalers, and any others who engaged in the bulk distribution of petroleum products for resale. Thus a sale to a petroleum jobber who is engaged in selling petroleum products to gasoline stations would clearly be a sale to a customer described in section 7(b)(3). The essential tests are: first, that the customer must be one who is engaged in the distribution of ''such products'', which means petroleum products; second, that he must engage in ''the bulk distribution'' of such products; and finally, that he must be engaged in such distribution ''for resale''. These three requirements are discussed in §§ 794.132 through 794.134.

§ 794.132 "Petroleum products".

A sale by an enterprise engaged in the wholesale or bulk distribution of petroleum products will be included in the 25 percent limitation under the exemption only if it is made to a customer who engages in the distribution, in bulk and for resale, of ''petroleum products''. The term ''petroleum products'' as used in section 7(b)(3) includes such products as gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquified-petroleum gas. Sales to customers who are not engaged in the distribution of petroleum products will not be included in the 25 percent limitation.

§ 794.133 "Bulk" distribution.

''Bulk'' distribution of petroleum products typically connotes those methods of distribution in which large quantities of the product are distributed in a single delivery or delivery trip. Thus, ''bulk'' distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer (whether or not at ''wholesale''). It also includes deliveries made in series on a single trip on a delivery route to the storage tanks or facilities of a number of customers from a bulk supply of the product transported by tank truck, motor transport, or other motor carrier operated by the enterprise. Such deliveries are to be contrasted with such typical small-quantity individual deliveries as those made into the tank of a motor vehicle for use in its propulsion.

§ 794.134 Distribution "for resale."

A sale made to a customer engaged in the bulk distribution of petroleum products will be included in the 25 percent limitation only if the customer engages in the bulk distribution of petroleum products ''for resale''. Except with respect to a specific exclusion in section 3(n) regarding certain building materials, the word ''resale'' is not defined in the Act. The common meaning of ''resale'' is the act of ''selling again''. A sale is made for resale when the seller knows or has reasonable cause to believe that what is sold by him will be resold by the purchaser in the same or a different form. Where the sale is thus made for resale, it does not matter what ultimately happens to the subject of the sale. Thus, the fact that goods sold for resale are consumed by fire or no market is found for them and they are therefore never resold does not alter the character of the sale which is made for resale. In considering whether there is a sale of petroleum products for resale in any specific situation, the term ''sale'' includes, as defined in section 3(k) of the Act, ''any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.''

Application of Exemption to Employees

§ 794.135 Employees who are exempt.

If an enterprise engaged in distribution of petroleum products satisfies all the conditions specified in section 7(b)(3) as previously discussed, the partial exemption provided by this section from the Act's general overtime pay requirements will be applicable to all employees employed by their employer in activities of the enterprise for which the exemption was intended if, but only if, such employees are compensated in accordance with the compensation requirements of section 7(b)(3) (see § 794.100).

§ 794.136 Employees whose activities may qualify them for exemption.

The activities for which the section 7(b)(3) partial exemption was intended

are discussed generally in §§ 794.103 through 794.104. In accordance with the principles there set forth, those employees employed in an enterprise which qualifies for application of the exemption, who are engaged in the storage and delivery of petroleum products for the enterprise, and those employees whose work is required for the performance of the activities in the wholesale or bulk distribution of the petroleum products or the related activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products, are employees for whom the employer may take the exemption provided they are paid in accordance with the special compensation provisions of section 7(b)(3). Thus, so long as these payment requirements are met, the exemption is applicable not only to such employees as drivers, helpers, loaders, dispatchers, and warehousemen engaged in the bulk delivery and storage of petroleum products, but also to such employees as office, management, and sales personnel, maintenance, custodial, protective personnel, and any others, who engage in related functions customarily carried on by such enterprises in the industry in conjunction with the wholesale and bulk distribution of the petroleum products.

§ 794.137 Effect of activities other than "wholesale or bulk distribution of petroleum products."

As previously noted, in some cases the related activities performed through unified operation or common control for a common business purpose which are included in the enterprise under the definition in section 3(r) of the Act may include activities other than the wholesale or bulk distribution of petroleum products. Examples are tire recapping or gasoline station services, the sale and servicing of oil burners, or the distribution of coal, ice, feed, building supplies, paint, etc. In some instances, as in the case of oil-burner servicing, these other activities are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. As indicated in § 794.104, employees of the enterprise who engage in such activities are within the general scope of the exemption. However, activities which are not customary practices of enterprises in the industry of wholesale or bulk distribution of petroleum products are not within the scope of the intent of the section 7(b)(3) exemption. For example, construction activities, operation of a sporting goods store, scrap paper and metal activities, the operation of a general repair garage, etc., are not the type of activities for which the section 7(b)(3) exemption was intended. Thus, where an enterprise engaged in the wholesale or bulk distribution of petroleum products operates a general repair garage, a mechanic servicing the automobiles and trucks brought to the garage by customers will not for that reason be within the exemption provided by section 7(b)(3), although the exemption provided by section 13(a)(2) may apply to him if the garage qualifies as an exempt retail or service establishment under the tests provided in that section of the Act. On the other hand, mechanics employed by an enterprise engaged in the wholesale or bulk distribution of petroleum products for the purpose of keeping the distribution equipment of the enterprise in good repair would come within the 7(b)(3) exemption.

§ 794.138 Workweek unit in applying the exemption.

(a) As is true generally with respect to provisions of the Act concerning compensation for overtime hours of work (see §§ 778.100 through 778.105 of this chapter, *Overnight Transportation Co.* v. *Missel,* 316 U.S. 572), the unit of time to be used in determining the application of all provisions of the section 7(b)(3) exemption to an employee is the workweek. As defined in § 778.105 of this chapter, an employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at any 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.

(b) By its terms (§ 794.100), section 7(b)(3) exempts an employer from any statutory responsibility he might otherwise have for a violation of section 7(a) of the Act ''by employing any employee for a workweek in excess of that specified in such subsection'' without paying the overtime compensation prescribed therein, ''if such employee is so employed * * * by an * * * enterprise'' qualifying under section 7(b)(3) for application of its provisions to such employment and if such employee receives the compensation which section 7(b)(3) requires. Accordingly, for section 7(b)(3) to apply to any workweek when an employee is employed for hours in excess of those specified in section 7(a), it must be established that in such workweek he is employed by his employer in the exempt activities of an enterprise described in section 7(b)(3) and that the compensation received by him for his work in such workweek satisfies the special pay requirements of section 7(b)(3).

§ 794.139 Exempt and nonexempt activities in the workweek.

The general nature of the activities of a wholesale or bulk petroleum distribution enterprise in which an employee must be engaged in order to come within the intent of the section 7(b)(3) exemption is discussed in §§ 794.136 through 794.137. In each case where an employee of the enterprise is engaged for a substantial portion of his workweek in activities which do not appear to be a part of the wholesale or bulk distribution of petroleum products, it will be necessary to examine such activities and the manner and extent of their performance to determine whether they are included in or are foreign to the activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products. If they are foreign to the activities thus customarily performed, engagement in them by the employee for a substantial portion of his workweek will render section 7(b)(3) inapplicable to him for that workweek. On the other hand, where an employee, who is otherwise engaged in the exempt activities (the wholesale or bulk distribution of petroleum products, including activities which are a necessary part thereof, and in activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), devotes an insubstantial amount of time (for administrative purposes, not more than 20 percent in a workweek) to these foreign activities, the section 7(b)(3) exemption will not for that reason be considered inapplicable to him.

§ 794.140 Compensation requirements for a workweek under section 7(b)(3).

(a) Exemption of an employee in any workweek under section 7(b)(3) is expressly conditioned on and limited by the special compensation provisions which it contains. These are set forth in full text in § 794.100. They require payment to the employee of compensation at specified rates for certain periods within the workweek when such periods are included in his hours of work. Their application requires an increase of at least 50 percent in the minimum wage rate otherwise applicable to the employee in such workweek ''for employment in excess of forty hours'' and, in addition, if such employment is ''in excess of twelve hours in any workday, or * * * in excess of fifty-six hours in any workweek, as the case may be,'' the employee must be paid overtime compensation ''at a rate not less than one and one-half times the regular rate at which he is employed'' for all hours worked in the workweek in excess of the specified daily standard or in excess of the specified weekly standard, whichever is the greater number of overtime hours. The sections following discuss separately the application of these provisions to workweeks when the employee's hours of work do not exceed the daily or weekly standard specified in section 7(b)(3), and to workweeks when hours in excess of the daily or the weekly standard are worked.

(b) The special compensation requirements of section 7(b)(3) apply to an employee otherwise eligible for the exemption whenever he works more than 40 hours in a workweek for an enterprise described in and operating under

this subsection. In any workweek in which the employee does not work more than 40 hours for his employer only the minimum wage requirements of section 6 are applicable. This is because section 7(b)(3) operates only as an exemption from the requirement of section 7(a) that compensation at a rate not less than one and one-half times the employee's regular rate must be paid for all hours worked by him in excess of 40 in the workweek. (This general 40-hour workweek standard has been applicable since Feb. 1, 1969, to all employment within the general coverage of the Act, regardless of whether any overtime pay requirements were previously applicable to such employment before the provisions added by the Fair Labor Standards Amendments of 1966 became effective.)

§ 794.141 Workweeks when hours worked do not exceed 12 in any day or 56 in the week; compensation requirements.

(a) The overtime pay exemption provided by section 7(b)(3) is ''limited to 12 hours a day and 56 hours a week'' in any workweek; the exemption is provided ''for employment up to 12 hours in any workday and up to 56 hours in any workweek'' without any payment for overtime hours at one and one-half times the regular rate being required. However, the exemption from any such time-and-one-half payment is limited to workweeks when ''no more'' than the specified hours are worked and is contingent on payment to the employee in such a workweek of ''compensation for hours between 40 and 56'' at a rate ''not less than one and one-half times the applicable minimum wage.'' (H. Rept. No. 1366, pp. 12–13, 43, and S. Rept. No. 1487, p. 32, 89th Cong., second sess.) Thus, the exemption will be applicable to an employee otherwise eligible under the principles previously discussed in this part in any workweek when his hours of work do not exceed 12 in any day or 56 in the week if, and only if, his ''compensation for employment in excess of forty hours'' is ''at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6'', as provided in section 7(b)(3). This means that in addition to the requirement of section 6, under which the first 40 hours of work must be paid for at a rate not less than the minimum hourly wage rate therein specified, the compensation requirements applicable to such an employee for whom the 7(b)(3) exemption is claimed include any increase in his regular straight-time pay rate for the hours worked in excess of 40 which may be necessary in order to raise the wage rate for such hours to a level of 50 percent above the rate required under section 6. Of course, if the employee is employed at a regular straight-time rate for all his hours of work which is as great or greater than one and one-half times the minimum wage applicable to him under section 6, no increase for the hours in excess of 40 will be required under the provisions of section 7(b)(3).

(b) The general minimum wage rate applicable to employees in employment that was subject to the minimum wage provisions of the Act prior to the effective date of the Fair Labor Standards Amendments of 1966 is $1.60 an hour. Under section 7(b)(3) an employee of a wholesale or bulk petroleum products distributor to whom this rate is applicable must be paid at least $2.40 an hour for hours worked in excess of 40 in the workweek in order for the exemption to apply. Many employees of such distributors are subject to the $1.60 minimum wage rate under section 6 either because they are traditionally covered as employees individually engaged in commerce or in the production of goods for commerce as defined in the Act or because the enterprise coverage provisions in effect prior to the 1966 amendments (applicable to enterprises with an annual gross volume of $1 million or more including excise taxes) would subject their employment to the minimum wage provisions if the 1966 amendments had not been enacted. In the case, however, of an employee of such a distributor whose employment comes within the minimum wage provisions only because of the 1966 amendments (which reduced the annual gross volume for covered enterprises to $500,000 on Feb. 1, 1967, and to $250,000 on Feb. 1, 1969, exclusive of specified separately stated excise taxes at the retail level), the minimum wage rate applicable under section 6 was $1.30 an

hour until February 1, 1970, when it increased to $1.45 an hour. Beginning February 1, 1971, the minimum wage rate applicable to such an employee will be the same ($1.60 an hour) as that presently applicable to employment covered by the provisions of the prior Act. For employees subject to the $1.30 minimum wage rate the rate required for work over 40 hours under section 7(b)(3) was accordingly $1.95 an hour; for those subject to the $1.45 rate beginning February 1, 1970, such rate is $2.175. A discussion of the present and prior coverage of the Act will be found in part 776 of this chapter, when a revision of such part discussing enterprise coverage is published.

§ 794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.

(a) As noted in § 794.141, the partial exemption provided by section 7(b)(3) from the requirement that overtime hours be paid for at not less than one and one-half times the employee's regular rate applies only to ''employment up to 12 hours in any workday and up to 56 hours in any workweek.'' The statute makes it plain that in any workweek when an employee otherwise eligible for the exemption works more than the specified daily or weekly hours the exemption applies only ''if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.'' Failure of the employer to pay overtime compensation under these special standards defeat the exemption. (See *Wirtz* v. *Osceola Farms Co.*, 372 F. 2d 584 (C.A. 5); *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 298 (C.A. 9).)

(b) Under this provision, the number of hours worked in the workweek which are in excess of 12 in any workday or workdays therein, or the number in excess of 56 in the week, whichever is the greater number, must be compensated as provided in section 7(b)(3). Thus, the requisite time-and-one-half compensation must be paid for all daily overtime hours in excess of 12 per day worked by an employee in a workweek when his hours worked do not exceed 56 in the week; and for all weekly overtime hours in excess of 56 which he works in a workweek when he does not work more than 12 hours in any day. When an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which the exemption is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater. Thus, if his total hours of work in the workweek which are in excess of the daily maximum are 10 and his hours in excess of the weekly maximum are 8, overtime compensation is required for 10 hours, not 18. As an example, suppose an employee employed at an hourly rate of $2.40 is employed under the other conditions specified for exemption under section 7(b)(3) and works the following schedule:

Hours	M	T	W	T	F	S	S	Tot.
Worked	14	9	10	15	12	8	0	68

Number of overtime hours in excess of 56 in the workweek, 12; number of hours in excess of 12 per day, five.

Since the weekly overtime hours are greater, the employee is entitled to overtime pay for 12 hours at $3.60 an hour (1½ × $2.40), a total of $43.60 for the overtime hours, in addition to pay at his regular rate for the remaining 56 hours (56 × $2.40) in the amount of $134.40, or a total of $177.60 for the week. If the employee had not worked the 8 hours on Saturday, his total hours worked in the week would have been 60, of which five were daily overtime hours, and there would have been 4 weekly overtime hours under the section 7(b) standard. For such a schedule the employee would be entitled to 5 hours of overtime pay at time and one-half (5 × 1½ × $2.40 = $18) plus the pay at his regular rate for the remaining 55 hours (55 × $2.40 = $132) making a total of $150 due him for the week.

(c) The overtime compensation payable to an employee under section 7(b)(3) when his hours worked in the workweek are in excess of 12 in any workday or in excess of 56 in the week must be ''at a rate not less than one

and one-half times the regular rate at which he is employed.'' This extra compensation for the excess hours cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid (§ 778.315 of this chapter). In computing the extra compensation due, the ''regular rate'' of the employee is calculated in accordance with section 7(e) of the Act, as explained in § 778.107 of this chapter, *et seq.*, and can in no event be less than the minimum required by the Act (see § 778.107 of this chapter). Since, for exemption from section 7(a) under section 7(b)(3) in workweeks exceeding 40 hours, the Act requires that the employee receive not only compensation for 40 hours at not less than the minimum rate prescribed in section 6 but also ''compensation for employment in excess of 40 hours'' at a rate not less than one and one-half times such minimum rate, the ''regular rate'', on which time-and-one-half overtime pay must be computed for daily hours worked in excess of 12 or weekly hours worked in excess of 56, must be calculated in conformity with these minimum standards.

(d) The following illustrations of the application of these principles in the case of an employee whose applicable minimum wage rate under section 6 is $1.60 an hour may be helpful. First, suppose the ''regular rate'' at which such an employee is employed, calculated in accordance with section 7(e) of the Act and part 778 of this chapter, is $2.40 an hour or more. This would be true of an employee employed solely at a single hourly rate of pay of $2.40 or more which he receives as straight time compensation for every hour of work. It would likewise be true of an employee, however compensated (whether by a salary for a fixed or variable number of hours, by commissions, piece rates, day rates or other pay systems or by a combination of these), whose pay for all hours worked in the workweek (except amounts excluded under section 7(e)) yields him average hourly straight-time earnings of $2.40 or more an hour. Since the employee's regular rate received for all nonovertime hours of work is in such a case not less than one and one-half times his applicable minimum rate under section 6, the compensation requirements of section 7(b)(3) are satisfied for all nonovertime as well as overtime hours worked if he receives compensation at his ''regular rate'' of $2.40 or more an hour for all hours worked in his workweek which are not in excess of 12 in his workday or 56 in his workweek, together with extra compensation for overtime in an amount sufficient to provide compensation for all his hours worked in excess of such daily or weekly hours, whichever are greater, at a rate at least 50 percent higher than such regular rate (at least $3.60 an hour if the regular rate is $2.40 an hour). A somewhat different situation is presented, however, where the employee whose applicable minimum wage under section 6 is $1.60 an hour is paid, as the Act permits, at a wage rate for nonovertime hours up to 40 in the workweek which is not less than the $1.60 minimum but is not as much as the $2.40 required for hours of employment in excess of 40. As an example, suppose he is paid $2 an hour for 40 hours and $2.40 as required by section 7(b)(3) for hours in excess of 40, and works 60 hours in a workweek in which 10 of his hours worked are in excess of 12 in a workday for which overtime compensation must be paid at not less than one and one-half times his regular rate of pay. Since payment of the $2 and $2.40 rates for hours worked up to and in excess of 40, respectively, satisfies the straight-time requirements for compensation under section 7(b)(3), all the compensation requirements for exemption thereunder will be satisfied if, in addition, he is paid for the 10 daily overtime hours an extra sum equal to one-half his ''regular rate'' multiplied by 10. His regular rate is computed for the workweek by dividing his total straight-time compensation for the week by the number of hours worked for which it is paid and is accordingly $2.133 an hour ($2 × 40 = $80; $2.40 × 20 = $48; $80 + 48 = $128; $128 ÷ 60 = $2.133; see § 778.115 of this chapter). Thus, the section 7(b)(3) compensation requirements are satisfied by payment of straight-time compensation in the amount of $80 for 40 hours of

work and in the amount of $48 for the 20 additional hours worked, together with $10.67 as overtime premium for the 10 daily overtime hours ($2.133 × ½ × 10), or total pay of $138.67 for the week.

§ 794.143 Work exempt under another section of the Act.

Where an employee performs work during his workweek, some of which is exempt under one section of the Act, and the remainder of which is exempt under another section or sections, of the Act, the exemptions may be combined. The employee's combination exemption is controlled in such case by that exemption which is narrower in scope. For example, if part of his work is exempt from both minimum wage and overtime compensation under one section of the Act, and the rest is exempt only from the overtime pay requirements by virtue of section 7(b)(3), the employee is exempt that week from the overtime pay provisions, but not from the minimum wage requirements. Similarly, an employee who spends part of his workweek in work which would, if done throughout the week, exempt him completely from the overtime pay requirements, and the remainder of the week in work exempt from such requirements only to the extent and under the conditions specified in section 7(b)(3), could be exempt from overtime pay only to such extent and under such conditions. Thus where an employee spends part of his workweek in transporting petroleum products by tank truck for an employer in an enterprise described in section 7(b)(3), and the remainder of his workweek in driving a taxicab for the employer's taxi business (work exempt from the overtime provisions under section 13(b)(17)), he is eligible for exemption from overtime pay only if he is compensated in such workweek in accordance with the provisions of section 7(b)(3) and only to the extent which that section provides.

RECORDS TO BE KEPT BY EMPLOYERS

§ 794.144 Records to be maintained.

(a) *Form of records.* No particular order or form of records is prescribed by the recordkeeping regulations (part 516 of this chapter). Every employer operating under section 7(b)(3) of the Act is, however, required to maintain and preserve records containing the information and data as set out in §§ 516.2 and 516.21 of this chapter.

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT

Sec.

AUTHORITY: 29 U.S.C. 201–219.

SOURCE: 89 FR 1741, Jan. 10, 2024

§ 795.100 Introductory statement.

This part contains the Department of Labor's (the Department) general interpretations for determining whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). See 29 U.S.C. 201–19. These interpretations are intended to serve as a ''practical guide to employers and employees'' as to how the Department will seek to apply the Act. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138 (1944). The Administrator of the Department's Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined