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Code of Federal Regulations

# 29

**Parts 500 to 899**

Revised as of July 1, 2009

# Labor

Containing a codification of documents of general applicability and future effect

As of July 1, 2009

*With Ancillaries*

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# Table of Contents


| | Page |
|---|---|
| Explanation | v |
| Title 29: | |
| SUBTITLE B—Regulations Relating to Labor (Continued) | |
| Chapter V—Wage and Hour Division, Department of Labor | 5 |
| Finding Aids: | |
| Table of CFR Titles and Chapters | 861 |
| Alphabetical List of Agencies Appearing in the CFR | 881 |
| List of CFR Sections Affected | 891 |

*Cite this Code:* CFR

*To cite the regulations in this volume use title, part and section number. Thus,* 29 CFR 500.0 *refers to title 29, part 500, section 0.*

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Title 1 through Title 16.....as of January 1
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Title 28 through Title 41.....as of July 1
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RAYMOND A. MOSLEY,
*Director*,
*Office of the Federal Register*.
*July 1, 2009*.

# THIS TITLE

Title 29—LABOR is composed of nine volumes. The parts in these volumes are arranged in the following order: parts 0–99, parts 100–499, parts 500–899, parts 900–1899, part 1900–§ 1910.999, part 1910.1000–end of part 1910, parts 1911–1925, part 1926, and part 1927 to end. The contents of these volumes represent all current regulations codified under this title as of July 1, 2009.

The OMB control numbers for title 29 CFR part 1910 appear in § 1910.8. For the convenience of the user, § 1910.8 appears in the Finding Aids section of the volume containing § 1910.1000 to the end.

Subject indexes appear following the occupational safety and health standards (part 1910), and following the safety and health regulations for: Longshoring (part 1918), Gear Certification (part 1919), and Construction (part 1926).

For this volume, Bonnie Fritts was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.

# Title 29—Labor

(This book contains parts 500 to 899)

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SUBTITLE B—REGULATIONS RELATING TO LABOR (CONTINUED)

*Part*

CHAPTER V—Wage and Hour Division, Department of Labor 500

# Subtitle B—Regulations Relating to Labor (Continued)

# CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

SUBCHAPTER A—REGULATIONS


| *Part* | | *Page* |
|---|---|---|
| 500 | Migrant and seasonal agricultural worker protection | 9 |
| 501 | Enforcement of contractual obligations for temporary alien agricultural workers admitted under section 216 of the Immigration and Nationality Act | 53 |
| 502 | Enforcement of contractual obligations for temporary alien agricultural workers admitted under section 218 of the Immigration and Nationality Act | 64 |
| 504 | Attestations by facilities using nonimmigrant aliens as registered nurses | 80 |
| 505 | Labor standards on projects or productions assisted by grants from the National Endowments for the Arts and Humanities | 80 |
| 506 | Attestations by employers using alien crewmembers for longshore activities in U.S. ports | 84 |
| 507 | Labor condition applications and requirements for employers using nonimmigrants on H–1B specialty visas in specialty occupations and as fashion models | 85 |
| 508 | Attestations filed by employers utilizing F–1 students for off-campus work | 85 |
| 510 | Implementation of the minimum wage provisions of the 1989 amendments to the Fair Labor Standards Act in Puerto Rico | 85 |
| 511 | Wage order procedure for American Samoa | 107 |
| 515 | Utilization of State agencies for investigations and inspections | 113 |
| 516 | Records to be kept by employers | 116 |
| 519 | Employment of full-time students at subminimum wages | 128 |

| Part | | Page |
|---|---|---|
| 520 | Employment under special certificate of messengers, learners (including student-learners), and apprentices | 139 |
| 521–523 | [Reserved] | |
| 525 | Employment of workers with disabilities under special certificates | 152 |
| 527 | [Reserved] | |
| 528 | Annulment or withdrawal of certificates for the employment of student-learners, apprentices, learners, messengers, handicapped persons, student-workers, and full-time students in agriculture or in retail or service establishments at special minimum wage rates | 162 |
| 530 | Employment of homeworkers in certain industries | 164 |
| 531 | Wage payments under the Fair Labor Standards Act of 1938 | 177 |
| 536 | Area of production | 190 |
| 541 | Defining and delimiting the exemptions for executive, administrative, professional, computer and outside sales employees | 190 |
| 547 | Requirements of a ''Bona fide thrift or savings plan'' | 215 |
| 548 | Authorization of established basic rates for computing overtime pay | 217 |
| 549 | Requirements of a ''Bona fide profit-sharing plan or trust'' | 231 |
| 550 | Defining and delimiting the term ''Talent fees'' | 233 |
| 551 | Local delivery drivers and helpers; wage payment plans | 234 |
| 552 | Application of the Fair Labor Standards Act to domestic service | 239 |
| 553 | Application of the Fair Labor Standards Act to employees of State and local governments | 244 |
| 570 | Child labor regulations, orders and statements of interpretation | 268 |
| 575 | Waiver of child labor provisions for agricultural employment of 10 and 11 year old minors in hand harvesting of short season crops | 310 |
| 578 | Minimum wage and overtime violations—civil money penalties | 316 |
| 579 | Child labor violations—civil money penalties | 317 |
| 580 | Civil money penalties—procedures for assessing and contesting penalties | 322 |

| Part | | Page |
|---|---|---|
| 697 | Industries in American Samoa | 326 |

SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

| | | |
|---|---|---|
| 775 | General | 330 |
| 776 | Interpretative bulletin on the general coverage of the wage and hours provisions of the Fair Labor Standards Act of 1938 | 330 |
| 778 | Overtime compensation | 369 |
| 779 | The Fair Labor Standards Act as applied to retailers of goods or services | 424 |
| 780 | Exemptions applicable to agriculture, processing of agricultural commodities, and related subjects under the Fair Labor Standards Act | 526 |
| 782 | Exemption from maximum hours provisions for certain employees of motor carriers | 601 |
| 783 | Application of the Fair Labor Standards Act to employees employed as seamen | 617 |
| 784 | Provisions of the Fair Labor Standards Act applicable to fishing and operations on aquatic products | 632 |
| 785 | Hours worked | 658 |
| 786 | Miscellaneous exemptions | 670 |
| 788 | Forestry or logging operations in which not more than eight employees are employed | 672 |
| 789 | General statement on the provisions of section 12(a) and section 15(a)(1) of the Fair Labor Standards Act of 1938, relating to written assurances | 676 |
| 790 | General statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938 | 680 |
| 791 | Joint employment relationship under Fair Labor Standards Act of 1938 | 706 |
| 793 | Exemption of certain radio and television station employees from overtime pay requirements under section 13(b)(9) of the Fair Labor Standards Act | 707 |
| 794 | Partial overtime exemption for employees of wholesale or bulk petroleum distributors under section 7(b)(3) of the Fair Labor Standards Act | 712 |

SUBCHAPTER C—OTHER LAWS

| | | |
|---|---|---|
| 801 | Application of the Employee Polygraph Protection Act of 1988 | 732 |

| Part | | Page |
|---|---|---|
| 825 | The Family and Medical Leave Act of 1993 ..... | 761 |
| | SUBCHAPTER D—GARNISHMENT OF EARNINGS | |
| 870 | Restriction on garnishment ..... | 853 |
| 871–899 | [Reserved] | |

# SUBCHAPTER A—REGULATIONS

## PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

### Subpart A—General Provisions


Sec.
500.0 Introduction.
500.1 Purpose and scope.
500.2 Compliance with State laws and regulations.
500.3 Effective date of the Act; transition period; repeal of the Farm Labor Contractor Registration Act.
500.4 Effect of prior judgments and final orders obtained under the Farm Labor Contractor Registration Act.
500.5 Filing of applications, notices and documents.
500.6 Accuracy of information, statements and data.
500.7 Investigation authority of the Secretary.
500.8 Prohibition on interference with Department of Labor officials.
500.9 Discrimination prohibited.
500.10 Waiver of rights prohibited.
500.20 Definitions.

APPLICABILITY OF THE ACT: EXEMPTIONS

500.30 Persons not subject to the Act.


### Subpart B—Registration of Farm Labor Contractors and Employees of Farm Labor Contractors Engaged in Farm Labor Contracting Activities


REGISTRATION REQUIREMENTS: GENERAL

500.40 Registration in general.
500.41 Farm labor contractor is responsible for actions of his farm labor contractor employee.
500.42 Certificate of Registration to be carried and exhibited.
500.43 Effect of failure to produce certificate.

APPLICATIONS AND RENEWAL OF FARM LABOR CONTRACTOR AND FARM LABOR CONTRACTOR EMPLOYEE CERTIFICATES

500.44 Form of application.
500.45 Contents of application.
500.46 Filing an application.
500.47 Place for filing application.

ACTION ON APPLICATION

500.48 Issuance of certificate.
500.50 Duration of certificate.
500.51 Refusal to issue or to renew, or suspension or revocation of certificate.
500.52 Right to hearing.
500.53 Nontransfer of certificate.
500.54 Change of address.
500.55 Changes to or amendments of certificate authority.
500.56 Replacement of Certificate of Registration or Farm Labor Contractor Employee Certificate.

ADDITIONAL OBLIGATIONS OF FARM LABOR CONTRACTORS AND FARM LABOR CONTRACTOR EMPLOYEES

500.60 Farm labor contractors' recruitment, contractual and general obligations.
500.61 Farm Labor contractors must comply with all worker protections and all other statutory provisions.
500.62 Obligations of a person holding a valid Farm Labor Contractor Employee Certificate of Registration.


### Subpart C—Worker Protections


GENERAL

500.70 Scope of worker protections.
500.71 Utilization of only registered farm labor contractors.
500.72 Agreements with workers.
500.73 Required purchase of goods or services solely from any person prohibited.

RECRUITING, HIRING AND PROVIDING INFORMATION TO MIGRANT AGRICULTURAL WORKERS

500.75 Disclosure of information.

HIRING AND PROVIDING INFORMATION TO SEASONAL AGRICULTURAL WORKERS

500.76 Disclosure of information.

EMPLOYMENT INFORMATION FURNISHED

500.77 Accuracy of information furnished.
500.78 Information in foreign language.

WAGES AND PAYROLL STANDARDS

500.80 Payroll records required.
500.81 Payment of wages when due.


### Subpart D—Motor Vehicle Safety and Insurance for Transportation of Migrant and Seasonal Agricultural Workers, Housing Safety and Health for Migrant Workers


MOTOR VEHICLE SAFETY

500.100 Vehicle safety obligations.
500.101 Promulgation and adoption of vehicle standards.
500.102 Applicability of vehicle safety standards.
500.103 Activities not subject to vehicle safety standards.

500.104 Department of Labor standards for passenger automobiles and station wagons and transportation of seventy-five miles or less.
500.105 DOT standards adopted by the Secretary.

INSURANCE

500.120 Insurance policy or liability bond is required for each vehicle used to transport any migrant or seasonal agricultural worker.
500.121 Coverage and level of insurance required.
500.122 Adjustments in insurance requirements when workers' compensation coverage is provided under State law.
500.123 Property damage insurance required.
500.124 Liability bond in lieu of insurance policy.
500.125 Qualifications and eligibility of insurance carrier or surety.
500.126 Duration of insurance or liability bond.
500.127 Limitations on cancellation of insurance or liability bond of registered farm labor contractors.
500.128 Cancellation of insurance policy or liability bond not relief from insurance requirements.

HOUSING SAFETY AND HEALTH

500.130 Application and scope of safety and health requirement.
500.131 Exclusion from housing safety and health requirement.
500.132 Applicable Federal standards: ETA and OSHA housing standards.
500.133 Substantive Federal and State safety and health standards defined.
500.134 Compliance with State standards.
500.135 Certificate of housing inspection.

**Subpart E—Enforcement**

500.140 General.
500.141 Concurrent actions.
500.142 Representation of the Secretary.
500.143 Civil money penalty assessment.
500.144 Civil money penalties—payment and collection.
500.145 Registration determinations.
500.146 Continuation of matters involving violations of FLCRA.
500.147 Continuation of matters involving violations of section 106 of MSPA.

AGREEMENTS WITH FEDERAL AND STATE AGENCIES

500.155 Authority.
500.156 Scope of agreements with Federal agencies.
500.157 Scope of agreements with State agencies.
500.158 Functions delegatable.
500.159 Submission of plan.
500.160 Approved State plans.
500.161 Audits.
500.162 Reports.

CENTRAL PUBLIC REGISTRY

500.170 Establishment of registry.

**Subpart F—Administrative Proceedings**

GENERAL

500.200 Establishment of procedures and rules of practice.
500.201 Applicability of procedures and rules.

PROCEDURES RELATING TO HEARING

500.210 Written notice of determination required.
500.211 Contents of notice.
500.212 Request for hearing.

PROCEDURES RELATING TO SUBSTITUTED SERVICE

500.215 Change of address.
500.216 Substituted service.
500.217 Responsibility of Secretary for service.

RULES OF PRACTICE

500.219 General.
500.220 Service of determinations and computation of time.
500.221 Commencement of proceeding.
500.222 Designation of record.
500.223 Caption of proceeding.

REFERRAL FOR HEARING

500.224 Referral to Administrative Law Judge.
500.225 Notice of docketing.
500.226 Service upon attorneys for the Department of Labor—number of copies.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

500.231 Appearances; representation of the Department of Labor.
500.232 Consent findings and order.

POST-HEARING PROCEDURES

500.262 Decision and order of Administrative Law Judge.

MODIFICATION OR VACATION OF ORDER OF ADMINISTRATIVE LAW JUDGE

500.263 Authority of the Secretary.
500.264 Procedures for initiating review.
500.265 Implementation by the Secretary.
500.266 Responsibility of the Office of Administrative Law Judges.
500.267 Filing and Service.
500.268 Final decision of the Secretary.
500.269 Stay pending decision of the Secretary.

RECORD

500.270 Retention of official record.
500.271 Certification of official record.

AUTHORITY: Pub. L. 97–470, 96 Stat. 2583 (29 U.S.C. 1801–1872); Secretary's Order No. 4–2001, 66 FR 29656.

SOURCE: 48 FR 36741, Aug. 12, 1983, unless otherwise noted.

## Subpart A—General Provisions

### § 500.0 Introduction.

(a) The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), hereinafter referred to as MSPA or the Act, repeals and replaces the Farm Labor Contractor Registration Act of 1963, as amended, hereinafter referred to as FLCRA or the Farm Labor Contractor Registration Act. Prior judgments and final orders obtained under FLCRA continue in effect as stated in § 500.4.

(b) These regulations include provisions necessitated by the Immigration Reform and Control Act's (IRCA) amendment to the Immigration and Nationality Act (INA). IRCA amended MSPA to remove section 106 thereof prohibiting the employment of illegal aliens. Matters concerning certificate actions or the assessment of civil money penalties, for a violation of section 106 of MSPA which occurred prior to June 1, 1987, continue through final administrative determination as stated in § 500.147.

[48 FR 36741, Aug. 12, 1983, as amended at 54 FR 13328, Mar. 31, 1989]

### § 500.1 Purpose and scope.

(a) Congress stated, in enacting the Migrant and Seasonal Agricultural Worker Protection Act that ''[I]t is the purpose of this Act to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.'' It authorized the Secretary to issue such rules and regulations as are necessary to carry out the Act consistent with the requirements of chapter 5 of title 5, United States Code.

(b) These regulations implement this purpose and policy. The regulations contained in this part are issued in accordance with section 511 of the Act and establish the rules and regulations necessary to carry out the Act.

(c) Any farm labor contractor, as defined in the Act, is required to obtain a Certificate of Registration issued pursuant to the Act from the Department of Labor or from a State agency authorized to issue such certificates on behalf of the Department of Labor. Such a farm labor contractor must ensure that any individual whom he employs to perform any farm labor contracting activities also obtains a Certificate of Registration. The farm labor contractor is responsible, as well, for any violation of the Act or these regulations by any such employee whether or not the employee obtains a certificate. In addition to registering, farm labor contractors must comply with all other applicable provisions of the Act when they recruit, solicit, hire, employ, furnish or transport or, in the case of migrant agricultural workers, provide housing.

(d) Agricultural employers and agricultural associations which are subject to the Act must comply with all of the worker protections which are applicable under the Act to migrant or seasonal agricultural workers whom they recruit, solicit, hire, employ, furnish, or transport or, in the case of migrant agricultural workers, provide housing. The obligations will vary, depending on the types of activities affecting migrant or seasonal agricultural workers. Agricultural employers and agricultural associations and their employees need not obtain Certificates of Registration in order to engage in these activities, even if the workers they obtain are utilized by other persons or on the premises of another.

(e) The Act empowers the Secretary of Labor to enforce the Act, conduct investigations, issue subpenas and, in the case of designated violations of the Act, impose sanctions. As provided in the Act, the Secretary is empowered, among other things, to impose an assessment and to collect a civil money penalty of not more than $1,000 for each violation, to seek a temporary or permanent restraining order in a U.S.

District Court, and to seek the imposition of criminal penalties on persons who willfully and knowingly violate the Act or any regulation under the Act. In accordance with the Act and with these regulations, the Secretary may refuse to issue or to renew, or may suspend or revoke a certificate of registration issued to a farm labor contractor or to a person who engages in farm labor contracting as an employee of a farm labor contractor.

(f) The facilities and services of the U.S. Employment Service, including State agencies, authorized by the Wagner-Peyser Act may be denied to any person found by a final determination by an appropriate enforcement agency to have violated any employment-related laws including MSPA when notification of this final determination has been provided to the Job Service by that enforcement agency. See 20 CFR 658.501(a)(4). The facilities and services of the U.S. Employment Service shall be restored immediately upon compliance with 20 CFR 658.502(a)(4).

(g) Subparts A through E set forth the substantive regulations relating to farm labor contractors, agricultural employers and agricultural associations. These subparts cover the applicability of the Act, registration requirements applicable to farm labor contractors, the obligations of persons who hold Certificates of Registration, the worker protections which must be complied with by all who are subject to the Act, and the enforcement authority of the Secretary.

(h) Subpart F sets forth the rules of practice for administrative hearings relating to actions involving Certificates of Registration. It also outlines the procedure to be followed for filing a challenge to a proposed administrative action relating to violations and summarizes the methods provided for collection and recovery of a civil money penalty.

(i)(1) The Act requires that farm labor contractors obtain a certificate of registration from the Department of Labor prior to engaging in farm labor contracting activities. The Act also requires registration by individuals who will perform farm labor contracting activities for a farm labor contractor. Form WH–510 and WH–512 are the applications used to obtain Farm Labor Contractor and Farm Labor Contractor Employee Certificates of Registration. These forms have been approved by the Office of Management and Budget (OMB) under control numbers 1215–0038 (WH–510) and 1215–0037 (WH–512). Forms WH–514 and WH–514a are used when applying for transportation authorization to furnish proof of compliance with vehicle safety requirements. These forms have been jointly cleared by OMB under control number 1215–0036.

(2) The Act further requires disclosure to migrant and seasonal agricultural workers regarding wages, hours and other working conditions and housing when provided to migrant workers. The Department of Labor has developed optional forms for use in making the required disclosure. OMB has approved the following: Worker Information (WH–516) 1215–0145 and Housing Terms and Conditions (WH–521) 1215–0146.

(3) The Act also requires that farm labor contractors, agricultural employers and agricultural associations make, keep, preserve and disclose certain payroll records. Forms WH–501 and WH–501a (Spanish version) are provided to assist in carrying out this requirement. In addition, farm labor contractors who are applying for housing authorization must submit information which identifies the housing to be used along with proof of compliance with housing safety and health requirements. There has been no form developed for this purpose. The Act further requires disclosure by the insurance industry of certain information pertaining to cancellation of vehicle liability insurance policies. The requirements concerning recordkeeping, housing and insurance have been cleared by OMB under control number 1215–0148.

(4) The Act provides that no farm labor contractor shall knowingly employ or utilize the services of aliens not lawfully admitted for permanent residence or who have not been authorized by the Attorney General to accept employment. Form WH–509 is an optional form which may be used to self-certify that the applicant is a citizen of the U.S. This form has been cleared by

OMB under control number 1215–0091. (See § 500.59(a)(11)).

[48 FR 36741, Aug. 12, 1983; 48 FR 38380, Aug. 23, 1983]

### § 500.2 Compliance with State laws and regulations.

The Act and these regulations are intended to supplement State law; compliance with the Act or these regulations shall not excuse any

individual from compliance with appropriate State law or regulation.

### § 500.3 Effective date of the Act; transition period; repeal of the Farm Labor Contractor Registration Act.

(a) The provisions of the Migrant and Seasonal Agricultural Worker Protection Act are effective on April 14, 1983, and are codified in 29 U.S.C. 1801 *et seq*.

(b) The Migrant and Seasonal Agricultural Worker Protection Act repeals the Farm Labor Contractor Registration Act of 1963, as amended, (7 U.S.C. 2041, *et seq*.), effective April 14, 1983.

(c) Violations of the Farm Labor Contractor Registration Act occurring prior to April 14, 1983, may be pursued by the Department of Labor after that date.

### § 500.4 Effect of prior judgments and final orders obtained under the Farm Labor Contractor Registration Act.

The Secretary may refuse to issue or to renew, or may suspend or revoke, a Certificate of Registration under the Act, if the applicant or holder has failed to pay any court judgment obtained by the Secretary or any other person under the Farm Labor Contractor Registration Act, or has failed to comply with any final order issued by the Secretary under the Farm Labor Contractor Registration Act. The Secretary may deny a Certificate of Registration under the Act to any farm labor contractor who has a judgment outstanding against him, or is subject to a final order assessing a civil money penalty which has not been paid.

### § 500.5 Filing of applications, notices and documents.

Unless otherwise prescribed herein, all applications, notices and other documents required or permitted to be filed by these regulations shall be filed in accordance with the provisions of subpart F of the regulations.

### § 500.6 Accuracy of information, statements and data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to title 18, section 1001, of the United States Code, which provides:

*Section 1001. Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

### § 500.7 Investigation authority of the Secretary.

(a) The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places (including housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information as he deems necessary to determine compliance with the Act, or these regulations.

(b) The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in the Act, the Authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(c) Any person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Employment Service of the various States, or any office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or any other authorized representative of the Administrator. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, Employment Standards Administration for the region or area in which the reported violation is alleged to have occurred.

(d) In case of disobedience to a subpena, the Secretary may invoke the aid of a United States District Court which is authorized to issue an order requiring the person to obey such subpena.

### § 500.8 Prohibition on interference with Department of Labor officials.

It is a violation of section 512(c) of the Act for any person to unlawfully resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to the Act during the performance of such duties. (Other Federal statutes which prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.)

### § 500.9 Discrimination prohibited.

(a) It is a violation of the Act for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause:

(1) Filed a complaint with reference to the Act with the Secretary of Labor; or

(2) Instituted or caused to be instituted any proceeding under or related to the Act; or

(3) Testified or is about to testify in any proceeding under or related to the Act; or

(4) Exercised or asserted on behalf of himself or others any right or protection afforded by the Act.

(b) A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, no later than 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

### § 500.10 Waiver of rights prohibited.

Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

### § 500.20 Definitions.

For purposes of this part:

(a) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, and such authorized representatives as may be designated by the Administrator to perform any of the functions of the Administrator under this part.

(b) *Administrative Law Judge* means a person appointed as provided in title 5 U.S.C. and qualified to preside at hearings under 5 U.S.C. 557. *Chief Administrative Law Judge* means the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400, Washington, DC 20001–8002.

(c) *Agricultural association* means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(d) *Agricultural employer* means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

*Produces seed* means the planting, cultivation, growing and harvesting of seeds of agricultural or horticultural commodities. *Conditions seed* means the in-plant work done after seed production including the drying and aerating of seed.

(e) *Agricultural employment* means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(f) *Convicted* means that a final judgment of guilty has been rendered by a court of competent jurisdiction from which no opportunity for appeal remains.

(g) *Day-haul operation* means the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day. This term does not include transportation provided by an employer for individuals who are already employees at the time they are picked up nor does it include carpooling arrangements by such employees which are not specifically directed or requested by the employer, farm labor contractor or agent thereof.

(h)(1) The term *employ* has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act. As so defined, *employ* includes to suffer or permit to work.

(2) The term *employer* is given its meaning as found in the Fair Labor Standards Act. *Employer* under section 3(d) of that Act includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(3) The term *employee* is also given its meaning as found in the Fair Labor Standards Act. *Employee* under section 3(e) of that Act means any individual employed by an employer.

(4) The definition of the term *employ* may include consideration of whether or not an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act. Under MSPA, questions will arise whether or not a farm labor contractor engaged by an agricultural employer/association is a bona fide independent contractor or an employee. Questions also arise whether or not the worker is a bona fide independent contractor or an employee of the farm labor contractor and/or the agricultural employer/association. These questions should be resolved in accordance with the factors set out below and the principles articulated by the federal courts in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), *Sec'y of Labor, U.S. Dept. of Labor* v. *Lauritzen*, 835 F.2d 1529 (7th Cir. 1987), *cert.* denied, 488 U.S. 898 (1988); *Beliz* v. *McLeod*, 765 F.2d 1317 (5th Cir. 1985), and *Castillo* v. *Givens*, 704 F.2d 181 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983). If it is determined that the farm labor contractor is an *employee* of the agricultural employer/association, the agricultural workers in the farm labor contractor's crew who perform work for the agricultural employer/association are deemed to be employees of the agricultural employer/association and an inquiry into joint employment is not necessary or appropriate. In determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate. *Lauritzen* at 1538; *Beliz* at 1329; *Castillo* at 192; *Real* at 756. This determination is based upon an evaluation of all of the circumstances, including the following:

(i) The nature and degree of the putative employer's control as to the manner in which the work is performed;

(ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill;

(iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers;

(iv) Whether the services rendered by the putative employee require special skill;

(v) The degree of permanency and duration of the working relationship;

(vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.

(5) The definition of the term *employ* includes the *joint employment* principles applicable under the Fair Labor Standards Act. The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist. When the putative employers share responsibility for activities set out in the following factors or in other relevant facts, this is an indication that the putative employers are not completely disassociated with respect to the employment and that the agricultural worker may be economically dependent on both persons:

(i) If it is determined that a farm labor contractor is an independent contractor, it still must be determined whether or not the employees of the farm labor contractor are also jointly employed by the agricultural employer/association. *Joint employment* under the Fair Labor Standards Act is joint employment under the MSPA. *Such joint employment* relationships, which are common in agriculture, have been addressed both in the legislative history and by the courts.

(ii) The legislative history of the Act (H. Rep. No. 97–885, 97th Cong., 2d Sess., 1982) states that the legislative purpose in enacting MSPA was ''to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers * * *,'' which would only be accomplished by ''advanc[ing] * * * a completely new approach'' (Rept. at 3). Congress's incorporation of the FLSA term *employ* was undertaken with the deliberate intent of adopting the FLSA *joint employer* doctrine as the ''central foundation'' of MSPA and ''the best means by which to insure that the purposes of this MSPA would be fulfilled'' (Rept. at 6). Further, Congress intended that the *joint employer* test under MSPA be the formulation as set forth in *Hodgson* v. *Griffin & Brand of McAllen, Inc.* 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) (Rept. at 7). In endorsing *Griffin & Brand*, Congress stated that this formulation should be controlling in situations ''where an agricultural employer * * * asserts that the agricultural workers in question are the *sole* employees of an independent contractor/crewleader,'' and that the ''decision makes clear that even if a farm labor contractor is found to be a bona fide independent contractor, * * * this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer * * * of the harvest workers'' together with the farm labor contractor. Further, regarding the *joint employer* doctrine and the *Griffin & Brand* formulation, Congress stated that ''the absence of evidence on any of the criteria listed does not preclude a finding that an agricultural association or agricultural employer was a joint employer along with the crewleader'', and that ''it is expected that the special aspects of agricultural employment be kept in mind'' when applying the tests and criteria set forth in the case law and legislative history (Rept. at 8).

(iii) In determining whether or not an employment relationship exists between the agricultural employer/association and the agricultural worker, the ultimate question to be determined is the economic reality—whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee.

(iv) The factors set forth in paragraphs (h)(5)(iv)(A) through (G) of this section are analytical tools to be used in determining the ultimate question of economic dependency. The consideration of each factor, as well as the determination of the ultimate question of economic dependency, is a qualitative rather than quantitative analysis. The factors are not to be applied as a

checklist. No one factor will be dispositive of the ultimate question; nor must a majority or particular combination of factors be found for an employment relationship to exist. The analysis as to the existence of an employment relationship is not a strict liability or *per se* determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor. The factors set forth in paragraphs (h)(5)(iv)(A) through (G) of this section are illustrative only and are not intended to be exhaustive; other factors may be significant and, if so, should be considered, depending upon the specific circumstances of the relationship among the parties. How the factors are weighed depends upon all of the facts and circumstances. Among the factors to be considered in determining whether or not an employment relationship exists are:

(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

(B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

(C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

(D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

(E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

(F) Whether the work is performed on the agricultural employer/association's premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

(i) *Farm labor contracting activity* means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(j) *Farm labor contractor* means any person—other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(k) *Farm Labor Contractor Certificate of Registration* or *Certificate of Registration* means the certificate issued by the Administrator which permits a farm labor contractor to engage in farm labor contracting activities.

(l) *Farm labor contractor employee* who is required to obtain a Certificate of Registration as an employee of a farm labor contractor means a person who performs farm labor contracting activity solely on behalf of a farm labor contractor holding a valid Certificate of Registration and is not an independent farm labor contractor who would be required to register under the Act in his own right.

(m) *Farm Labor Contractor Employee Certificate* or *Farm Labor Contractor Employee Certificate of Registration* or *Employee Certificate* means the certificate issued by the Administrator to an employee of a farm labor contractor authorizing the performance of farm labor contracting activities solely on behalf of such farm labor contractor and not as an independent farm labor

contractor who would be required to register in his own right.

(n) *Illegal alien* means any person who is not lawfully admitted for permanent residence in the United States or who has not been authorized by the Attorney General to accept employment in the United States.

(o) *Immediate family* includes only:

(1) A spouse;

(2) Children, stepchildren, and foster children;

(3) Parents, stepparents, and foster parents; and

(4) Brothers and sisters.

(p) *Migrant agricultural worker* means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(1) *Migrant agricultural worker* does not include:

(i) Any immediate family member of an agricultural employer or a farm labor contractor; or

(ii) Any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act.

(2) *Permanent place of residence,* with respect to an individual, means a domicile or permanent home. Permanent place of residence does not include seasonal or temporary housing such as a labor camp. The term *permanent place of residence* for any nonimmigrant alien is that individual's country of origin.

(q) *Person* means any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(r) *Seasonal agricultural worker* means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence:

(1) When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(2) When employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

(i) *Seasonal agricultural worker* does not include:

(A) Any migrant agricultural worker;

(B) Any immediate family member of an agricultural employer or a farm labor contractor; or

(C) Any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act.

(ii) *Field work related to planting, cultivating or harvesting operations* includes all farming operations on a farm or ranch which are normally required to plant, harvest or produce agricultural or horticultural commodities, including the production of a commodity which normally occurs in the fields of a farm or ranch as opposed to those activities which generally occur in a processing plant or packing shed. A worker engaged in the placing of commodities in a container in the field and on-field loading of trucks and similar transports is included. Nursery, mushroom and similar workers engaged in activities in connection with planting, cultivating or harvesting operations are intended to be covered. An individual operating a machine, such as a picker, or tractor is not included when performing such activity.

(s) *On a seasonal or other temporary basis* means:

(1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(2) A worker is employed on *other temporary basis* where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is

contemplated to continue indefinitely, is not temporary.

(3) *On a seasonal or other temporary basis* does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(4) *On a seasonal or other temporary basis* does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(t) *Secretary* means the Secretary of Labor or the Secretary's authorized representative.

(u)(1) *Solicitor of Labor* means the Solicitor, United States Department of Labor, and includes attorneys designated by the Solicitor to perform functions of the Solicitor under these regulations.

(2) *Associate Solicitor for Fair Labor Standards* means the Associate Solicitor, who, among other duties, is in charge of litigation for the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(3) *Regional Solicitors* means the attorneys in charge of the various regional offices of the Office of the Solicitor.

(v) *State* means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam. *State agency* means a State agency vested with all powers necessary to cooperate with the U.S.

Department of Labor for purposes of entering into agreements to carry out the Act as provided in section 513 thereof.

(w) *Temporary nonimmigrant alien* means a person who has a residence in a foreign country which he does not intend to abandon and who comes temporarily to the United States, with approval of the Attorney General, to perform temporary service or labor.

(x) The *Wagner-Peyser Act* is the Act of June 6, 1933 (48 Stat. 113; codified in 29 U.S.C. 49 *et seq.*), providing, inter alia, for the establishment of the U.S. Employment Service. *Employment Service of the various States* means a State agency vested with all powers necessary to cooperate with the U.S. Employment Service under the Wagner-Peyser Act.

(y) The *Immigration and Nationality Act* (INA) as amended by the *Immigration Reform and Control Act of 1986* (IRCA) to effectively control unauthorized immigration to the United States and for other purposes, is set out in 8 U.S.C. 1101 *et seq.*

[48 FR 36741, Aug. 12, 1983; 48 FR 38374, Aug. 23, 1983, as amended at 54 FR 13329, Mar. 31, 1989; 56 FR 54708, Oct. 22, 1991; 62 FR 11747, Mar. 12, 1997]

APPLICABILITY OF THE ACT: EXEMPTIONS

### § 500.30 Persons not subject to the Act.

(a) *Family business exemption*. Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(b) *Small business exemption*. Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable. That exemption applies to an agricultural employer who did not, during any calendar quarter of the preceding calendar year, use more man-days of agricultural labor than the limit specified under that statute.

(1) Currently the limit for exemption is 500 man-days.

(2) A *man-day* means any day during which an employee performs agricultural labor for not less than one (1)

hour. Agricultural labor performed by an employer's parent, spouse, child, or other member of his immediate family, i.e., step-children, foster children, stepparents and foster parents, brothers, and sisters is not counted as man-days.

(3) The man-days of agricultural labor rendered in a joint employment relationship are counted toward the man-days of such labor of each employer for purposes of the man-day test of this exemption.

(c) *Common carriers.* Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker. A ''common carrier'' by motor vehicle is one which holds itself out to the general public to engage in transportation of passengers for hire, whether over regular or irregular routes, and which holds a valid certificate of authorization for such purposes from an appropriate local, State or Federal agency.

(d) *Labor organizations.* Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (without regard to the exclusion of agricultural employees in that Act) or as defined under applicable State labor relations law.

(e) *Nonprofit charitable organizations.* Any nonprofit charitable organization or public or private nonprofit educational institution.

(f) *Local short-term contracting activity.* Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(1) *Twenty-five mile intrastate radius* as used in section 4(a)(3)(D) of the Act means that engagement in a farm labor contracting activity may not go beyond a twenty-five mile intrastate geographical radius. Once this limit is transcended, the exemption no longer applies and the person becomes subject to the requirements of the Act. If, for example, a person or his employee solicits workers from a distance greater than twenty-five miles from his permanent residence or from across a State line, then the person has engaged in a named activity outside of the permitted scope of the exemption, and is subject to the requirements of the Act. A person who uses lines of communication (such as U.S. Mail, telephone, or advertising) to recruit, solicit, hire, or furnish workers over a distance greater than twenty-five miles from his permanent residence or from across a State line for agricultural employment is also engaged in a named activity beyond the specified limit of the exemption and is subject to the Act. In the case of a corporation its permanent place of residence for these purposes shall be a single designated location.

(2) *For not more than thirteen weeks per year* as used in section 4(a)(3)(D) of the Act means that farm labor contracting activities may not be engaged in for more than thirteen weeks in a year. This does not mean, however,

that persons who engage in intrastate and short-range farm labor contracting activities are exempt for the first thirteen weeks of their farm labor contracting activities each year. The number of weeks of contracting activity during the prior year is also a factor. When the limit of weeks for the exemption is exceeded in a calendar year, the person is subject immediately to the Act and is also presumed subject to the Act in the next calendar year, unless it can be shown that the tests of section 4(a)(3)(D) are met.

(g) *Custom combine.* Any custom combine, hay harvesting, or sheep shearing operation. *Custom combine, hay harvesting, and sheep shearing operation* means the agricultural services and activities involved in combining grain, harvesting hay and shearing sheep which are provided to a farmer on a contract basis by a person who provides the necessary equipment and labor and who specializes on providing such services and activities.

(h) *Custom poultry operations.* Any custom poultry harvesting, breeding, debeaking, desexing, or health service operation, provided the employees of the operation are not regularly required to be away from their permanent place of residence other than during their normal working hours.

(i) *Seed production exemption.* (1) Any person whose principal occupation or

business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(2) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with paragraph (i)(1) of this section by a person who is exempt thereunder.

(j) *Shade grown tobacco.* (1) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(2) Any person to the extent he is supplied with students or other individuals for agricultural employment is accordance with paragraph (j)(1) of this section by a person who is exempt thereunder.

(k) *Employees of exempt employers.* Any employee of any person described in paragraphs (c) through (j) of this section when performing farm labor contracting activities within the scope of such exemptions and exclusively for such person.

## Subpart B—Registration of Farm Labor Contractors and Employees of Farm Labor Contractors Engaged in Farm Labor Contracting Activities

REGISTRATION REQUIREMENTS; GENERAL

### § 500.40 Registration in general.

Any person who desires to engage in any activity as a farm labor contractor, as defined in the Act and these regulations, and is not exempt, is required first to obtain a Certificate of Registration authorizing each such activity. Any employee of a registered farm labor contractor who performs farm labor contracting activities solely on behalf of such contractor, and who is not an independent contractor, must obtain a Farm Labor Contractor Employee Certificate of Registration authorizing each such activity. The employee's certificate must show the name of the farm labor contractor for whom the activities are to be performed. The contractor whose name appears on the employee's certificate must hold a valid Certificate of Registration covering the entire period shown on the employee's certificate.

### § 500.41 Farm labor contractor is responsible for actions of his farm labor contractor employee.

(a) A farm labor contractor is responsible for assuring that every employee who is performing farm labor contracting activities on behalf of such contractor has obtained either a Farm Labor Contractor Employee Certificate of Registration or a Certificate of Registration as an independent farm labor contractor, as required by the Act and these regulations, prior to such employee's engagement in any activity enumerated in section 3(6) of the Act. A farm labor contractor who utilizes the services of another farm labor contractor who is not his employee must also comply with the provisions of § 500.71. The farm labor contractor is responsible for any violations of the Act or these regulations committed by his employee, whether or not the employee has registered as required by the Act.

(b) A Farm Labor Contractor Employee Certificate of Registration is valid only during the period in which the holder is an employee of the registered farm labor contractor named on the Farm Labor Contractor Employee Certificate. If prior to the expiration of the Employee Certificate, the holder, through a change in employment, should become an employee of a different registered farm labor contractor, a replacement Employee Certificate which names the new employer may be obtained by submitting to the

regional office that issued the original employee certificate or to any regional office of the Wage and Hour Division, Employment Standards Administration, a written statement that includes the date of the change in employment status and the name, the permanent place of residence and certificate registration number of the new employer. Any such change should be reported immediately.

### § 500.42 Certificate of Registration to be carried and exhibited.

Each registered farm labor contractor and registered farm labor contractor employee shall carry at all times while engaging in farm labor contracting activities, a Certificate of Registration or a Farm Labor Contractor Employee Certificate as appropriate and, upon request, shall exhibit that certificate to representatives of the U.S. Department of Labor and State Employment Service Agencies and to all persons with whom he intends to deal as a farm labor contractor or farm labor contractor employee.

### § 500.43 Effect of failure to produce certificate.

The facilities and the services authorized by the Wagner-Peyser Act shall be denied to any farm labor contractor upon refusal or failure to produce, when asked, a Certificate of Registration. Services shall be provided upon presentation of a valid Certificate of Registration.

## APPLICATIONS AND RENEWAL OF FARM LABOR CONTRACTOR AND FARM LABOR CONTRACTOR EMPLOYEE CERTIFICATES

### § 500.44 Form of application.

An application for issuance or renewal of a Farm Labor Contractor Certificate of Registration or Farm Labor Contractor Employee Certificate shall be made on forms designated by the Secretary.

### § 500.45 Contents of application.

The application shall set forth the information required thereon which shall include the following:

(a) A declaration, subscribed and sworn to by the applicant, stating the applicant's permanent place of residence, the farm labor contracting activities for which the certificate is requested, and the address to which official documents should be mailed;

(b) A statement identifying each vehicle to be used to transport any migrant or seasonal agricultural worker and, if the vehicle is or will be owned or controlled by the applicant, documentation showing that the applicant for a Farm Labor Contractor Certificate of Registration is in compliance with the requirements of section 401 of the Act with respect to each such vehicle;

(c) A statement identifying each facility or real property to be used to house any migrant agricultural worker and, if the facility or real property is or will be owned or controlled by the applicant, documentation showing that the applicant for a Farm Labor Contractor Certificate of Registration is in compliance with section 203 of the Act with respect to each such facility or real property;

(d) A set of fingerprints of the applicant on Form FD 258 as prescribed by the U.S. Department of Justice;

(e) A declaration, subscribed and sworn to by the applicant, consenting to the designation by a court of the Secretary as an agent available to accept service of summons in any action against the applicant, if the applicant has left the jurisdiction in which the action is commenced or otherwise has become unavailable to accept service; and

(f) Such other relevant information as the Secretary may require.

### § 500.46 Filing an application.

Registration under the Act is required whether or not licensing or registration is required under State law.

### § 500.47 Place for filing application.

Application forms may be filed in any State Employment Service Office or in any office of the Wage and Hour Division, U.S. Department of Labor.

## ACTION ON APPLICATION

### § 500.48 Issuance of certificate.

The Administrator or authorized representative shall:

(a) Review each application received and determine whether such application is complete and properly executed;

(b) When appropriate, notify the applicant in writing of any incompleteness or error in the application and return the application for correction and completion;

(c) Determine, after appropriate investigation, whether the applicant has complied with the requirements of the Act and these regulations, and if appropriate, issue a Certificate of

Registration or a Farm Labor Contractor Employee Certificate of Registration authorizing the performance of one or more activities permitted under the Act;

(d) Authorize the activity of transporting a migrant or seasonal agricultural worker, subject to the maximum number of workers authorized to be transported under the vehicle liability policy and as indicated on the face of the Certificate of Registration, only upon receipt of:

(1) A statement in the manner prescribed by the Secretary identifying each vehicle to be used, or caused to be used, by the applicant for the transportation of any migrant or seasonal agricultural worker during the period for which registration is sought;

(2) Written proof that every such vehicle which is under the applicant's ownership or control, is in compliance with the vehicle safety requirements of the Act and these regulations; and

(3) Written proof that every such vehicle is in compliance with the insurance requirements of the Act and these regulations;

(e) Authorize the activity of driving a vehicle to transport a migrant or seasonal agricultural worker only upon receipt of (1) A doctor's certificate on the prescribed form, with an initial application for a Certificate of Registration or a Farm Labor Contractor Employee Certificate, and, when applying for a renewal, a new completed doctor's certificate if the previous doctor's certificate is more than three years old; and (2) evidence of a valid and appropriate license, as provided by State law, to operate the vehicle; and

(f) Authorize the activity of housing a migrant agricultural worker only upon receipt of (1) A statement identifying each facility or real property to be used for housing a migrant agricultural worker during the period for which registration is sought; and (2) if the facility or real property is or will be owned or controlled by the applicant, written proof that the facility or real property complies with the applicable Federal and State standards of health and safety. Such written proof may be either a certification issued by a State or local health authority or other appropriate agency, or a copy of a written request for the inspection of a facility or real property made to the appropriate State or local agency at least forty-five days prior to the date on which the facility or real property is to be occupied by migrant agricultural workers, dated and signed by the applicant or other person who owns or controls the facility or real property. If housing authorization is issued based on a written request for inspection and the housing facility or real property is subsequently inspected and does not meet the appropriate standards, the housing authorization is null and void. Should the required written proof for housing authorization be unavailable at the time of filing an application, the applicant must attest in writing that the applicant will not house any migrant agricultural worker in any facility or real property owned or controlled by the applicant, until such applicant shall have submitted all necessary written proof and obtained a Farm Labor Contractor Certificate of Registration showing that housing in the facility or real property is authorized by the Secretary of Labor. In such event, if otherwise eligible, the applicant will be issued a Certificate of Registration without a housing authorization. This certificate may be amended to include an authorization to house at such time as the required proof is forthcoming.

[48 FR 36741, Aug. 12, 1983, as amended at 61 FR 24865, May 16, 1996]

### § 500.50 Duration of certificate.

(a) *Initial certificates of farm labor contractors and farm labor contractor employees.* (1) An initial certificate issued under the Act and these regulations shall expire twelve months from the

date of issuance unless earlier suspended or revoked.

(2) Certificates applied for during the period beginning April 14, 1983, and ending November 30, 1983, may be issued for a period of up to twenty-four months for the purpose of an orderly transition to registration under the Act.

(3) Certificates issued to employees of farm labor contractors shall expire at the suspension, revocation or expiration of the farm labor contractor's Certificate of Registration under which such employee was authorized.

(b) *Certificate renewal of farm labor contractors and farm labor contractor employees.* (1) A certificate issued under the Act and these regulations may be temporarily extended by the filing of a properly completed and signed application with the Secretary at least thirty days prior to the expiration date. ''Filing'' may be accomplished by hand delivery, certified mail, or regular mail.

(i) If the application for renewal is filed by regular mail or if it is delivered in person by the applicant, it must be *received* by the Department of Labor or an authorized representative of the Department of Labor at least 30 days prior to the expiration date shown on the current certificate.

(ii) If the application for renewal is filed by certified mail, it must be *mailed* at least 30 days prior to the expiration date shown on the current certificate.

Where timely application for renewal has been filed, the authority to operate pursuant to a valid certificate under the Act and these regulations shall continue until the renewal application has been finally determined by the Secretary.

(2) A certificate issued under the Act and these regulations may be renewed by the Secretary for additional twelve-month periods or for periods in excess of twelve months but not in excess of twenty-four months.

(3) Eligibility for renewals of certificates for more than twelve months under the Act and these regulations shall be limited to those farm labor contractors and farm labor contractor employees who have not been cited during the preceding five years for a violation of the Act or any regulation under the Act, or the Farm Labor Contractor Registration Act or any regulation under such Act.

(c) *Continuation of certain FLCRA certificates.* (1) Certificates issued under FLCRA, and in effect on April 14, 1983, that are valid for the services performed under FLCRA, will be continued in effect and be accepted as authorization to perform like services under the Act and these regulations for the remainder of calendar year 1983. Such certificates will be subject to the Act and these regulations with respect to determinations to suspend, revoke or refuse renewal.

(2) Actions pending related to the suspension, revocation, or refusal to issue or renew FLCRA certificates shall continue through to a final determination. Any such certificate which is considered to be in effect under title 29 CFR 40.21 pending a final determination, will be considered valid under MSPA, provided application for a certificate under MSPA is made no later than November 30, 1983.

[48 FR 36741, Aug. 12, 1983, as amended at 54 FR 13329, Mar. 31, 1989]

### § 500.51 Refusal to issue or to renew, or suspension or revocation of certificate.

The Secretary may suspend or revoke or refuse to issue or to renew a Certificate of Registration (including a Farm Labor Contractor Employee Certificate) if the applicant or holder:

(a) Has knowingly made any misrepresentation in the application for such certificate;

(b) Is not the real party in interest in the application or Certificate of Registration and the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify under this section for a certificate;

(c) Has failed to comply with the Act or these regulations;

(d) Has failed to pay any court judgment obtained by the Secretary or any other person under the Act or these regulations or under the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act;

(e) Has failed to comply with any final order issued by the Secretary as a

result of a violation of the Act or these regulations or a violation of the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act;

(f) Has been convicted within the preceding five years:

(1) Of any crime under State or Federal law relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incident to any farm labor contracting activities, or

(2) Of any felony under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

(g) Has been found to have violated paragraph (1) or (2) of section 274A(a) of the Immigration and Nationality Act (INA) by hiring, recruiting, or referring for a fee, for employment in the United States, (1) An alien knowing the alien is an unauthorized alien as defined in section 274A(h)(3) of INA with respect to such employment, or (2) an individual without complying with the requirements concerning verification of the person's identity and employment authorization as stated in section 274A(b) of INA.

[48 FR 36741, Aug. 12, 1983, as amended at 54 FR 13329, Mar. 31, 1989]

### § 500.52 Right to hearing.

Any applicant or holder who desires an administrative hearing on the determination to refuse to issue or to renew, or to suspend or to revoke, a Certificate of Registration or a Farm Labor Contractor Employee Certificate of Registration, shall make a request in accordance with § 500.212, no later than thirty (30) days after service of the notice referred to in § 500.210.

### § 500.53 Nontransfer of certificate.

A Certificate of Registration may not be transferred or assigned.

### § 500.54 Change of address.

During the period for which the Certificate of Registration or Employee Certificate is in effect, each farm labor contractor or farm labor contractor employee shall provide to the Secretary, within thirty (30) days, a notice of each change of permanent place of residence in accordance with § 500.215.

### § 500.55 Changes to or amendments of certificate authority.

(a) During the period for which the Certificate of Registration is in effect, a farm labor contractor must apply to the Secretary to amend the Certificate of Registration whenever he intends to:

(1) Engage in another farm labor contracting activity;

(2) Use, or cause to be used, another vehicle than that covered by the certificate to transport any migrant or seasonal agricultural worker; or

(3) Use, or cause to be used, another real property or facility to house any migrant agricultural worker than that covered by the certificate.

(b) Whenever another vehicle or housing facility or real property is or will be owned, operated, or controlled by the farm labor contractor, the farm labor contractor must submit the appropriate information to obtain transportation, driving or housing authorization, as applicable, as described in § 500.48, within 10 days after the contractor obtains or learns of the intended use of such vehicle or housing facility or real property.

(c) Notwithstanding submission of the appropriate information, the farm labor contractor must comply with all applicable motor safety, insurance, and housing safety and health provisions of the Act and these regulations. With regard to housing, the farm labor contractor must submit the appropriate housing documentation as well as comply with the housing safety and health provisions of the Act and these regulations, prior to occupancy by a migrant agricultural worker.

### § 500.56 Replacement of Certificate of Registration or Farm Labor Contractor Employee Certificate.

If a Certificate of Registration or a Farm Labor Contractor Employee Certificate is lost or destroyed, a duplicate certificate may be obtained by the submission to the regional office that issued it or to any regional office of the Wage and Hour Division, Employment

Standards Administration, of a written statement explaining its loss or destruction, indicating where the original application was filed and requesting that a duplicate be issued.

ADDITIONAL OBLIGATIONS OF FARM LABOR CONTRACTORS AND FARM LABOR CONTRACTOR EMPLOYEES

### § 500.60 Farm labor contractors' recruitment, contractual and general obligations.

The Act imposes certain specific recruitment, contractual and general obligations on farm labor contractors and farm labor contractor employees. The contractor is responsible for any violations under the Act committed by his employee. Each of the following obligations applies to both farm labor contractors and farm labor contractor employees.

(a) Each farm labor contractor shall provide to any other farm labor contractor and to any agricultural employer and agricultural association to which such farm labor contractor has furnished any migrant or seasonal agricultural worker, copies of all records for that place of employment which such farm labor contractor is required to retain for each worker furnished or supplied. The recipient of these records shall keep them for a period of three years.

(b) Each farm labor contractor, without regard to any other provisions of this Act, shall obtain at each place of employment and make available for inspection to every worker he furnishes for employment, a written statement of the conditions of such employment as described in sections 201(b) and 301(b) of the Act and §§ 500.75 and 500.76 of these regulations. As with the written disclosure statements under §§ 500.76 and 500.77, these statements must be provided to the workers in English or, as necessary and reasonable, in Spanish or another language common to migrant or seasonal agricultural workers who are not fluent in English.

(c)(1) No farm labor contractor shall violate, without justification, the terms of any written agreements made with an agricultural employer or an agricultural association pertaining to any contracting activity or worker protection under the Act. Normally, ''without justification'' would not include situations in which failure to comply with the terms of any written agreements was directly attributable to Acts of God, due to conditions beyond the control of the person or to conditions which he could not reasonably foresee.

(2) Written agreements do not relieve a farm labor contractor of any responsibility that such contractor would otherwise have under the Act and these regulations.

(d) All payroll records made by the farm labor contractor must be retained by him for a period of three years.

### § 500.61 Farm labor contractors must comply with all worker protections and all other statutory provisions.

Every farm labor contractor must comply with all of the provisions of titles I through V of the Act and all of the subparts of these regulations, unless subject to a specific statutory exemption. In addition to complying with all of the standards stated in subparts A and B of these regulations, every farm labor contractor must comply with each provision stated in subpart C and the motor vehicle safety and insurance and housing standards stated in subpart D.

### § 500.62 Obligations of a person holding a valid Farm Labor Contractor Employee Certificate of Registration.

Any person holding a valid Farm Labor Contractor Employee Certificate of Registration in accordance with the Act and these regulations is required to comply with the Act and these regulations to the same extent as if said person had been required to obtain a Certificate of Registration in such person's own name as a farm labor contractor.

## Subpart C—Worker Protections

GENERAL

### § 500.70 Scope of worker protections.

(a) *General.* The Act provides protections for migrant and seasonal agricultural workers irrespective of whether

they are employed by a farm labor contractor, an agricultural employer or an agricultural association, or, in the case where there is joint responsibility, by more than one of these persons. The Act's provisions include standards relating to vehicle safety, housing safety and health, disclosure of wages, hours and other conditions of employment, and recordkeeping. When any person not otherwise exempt from the Act recruits, solicits, hires, employs, furnishes or transports workers, that person is required to comply with the applicable protective provisions of the Act. In addition, any person not specifically exempt from coverage of the Act (irrespective of whether that person is an agricultural employer, an agricultural association or farm labor contractor) who owns or controls a facility or real property which is used as housing for any migrant agricultural workers must ensure that the facility or real property complies with all substantive Federal and State safety and health standards made applicable to that type of housing. (See § 500.132)

(b) *Wage related protections.* Joint employment under the Fair Labor Standards Act, which establishes responsibility for the maintenance of payroll records, payment of wages and posting of notices under that law, is joint employment under MSPA for establishing responsibility for the maintenance of records, payment of wages and the posting of required posters under MSPA. In such joint employment situations the responsibility for assuring these MSPA protections may be carried out by one of the joint employers. While under a joint employment relationship all joint employers are equally responsible for assuring that the appropriate protections are provided, the creation of such a joint employment relationship does not also require unnecessary duplication of effort as, for example, in relation to the posting of posters (see §§ 500.75(e) and 500.76(e)) or the provision of an itemized written statement of the worker's pay (see § 500.80(d)). Failure to provide protections coming within the joint employment relationship, however, will result in all joint employers being responsible for that failure.

(c) *Transportation related protections.* Responsibility for compliance with the motor vehicle safety and insurance provisions of section 401 of the Act and §§ 500.100 through 500.128 of these regulations is imposed upon the person or persons using or causing to be used, any vehicle for transportation of migrant or seasonal agricultural workers. As stated in these regulations, the transportation safety provisions do not include certain car pooling arrangements. Additionally, these regulations do not impose responsibility on an agricultural employer or agricultural association for a farm labor contractor's failure to adhere to the safety provisions provided in these regulations when the farm labor contractor is providing the vehicles and directing their use. However, when an agricultural employer or agricultural association specifically directs or requests a farm labor contractor to use the contractor's vehicle to carry out a task for the agricultural employer or agricultural association, such direction constitutes causing the vehicle to be used and the agricultural employer or agricultural association is jointly responsible with the farm labor contractor for assuring that the vehicle meets the insurance, and safety and health provisions of these regulations. In all cases a person using a farm labor contractor is required to take reasonable steps to determine that the vehicle used by the farm labor contractor is authorized to be used for transportation as prescribed in section 402 of the Act and § 500.71 of these regulations.

(d) *Housing related protections.* Responsibility for compliance with the housing safety and health provisions of section 203 of the Act and §§ 500.130 through 500.135 of these regulations is imposed upon the person (or persons) who owns or controls a facility or real property used as housing for migrant agricultural workers. Any agricultural employer or agricultural association which has a farm labor contractor operate housing which it owns or controls is responsible, as well as the farm labor contractor, for insuring compliance with the housing safety and health provisions of these regulations. When the owner or operator of the housing is not an agricultural employer, agricultural

association or farm labor contractor, the owner is responsible for that housing meeting the safety and health provisions under the Act and these regulations. This is subject to the exclusion stated in § 500.131 of these regulations which provides that the housing safety and health requirements do not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to any migrant agricultural worker of the same character and on the same or comparable terms and conditions as provided to the general public.

### § 500.71 Utilization of only registered farm labor contractors.

The Act prohibits any person from utilizing the services of a farm labor contractor to supply migrant or seasonal agricultural workers without first taking reasonable steps to determine that the farm labor contractor possesses a valid Certificate of Registration, issued pursuant to the Act, which authorizes the activity for which the contractor is to be utilized. This prohibition also applies to a farm labor contractor who wishes to utilize the services of another farm labor contractor (see § 500.41). In making the determination about a contractor's registration status, a person may rely upon the contractor's possession of a Certificate of Registration which on its face is valid and which authorizes the activity for which the contractor is utilized. A person has the alternative to confirm the contractor's registration through the central registry maintained by the United States Department of Labor.

### § 500.72 Agreements with workers.

(a) The Act prohibits farm labor contractors, agricultural employers and agricultural associations from violating, without justification, the terms of any working arrangements they have made with migrant or seasonal agricultural workers. Normally, ''without justification'' would not include situations in which failure to comply with the terms of any working arrangements was directly attributable to acts of God, due to conditions beyond the control of the person or to conditions which he could not reasonably foresee.

(b) Written agreements do not relieve any person of any responsibility that the person would otherwise have under the Act or these regulations.

### § 500.73 Required purchase of goods or services solely from any person prohibited.

The Act prohibits a farm labor contractor, agricultural employer or agricultural association from requiring a migrant or seasonal agricultural worker to purchase goods or services solely from such farm labor contractor, agricultural employer, or agricultural association, or any other person acting as an agent for any person subject to this prohibition.

## RECRUITING, HIRING AND PROVIDING INFORMATION TO MIGRANT AGRICULTURAL WORKERS

### § 500.75 Disclosure of information.

(a) Where disclosure is required, Department of Labor optional forms may be used to satisfy the requirements of disclosure under the Act.

(b) Each farm labor contractor, agricultural employer, and agricultural association which recruits any migrant agricultural worker shall ascertain to the best of his ability and disclose, in writing to the extent that he has obtained such information, to such worker at the time of recruitment, the following information:

(1) The place of employment (with as much specificity as practical, such as the name and address of the employer or the association);

(2) The wage rates (including piece rates) to be paid;

(3) The crops and kinds of activities on which the worker may be employed;

(4) The period of employment;

(5) The transportation, housing, and any other employee benefits to be provided, if any, and any costs to be charged for each of them;

(6) Whether state workers' compensation or state unemployment insurance is provided:

(i) If workers' compensation is provided, the required disclosure must include the name of the workers' compensation insurance carrier, the

name(s) of the policyholder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which such notice must be given.

(ii) The information requirement in paragraph (b)(6)(i) of this section may be satisfied by giving the worker a photocopy of any workers' compensation notice required by State law;.

(7) The existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(8) The existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(c) Each farm labor contractor, agricultural employer and agricultural association which employs any migrant agricultural worker shall post (and maintain) in a conspicuous place at the place of employment a poster provided by the Secretary of Labor, which sets out the rights and protections for workers required under the Act.

(d) The employer (other than a farm labor contractor) of any migrant agricultural worker, shall provide at the place of employment on request of the worker, a written statement of the conditions of employment. A farm labor contractor shall provide such information in accordance with § 500.60(b) of these regulations.

(e) In a joint employment situation, each employer is equally responsible for displaying and maintaining the poster and for responding to worker requests for written statements of the conditions of employment which are made during the course of employment. This joint responsibility, however, does not require needless duplication, such as would occur if each employer posted the same poster or provided the same written statement with respect to the same employment conditions. Failure to provide the information required by a joint employment relationship, however, will result in all joint employers being responsible for that failure.

(f) Each farm labor contractor, agricultural employer and agricultural association which provides housing for any migrant agricultural worker shall post in a conspicuous place (at the site of the housing) or present in the form of a written statement to the worker the following information on the terms and conditions of occupancy of such housing, if any:

(1) The name and address of the farm labor contractor, agricultural employer

or agricultural association providing the housing;

(2) The name and address of the individual in charge of the housing;

(3) The mailing address and phone number where persons living in the housing facility may be reached;

(4) Who may live at the housing facility;

(5) The charges to be made for housing;

(6) The meals to be provided and the charges to be made for them;

(7) The charges for utilities; and

(8) Any other charges or conditions of occupancy.

(g) If the terms and conditions of occupancy are posted, the poster shall be displayed and maintained during the entire period of occupancy. If the terms and conditions of occupancy are disclosed to the worker through a statement (rather than through a posting), such statement shall be provided to the worker prior to occupancy. Department of Labor optional forms may be used to satisfy this requirement.

[48 FR 36741, Aug. 12, 1983, as amended at 61 FR 24866, May 16, 1996]

HIRING AND PROVIDING INFORMATION TO SEASONAL AGRICULTURAL WORKERS

### § 500.76 Disclosure of information.

(a) Where disclosure is required, Department of Labor optional forms may be used to satisfy the requirements of disclosure under the Act.

(b) Each farm labor contractor, agricultural employer and agricultural association, which recruits any seasonal agricultural worker for employment on a farm or ranch to perform field work

related to planting, cultivating or harvesting operations, shall ascertain and, upon request, disclose in writing the following information to such worker when an offer of employment is made:

(1) The place of employment (with as much specificity as practical, such as the name and address of the employer or the association);

(2) The wage rates (including piece rates) to be paid;

(3) The crops and kinds of activities on which the worker may be employed;

(4) The period of employment;

(5) The transportation and any other employee benefits to be provided, if any, and any costs to be charged for each of them;

(6) Whether state workers' compensation or state unemployment insurance is provided:

(i) If workers' compensation is provided, the required disclosure must include the name of the workers' compensation insurance carrier, the name(s) of the policyholder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which such notice must be given.

(ii) The information requirement in paragraph (b)(6)(i) of this section may satisfied giving the worker a photocopy of any workers' compensation notice required by State law;

(7) The existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(8) The existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(c) Each farm labor contractor, agricultural employer and agricultural association which recruits any seasonal agricultural worker for employment through the use of day-haul operation in canning, packing, ginning, seed conditioning or related research, or processing operations, shall ascertain and disclose in writing to the worker at the time of recruitment the information on employment conditions set out in paragraph (b) of this section.

(d)(1) Each farm labor contractor, agricultural employer and agricultural association which employs any seasonal agricultural worker shall post (and maintain) at the place of employment in a conspicuous place readily accessible to the worker a poster provided by the Secretary of Labor which sets out the rights and protections for such worker required under the Act.

(2) Such employer shall provide, on request of the worker, a written statement of the information described in paragraph (b) of this section.

(e) In a joint employment situation, each employer is equally responsible for displaying and maintaining the poster and for responding to worker requests for written statements of the conditions of employment which are made during the course of employment. This joint responsibility, however, does not require needless duplication, such as would occur if each employer posted the same poster or provided the same written statement with respect to the same employment conditions.

[48 FR 36741, Aug. 12, 1983, as amended at 61 FR 24866, May 16, 1996]

EMPLOYMENT INFORMATION FURNISHED

### § 500.77 Accuracy of information furnished.

No farm labor contractor, agricultural employer or agricultural association shall knowingly provide false or misleading information on the terms, conditions or existence of agricultural employment and housing required to be disclosed by the Act and these regulations to any migrant or seasonal agricultural worker.

### § 500.78 Information in foreign language.

Each farm labor contractor, agricultural employer and agricultural association shall make all required written disclosures to the worker, including the written disclosures of the terms and conditions of occupancy of housing to be provided to any migrant worker, in English or, as necessary and reasonable, in Spanish or another language

common to migrant or seasonal agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, Haitian-Creole and other languages, as necessary, which may be used in providing workers with such information.

WAGES AND PAYROLL STANDARDS

### § 500.80 Payroll records required.

(a) Each farm labor contractor, agricultural employer and agricultural association which employs any migrant or seasonal agricultural worker shall make and keep the following records with respect to each worker including the name, permanent address, and Social Security number:

(1) The basis on which wages, are paid;

(2) The number of piecework units earned, if paid on a piecework basis;

(3) The number of hours worked;

(4) The total pay period earnings;

(5) The specific sums withheld and the purpose of each sum withheld; and

(6) The net pay.

(b) Each farm labor contractor, agricultural employer and agricultural association which employs any migrant or seasonal agricultural worker shall preserve all payroll records with respect to each such worker for a period of three years.

(c) When a farm labor contractor furnishes any migrant or seasonal agricultural worker, and the farm labor contractor is the employer, the farm labor contractor must furnish the agricultural employer, agricultural association or other farm labor contractor to whom the workers are furnished, a copy of all payroll records required under paragraph (a) of this section which the farm labor contractor has made regarding such worker for that place of employment. The person receiving such records shall maintain them for a period of three years.

(d) In addition to making records of this payroll information, the farm labor contractor, agricultural employer and agricultural association shall provide each migrant or seasonal agricultural worker employed with an itemized written statement of this information at the time of payment for each pay period which must be no less often than every two weeks (or semi-monthly). Such statement shall also include the employer's name, address, and employer identification number assigned by the Internal Revenue Service. This responsibility does not require needless duplication such as would occur if each provided the worker with a written itemized statement for the same work.

### § 500.81 Payment of wages when due.

Each farm labor contractor, agricultural employer and agricultural association which employs any migrant or seasonal agricultural worker must pay the wages owed such worker when due. In meeting this responsibility, the farm labor contractor, agricultural employer and agricultural association shall pay the worker no less often than every two weeks (or semi-monthly).

## Subpart D—Motor Vehicle Safety and Insurance for Transportation of Migrant and Seasonal Agricultural Workers, Housing Safety and Health for Migrant Workers

MOTOR VEHICLE SAFETY

### § 500.100 Vehicle safety obligations.

(a) *General obligations.* Each farm labor contractor, agricultural employer and agricultural association which uses, or causes to be used, any vehicle to transport a migrant or seasonal agricultural worker shall ensure that such vehicle conforms to vehicle safety standards prescribed by the Secretary of Labor under the Act and with other applicable Federal and State safety standards. Each farm labor contractor, agricultural employer and agricultural association shall also ensure that each driver of any such vehicle has a currently valid motor vehicle operator's permit or license, as provided by applicable State law, to operate the vehicle.

(b) *Proof of compliance with vehicle safety standards.* Prima facie evidence that safety standards have been met will be shown by the presence of a current State vehicle inspection sticker. Such sticker will not, however, relieve

the farm labor contractor, agricultural employer or agricultural association from responsibility for maintaining the vehicle in accordance with § 500.104 or § 500.105, as applicable.

(c) *Uses or causes to be used.* The term ''uses or causes to be used'' as set forth in paragraph (a) of this section does not include carpooling arrangements made by the workers themselves, using one of the workers' own vehicles. However, carpooling does not include any transportation arrangement in which a farm labor contractor participates or which is specifically directed or requested by an agricultural employer or an agricultural association.

### § 500.101 Promulgation and adoption of vehicle standards.

(a) *General.* All transportation of migrant and seasonal agricultural workers, whether on the farm or on the road, shall be subject to the vehicle safety standards of the Act, except for activities under the circumstances set out in § 500.103.

(b) *Compliance required.* Any violation of the standards promulgated by the Secretary in § 500.104 or adopted by the Secretary in § 500.105 shall be a violation of the Act and these regulations.

(c) *Development of Department of Labor Standards.* In developing the regulations in § 500.104, the Secretary has considered among other factors: (1) The type of vehicle used, (2) the passenger capacity of the vehicle, (3) the distance which such workers will be carried in the vehicle, (4) the type of roads and highways on which such workers will be carried in the vehicle, and (5) the extent to which a proposed standard would cause an undue burden on agricultural employers, agricultural associations, or farm labor contractors.

(d) *Adoption of Department of Transportation (DOT) Standards.* In accordance with section 401(b)(2)(C) of the Act, the Secretary has adopted in § 500.105 of these regulations, the DOT standards, without regard to the mileage and boundary limitations established in 49 U.S.C. 3102(c).

### § 500.102 Applicability of vehicle safety standards.

(a) Any passenger automobile or station wagon used or caused to be used by any farm labor contractor, agricultural employer or agricultural association to transport any migrant or seasonal agricultural worker shall meet the vehicle safety standards prescribed in § 500.104.

(b) Any vehicle, other than a passenger automobile or station wagon, used or caused to be used by any farm labor contractor, agricultural employer or agricultural association to transport any migrant or seasonal agricultural worker pursuant to a day-haul operation shall be subject to the safety standards prescribed under § 500.105.

(c) Any vehicle, other than a passenger automobile or station wagon, which has been or is being used or caused to be used for any trip of a distance greater than 75 miles by a farm labor contractor, agricultural employer or agricultural association to transport any migrant or seasonal agricultural worker, shall be subject to the safety standards prescribed under § 500.105. One trip may have numerous intermediate stops.

(d) Any vehicle, other than a passenger automobile or station wagon, used or caused to be used by any farm labor contractor, agricultural employer or agricultural association to transport any migrant or seasonal agricultural worker in any manner not addressed by paragraphs (a), (b), or (c) of this section shall meet the vehicle safety standards prescribed in § 500.104.

(e) The use or intended use of a vehicle, other than a passenger automobile or station wagon, for transportation of the type identified in § 500.102(b) or § 500.102(c) will make the vehicle subject to the standards prescribed under § 500.105, so long as the vehicle is used for transportation subject to the Act and these regulations.

(f) Any pickup truck used only for transportation subject to § 500.104 when transporting passengers only within the cab shall be treated as a station wagon.

(g) Pursuant to section 401(b)(2)(C) of the Act, standards prescribed by the Secretary shall be in addition to, and shall not supersede nor modify, any standards prescribed under part II of the Interstate Commerce Act and any successor provision of subtitle IV of

title 49, U.S. Code or the regulations issued thereunder which is independently applicable to transportation to which this section applies. A violation of any such standard shall also constitute a violation of the Act and these regulations.

[48 FR 36741, Aug. 12, 1983; 48 FR 38380, Aug. 23, 1983]

### § 500.103 Activities not subject to vehicle safety standards.

(a) *Agricultural machinery and equipment excluded.* Vehicle safety standards or insurance requirements issued under the Act and these regulations do not apply to the transportation of any seasonal or migrant agricultural worker on a tractor, combine, harvester, picker, other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry. This exclusion applies only to workers carrying out these activities on such machinery and equipment or being engaged in transportation incidental thereto. The exclusion does not include the use of such machinery for the transportation of any worker under any other circumstances.

(b) *Exclusion for immediate family transporting family members.* The standards of this subpart do not apply to an individual migrant or seasonal agricultural worker when the only other occupants of that individual's vehicle consist of his immediate family members as defined in § 500.20(o).

(c) *Carpooling.* Vehicle safety standards or insurance requirements of the Act and these regulations do not apply to carpooling arrangements made by the workers themselves, using one of the workers' own vehicles and not specifically directed or requested by an agricultural employer or agricultural association. Carpooling, however, does not include any transportation arrangement in which a farm labor contractor participates.

(See also § 500.120)

### § 500.104 Department of Labor standards for passenger automobiles and station wagons and transportation of seventy-five miles or less.

Any farm labor contractor, agricultural employer or agricultural association providing transportation in passenger automobiles and station wagons and other vehicles used only for transportation as provided in § 500.102(a) and (d) shall comply with the following vehicle safety standards:

(a) *External lights.* Head lights, tail lights, stop lights, back-up lights, turn signals and hazard warning lights shall be operable.

(b) *Brakes.* Every vehicle shall be equipped with operable brakes for stopping and holding on an incline. Brake systems shall be free of leaks.

(c) *Tires.* Tires shall have at least 2/32 inch tread depth, and have no cracks/defects in the sidewall.

(d) *Steering.* The steering wheel and associated mechanism shall be maintained so as to safely and accurately turn the vehicles.

(e) *Horn.* Vehicles shall have an operable air or electric horn.

(f) *Mirrors.* Mirrors shall provide the driver full vision of the sides and to the rear of the vehicle.

(g) *Windshields/windshield wipers.* Windshields and windows may not have cracks or opaque obstructions which obscure vision. Vehicles shall be equipped with windshield wipers that are operational to allow the operator full frontal vision in all weather conditions.

(h) *Fuel system.* Fuel lines and the fuel tank shall be free of leaks. The tank shall be fitted with a cap to securely cover the filling opening.

(i) *Exhaust system.* The exhaust system shall discharge carbon monoxide away from the passenger compartment and be free of leaks beneath the passenger compartment.

(j) *Ventilation.* Windows will be operational to allow fresh air to the occupants of the vehicle.

(k) *Safe loading.* Vehicles will not be driven when loaded beyond the manufacturer's gross vehicle weight rating.

(l) *Seats.* A seat securely fastened to the vehicle will be provided for each occupant or rider in, or on, any vehicle, except that transportation which is

primarily on private farm roads will be excused from this requirement provided the total distance traveled does not exceed ten (10) miles, and so long as the trip begins and ends on a farm owned or operated by the same employer.

(m) *Handles and latches.* Door handles and latches shall be provided and maintained to allow exiting capability for vehicle occupants.

(n) *Passenger compartment.* Floor and sides of any part of the vehicle to be occupied by passengers must be free of openings, rusted areas or other defects which are likely to result in injury to passengers.

### § 500.105 DOT standards adopted by the Secretary.

(a) Any farm labor contractor, agricultural employer or agricultural association providing transportation in vehicles other than passenger automobiles and station wagons used for transportation as provided in § 500.102 (b), (c), and (e) shall comply with the motor carrier safety standards listed in paragraph (b) of this section.

(b) The Secretary for the purposes of this section has adopted from 49 CFR part 398 the following pertinent standards. (In adopting these standards, editorial changes necessitated by the Act and these regulations have been made to conform the language to these regulations):

(1) *Qualification of drivers or operators (Source: 49 CFR 398.3)*—(i) *Compliance required.* Every person subject to this Act who drives a motor vehicle or is responsible for the hiring, supervision, training, assignment or dispatching of drivers shall comply and be conversant with the requirements of this section.

(ii) *Minimum physical requirements.* No such person shall drive, nor shall any such person require or permit any person to drive, any motor vehicle unless such person possesses the following minimum qualifications:

(A) No loss of foot, leg, hand or arm,

(B) No mental, nervous, organic, or functional disease, likely to interfere with safe driving.

(C) No loss of fingers, impairment of use of foot, leg, fingers, hand or arm, or other structural defect or limitation, likely to interfere with safe driving.

(D) *Eyesight.* Visual acuity of at least 20/40 (Snellen) in each eye either without glasses or by correction with glasses; form field of vision in the horizontal meridian shall not be less than a total of 140 degrees; ability to distinguish colors red, green and yellow; drivers requiring correction by glasses shall wear properly prescribed glasses at all times when driving.

(E) *Hearing.* Hearing shall not be less than 10/20 in the better ear, for conversational tones, without a hearing aid.

(F) *Liquor, narcotics and drugs.* Shall not be addicted to the use of narcotics or habit forming drugs, or the excessive use of alcoholic beverages or liquors.

(G) *Initial and periodic physical examination of drivers.* No such person shall drive nor shall any such person require or permit any person to drive any motor vehicle unless within the immediately preceding 36-month period such person shall have been physically examined and shall have been certified in accordance with the provisions of paragraph (b)(1)(ii)(H) of this section by a licensed doctor of medicine or osteopathy as meeting the requirements of this subsection.

(H) *Certificate of physical examination.* Every person shall have in his files at his principal place of business for every driver employed or used by him a legible certificate of a licensed doctor of medicine or osteopathy based on a physical examination as required by paragraph (b)(1)(ii)(G) of this section or a legible photographically reproduced copy thereof, and every driver shall have in his possession while driving, such a certificate or a photographically reproduced copy thereof covering himself.

(I) *Doctor's certificate.* The doctor's certificate shall certify as follows:

DOCTOR'S CERTIFICATE

(Driver of Migrant Workers)

This is to certify that I have this day examined _____ in accordance with § 398.3(b) of the Federal Motor Carrier Safety Regulations of the Federal Highway Administration and that I find him

Qualified under said rules ☐

Qualified only when wearing glasses ☐

I have kept on file in my office a completed examination.

(Date) _____

(Place) _____

_____

(Signature of examining doctor)

_____

(Address of doctor)

_____

(Signature of driver)

_____

(Address of driver)

(iii) *Minimum age and experience requirements.* No person shall drive, nor shall any person require or permit any person to drive, any motor vehicle unless such person possesses the following minimum qualifications:

(A) *Age.* Minimum age shall be 21 years.

(B) *Driving skill.* Experience in driving some type of motor vehicle (including private automobiles) for not less than one year, including experience throughout the four seasons.

(C) *Knowledge of regulations.* Familiarity with the rules and regulations prescribed in this part pertaining to the driving of motor vehicles.

(D) *Knowledge of English.* Every driver shall be able to read and speak the English language sufficiently to understand highway traffic signs and signals and directions given in English and to respond to official inquiries.

(E) *Driver's permit.* Possession of a valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued.

(2) *Driving of motor vehicles (Source: 49 CFR 398.4)*—(i) *Compliance required.* Every person shall comply with the requirements of this section, shall instruct its officers, agents, representatives and drivers with respect thereto, and shall take such measures as are necessary to insure compliance therewith by such persons. All officers, agents, representatives, drivers, and employees of persons subject to this Act directly concerned with the management, maintenance, operation, or driving of motor vehicles, shall comply with and be conversant with the requirements of this section.

(ii) *Driving rules to be obeyed.* Every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless such laws, ordinances and regulations are at variance with specific regulations of the Federal Highway Administration, which impose a greater affirmative obligation or restraint.

(iii) [Reserved]

(iv) *Alcoholic beverages.* No driver shall drive or be required or permitted to drive a motor vehicle, be in active control of any such vehicle, or go on duty or remain on duty, when under the influence of any alcoholic beverage or liquor, regardless of its alcoholic content, nor shall any driver drink any such beverage or liquor while on duty.

(v) *Schedules to conform with speed limits.* No person shall permit nor require the operation of any motor vehicle between points in such period of time as would necessitate the vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the vehicle is being operated.

(vi) *Equipment and emergency devices.* No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts, accessories, and emergency devices are in good working order; nor shall any driver fail to use or make use of such parts, accessories, and devices when and as needed:

Service brakes, including trailer brake connections.
Parking (hand) brake.
Steering mechanism.
Lighting devices and reflectors.
Tires.
Horn.
Windshield wiper or wipers.
Rear-vision mirror or mirrors.
Coupling devices.
Fire extinguisher, at least one properly mounted.
Road warning devices, at least one red burning fusee and at least three flares (oil burning pot torches), red electric lanterns, or red emergency reflectors.

(vii) *Safe loading*—(A) *Distribution and securing of load.* No motor vehicle shall be driven nor shall any motor carrier permit or require any motor vehicle to be driven if it is so loaded, or if the load thereon is so improperly distributed or so inadequately secured, as to prevent its safe operation.

(B) *Doors, tarpaulins, tailgates and other equipment.* No motor vehicle shall be driven unless the tailgate, tailboard, tarpaulins, doors, all equipment and rigging used in the operation of said vehicle, and all means of fastening the load, are securely in place.

(C) *Interference with driver.* No motor vehicle shall be driven when any object obscures his view ahead, or to the right or left sides, or to the rear, or interferes with the free movement of his arms or legs, or prevents his free and ready access to the accessories required for emergencies, or prevents the free and ready exit of any person from the cab or driver's compartment.

(D) *Property on motor vehicles.* No vehicle transporting persons and property shall be driven unless such property is stowed in a manner which will assure: (*1*) Unrestricted freedom of motion to the driver for proper operation of the vehicle; (*2*) unobstructed passage to all exits by any person; and (*3*) adequate protection to passengers and others from injury as a result of the displacement or falling of such articles.

(E) *Maximum passengers on motor vehicles.* No motor vehicle shall be driven if the total number of passengers exceeds the seating capacity which will be permitted on seats prescribed in § 500.105(b)(3)(vi). All passengers carried on such vehicle shall remain seated while the motor vehicle is in motion.

(viii) *Rest and meal stops.* Every person shall provide for reasonable rest stops at least once between meal stops. Meal stops shall be made at intervals not to exceed six hours and shall be for a period of not less than 30 minutes duration.

(ix) *Kinds of motor vehicles in which workers may be transported.* Workers may be transported in or on only the following types of motor vehicles: A bus, a truck with no trailer attached, or a semitrailer attached to a truck-tractor provided that no other trailer is attached to the semitrailer. Closed vans without windows or means to assure ventilation shall not be used.

(x) *Limitation on distance of travel in trucks.* Any truck when used for the transportation of migrant or seasonal agricultural workers, if such workers are being transported in excess of 600 miles, shall be stopped for a period of not less than eight consecutive hours either before or upon completion of 600 miles travel, and either before or upon completion of any subsequent 600 miles travel to provide rest for drivers and passengers.

(xi) *Lighting devices and reflectors.* No motor vehicle shall be driven when any of the required lamps or reflectors are obscured by the tailboard, by any and all lighting devices required pursuant to 49 U.S.C. 3102(c) shall be lighted during darkness or at any other time when there is not sufficient light to render vehicles and persons visible upon the highway at a distance of 500 feet.

(xii) *Ignition of fuel; prevention.* No driver or other person shall: (A) Fuel a motor vehicle with the engine running, except when it is necessary to run the engine to fuel the vehicle; (B) smoke or expose any open flame in the vicinity of a vehicle being fueled; (C) fuel a motor vehicle unless the nozzle of the fuel hose is continuously in contact with the intake pipe of the fuel tank; (D) permit any other person to engage in such activities as would be likely to result in fire or explosion.

(xiii) *Reserve fuel.* No supply of fuel for the propulsion of any motor vehicle or for the operation of any accessory thereof shall be carried on the motor vehicle except in a properly mounted fuel tank or tanks.

(xiv) *Driving by unauthorized person.* Except in case of emergency, no driver shall permit a motor vehicle to which he is assigned to be driven by any person not authorized to drive such vehicle.

(xv) *Protection of passengers from weather.* No motor vehicle shall be driven while transporting passengers unless the passengers therein are protected from inclement weather conditions such as rain, snow, or sleet, by use of the top or protective devices required by § 500.105(b)(3)(vi)(E).

(xvi) *Unattended vehicles; precautions.* No motor vehicle shall be left unattended by the driver until the parking brake has been securely set, the wheels chocked, and all reasonable precautions have been taken to prevent the movement of such vehicle.

(xvii) *Railroad grade crossings; stopping required; sign on rear of vehicle.*

Every motor vehicle shall, upon approaching any railroad grade crossing, make a full stop not more than 50 feet, nor less than 15 feet from the nearest rail of such railroad grade crossing, and shall not proceed until due caution has been taken to ascertain that the course is clear; except that a full stop need not be made at:

(A) A street car crossing within a business or residence district of a municipality;

(B) A railroad grade crossing where a police officer or a traffic-control signal (not a railroad flashing signal) directs traffic to proceed:

(C) An abandoned or exempted grade crossing which is clearly marked as such by or with the consent of the proper state authority, when such marking can be read from the driver's position.

All such motor vehicles shall display a sign on the rear reading, ''This Vehicle Stops at Railroad Crossings.''

(3) *Parts and accessories necessary (Source: 49 CFR 398.5)*—(i) *Compliance*. Every person and its officers, agents, drivers, representatives and employees directly concerned with the installation and maintenance of equipment and accessories shall comply and be conversant with the requirements and specifications of this part, and no person shall operate any motor vehicle, or cause or permit it to be operated, unless it is equipped in accordance with said requirements and specifications.

(ii) *Lighting devices*. Every motor vehicle shall be equipped with the lighting devices and reflectors required pursuant to 49 U.S.C. 3102 (c).

(iii) *Brakes*. Every motor vehicle shall be equipped with brakes as required pursuant to 49 U.S.C. 3102 (c).

(iv) *Coupling devices; fifth wheel mounting and locking*. The lower half of every fifth wheel mounted on any truck-tractor or dolly shall be securely affixed to the frame thereof by U-bolts of adequate size, securely tightened, or by other means providing at least equivalent security. Such U-bolts shall not be of welded construction. The installation shall be such as not to cause cracking, warping, or deformation of the frame. Adequate means shall be provided positively to prevent the shifting of the lower half of a fifth wheel on the frame to which it is attached. The upper half of every fifth wheel shall be fastened to the motor vehicle with at least the security required for the securing of the lower half to a truck-tractor or dolly. Locking means shall be provided in every fifth wheel mechanism including adapters when used, so that the upper and lower halves may not be separated without the operation of a positive manual release. A release mechanism operated by the driver from the cab shall be deemed to meet this requirement. On fifth wheels designed and constructed so as to be readily separable, the fifth wheel locking devices shall apply automatically on coupling for any motor vehicle the date of manufacture of which is subsequent to December 31, 1952.

(v) *Tires*. Every motor vehicle shall be equipped with tires of adequate capacity to support its gross weight. No motor vehicle shall be operated on tires which have been worn so smooth as to expose any tread fabric or which have any other defect likely to cause failure. No vehicle shall be operated while transporting passengers while using any tire which does not have tread configurations on that part of the tire which is in contact with the road surface. No vehicle transporting passengers shall be operated with regrooved, re-capped, or re-treaded tires on front wheels.

(vi) *Passenger compartment*. Every motor vehicle transporting passengers, other than a bus, shall have a passenger compartment meeting the following requirements:

(A) *Floors*. A substantially smooth floor, without protruding obstructions more than two inches high, except as are necessary for securing seats or other devices to the floor, and without cracks or holes.

(B) *Sides*. Side walls and ends above the floor at least 60 inches high, by attachment of sideboards to the permanent body construction if necessary. Stake body construction shall be construed to comply with this requirement only if all six-inch or larger spaces between stakes are suitably closed to prevent passengers from falling off the vehicle.

(C) *Nails, screws, splinters.* The floor and the interior of the sides and ends of the passenger-carrying space shall be free of inwardly protruding nails, screws, splinters, or other projecting objects likely to be injurious to passengers or their apparel.

(D) *Seats.* A seat shall be provided for each worker transported. The seats shall be: Securely attached to the vehicle during the course of transportation; not less than 16 inches nor more than 19 inches above the floor; at least 13 inches deep; equipped with backrests extending to a height of at least 36 inches above the floor, with at least 24 inches of space between the backrests or between the edges of the opposite seats when face to face; designed to provide at least 18 inches of seat for each passenger; without cracks more than two inches wide, and the exposed surfaces, if made of wood, planed or sanded smooth and free of splinters.

(E) *Protection from weather.* Whenever necessary to protect the passengers from inclement weather conditions, be equipped with a top at least 80 inches high above the floor and facilities for closing the sides and ends of the passenger-carrying compartment. Tarpaulins or other such removable devices for protection from the weather shall be secured in place.

(F) *Exit.* Adequate means of ingress and egress to and from the passenger space shall be provided on the rear or at the right side. Such means of ingress and egress shall be at least 18 inches wide. The top and the clear opening shall be at least 60 inches high, or as high as the side wall of the passenger space if less than 60 inches. The bottom shall be at the floor of the passenger space.

(G) *Gates and doors.* Gates or doors shall be provided to close the means of ingress and egress and each such gate or door shall be equipped with at least one latch or other fastening device of such construction as to keep the gate or door securely closed during the course of transportation; and readily operative without the use of tools.

(H) *Ladders or steps.* Ladders or steps for the purpose of ingress or egress shall be used when necessary. The maximum vertical spacing of footholds shall not exceed 12 inches, except that the lowest step may be not more than 18 inches above the ground when the vehicle is empty.

(I) *Hand holds.* Hand holds or devices for similar purpose shall be provided to permit ingress and egress without hazard to passengers.

(J) *Emergency exit.* Vehicles with permanently affixed roofs shall be equipped with at least one emergency exit having a gate or door, latch and hand hold as prescribed in paragraphs (b)(3)(vi) (G) and (I) of this section and located on a side or rear not equipped with the exit prescribed in paragraph (b)(3)(vi)(F) of this section.

(K) *Communication with driver.* Means shall be provided to enable the passengers to communicate with the driver. Such means may include telephone, speaker tubes, buzzers, pull cords, or other mechanical or electrical means.

(vii) *Protection from cold.* Every motor vehicle shall be provided with a safe means of protecting passengers from cold or undue exposure, but in no event shall heaters of the following types be used:

(A) *Exhaust heaters.* Any type of exhaust heater in which the engine exhaust gases are conducted into or through any space occupied by persons or any heater which conducts engine compartment air into any such space.

(B) *Unenclosed flame heaters.* Any type of heater employing a flame which is not fully enclosed.

(C) *Heaters permitting fuel leakage.* Any type of heater from the burner of which there could be spillage or leakage of fuel upon the tilting or overturning of the vehicle in which it is mounted.

(D) *Heaters permitting air contamination.* Any heater taking air, heated or to be heated, from the engine compartment or from direct contact with any portion of the exhaust system; or any heater taking air in ducts from the outside atmosphere to be conveyed through the engine compartment, unless said ducts are so constructed and installed as to prevent contamination of the air so conveyed by exhaust or engine compartment gases.

(E) Any heater not securely fastened to the vehicle.

(4) *Hours of service of drivers; maximum driving time (Source: 49 CFR 398.6).* No

person shall drive nor shall any person permit or require a driver employed or used by it to drive or operate for more than 10 hours in the aggregate (excluding rest stops and stops for meals) in any period of 24 consecutive hours, unless such driver be afforded eight consecutive hours rest immediately following the 10 hours aggregate driving. The term ''24 consecutive hours'' as used in this part means any such period starting at the time the driver reports for duty.

(5) *Inspection and maintenance of motor vehicles (Source: 49 CFR 398.7).* Every person shall systematically inspect and maintain or cause to be systematically maintained, all motor vehicles and their accessories subject to its control, to insure that such motor vehicles and accessories are in safe and proper operating condition.

[48 FR 36741, Aug. 12, 1983; 48 FR 38380, Aug. 23, 1983]

INSURANCE

### § 500.120 Insurance policy or liability bond is required for each vehicle used to transport any migrant or seasonal agricultural worker.

A farm labor contractor, agricultural employer or agricultural association shall not transport any migrant or seasonal agricultural worker or his property in any vehicle such contractor, employer or association owns, operates, controls, or causes to be operated unless he has an insurance policy or liability bond in effect which insures against liability for damage to persons or property arising from the ownership, operation, or causing to be operated of such vehicle. Generally, the owner or lessor of the vehicle will be responsible for providing the required insurance. The insurance requirements do not apply to vehicles involved in carpooling arrangements made by the workers themselves, using one of the workers' own vehicles and not specifically directed or requested by an agricultural employer or agricultural association. However, carpooling does not include any transportation arrangement in which a farm labor contractor participates. Activities exempt from transportation safety standards are also exempt from insurance requirements. (See also § 500.103.)

### § 500.121 Coverage and level of insurance required.

(a) Except where a liability bond pursuant to § 500.124 of this part has been approved by the Secretary, a farm labor contractor, agricultural employer or agricultural association shall, in order to meet the insurance requirements in § 500.120, obtain a policy of vehicle liability insurance.

(b) The amount of vehicle liability insurance shall not be less than $100,000 for each seat in the vehicle, but in no event is the total insurance required to be more than $5,000,000 for any one vehicle. The number of seats in the vehicle shall be determined by reference to § 500.105(b)(3)(vi). See § 500.122 regarding insurance requirements where State workers' compensation coverage is provided.

(c) The insurance to be obtained under paragraph (a) of this section shall be issued by an insurance carrier licensed or otherwise authorized to do business in the State in which the insurance is obtained.

(d) The vehicle liability insurance to be obtained under paragraph (a) of this section shall be endorsed to insure against liability for personal injury to employees whose transportation is not covered by workers' compensation insurance, and to persons who are not employees; and for property damage as specified in (b) of this section.

(e) An agricultural employer or agricultural association may evidence the purchase of liability insurance which covers the workers while being transported, as required under paragraph (a) by obtaining and making available upon request to the Department of Labor a completed liability certificate of insurance showing that insurance conforming to the limits required by paragraph (b) and the coverage required by paragraph (d) of this section is in effect. A farm labor contractor must obtain such a certificate and provide a copy to the Administrator when applying for authorization to transport migrant or seasonal agricultural workers.

(f) With respect to an agricultural employer or agricultural association,

in the absence of the insurance certificate referred to under paragraph (e) of this section, the Department of Labor will look to the actual policy of insurance in determining compliance with the insurance requirements.

[48 FR 36741, Aug. 12, 1983, as amended at 57 FR 3905, Jan. 31, 1992; 61 FR 24866, May 16, 1996]

### § 500.122 Adjustments in insurance requirements when workers' compensation coverage is provided under State law.

(a) If a farm labor contractor, agricultural employer or agricultural association referred to in § 500.120 is the employer of a migrant or seasonal agricultural worker for purposes of a State workers' compensation law and such employer provides workers' compensation coverage for such worker in the case of bodily injury or death as provided by such State law, the following adjustments in the insurance requirements relating to having an insurance policy or liability bond apply:

(1) Except as provided in § 500.123, no vehicle liability insurance policy or liability bond shall be required of the employer, if such worker is transported only under circumstances for which there is coverage under such State law.

(2) A liability insurance policy or liability bond shall be required of the employer for circumstances under which coverage for the transportation of such worker is not provided under such State law.

(b) [Reserved]

(c) A farm labor contractor, agricultural employer or agricultural association who is the employer of a migrant or seasonal agricultural worker may evidence the issuance of workers' compensation insurance and passenger insurance under paragraph (a) of this section by obtaining and making available upon request to the Department of Labor:

(1) A workers' compensation coverage policy of insurance; and

(2) A certificate of liability insurance covering transportation of all passengers who are not employees and of workers whose transportation by the employer is not covered by workers' compensation insurance. See § 500.121.

(d) In the absence of the insurance certificate referred to under paragraph (c)(2) of this section, the Department of Labor will look to the actual policy of insurance or liability bond in determining compliance with the Act and these regulations.

[48 FR 36741, Aug. 12, 1983, as amended at 56 FR 30327, July 2, 1991; 61 FR 24866, May 16, 1996]

### § 500.123 Property damage insurance required.

(a) When a person who is an employer of a migrant or seasonal agricultural worker provides workers' compensation insurance which protects such worker in the event of bodily injury or death while the worker is being transported, such person must also obtain insurance providing a minimum of $50,000 for loss or damage in any one accident to the property of others (excluding cargo), or evidence of a general liability insurance policy that provides the same protection.

(b) Such person may evidence the purchase of motor carrier insurance or other appropriate insurance providing such property damage protection by obtaining and making available upon request to the Department of Labor a vehicle or other liability certificate of insurance showing that such person has obtained the property damage insurance required under paragraph (a) of this section.

(c) In the absence of the insurance certificate referred to in paragraph (b) of this section, the Department of Labor will look to the actual policy of insurance in determining compliance with paragraph (a) of this section.

### § 500.124 Liability bond in lieu of insurance policy.

Financial responsibility in lieu of insurance may be evidenced by a liability bond executed as the ''principal'' by the person who will be transporting a migrant or seasonal agricultural worker, together with a third party identified in the instrument as the ''surety'', to assure payment of any liability up to $500,000 for damages to persons or property arising out of such person's ownership of, operation of, or causing to be operated any vehicle for the

transportation of such worker in connection with the person's business, activities, or operations. The ''surety'' shall be one which appears on the list contained in Treasury Department Circular 570, or which has been approved by the Secretary under the Employee Retirement Income Security Act of 1974 (Pub. L. 93–406). Treasury Department Circular 570 may be obtained from the U.S. Treasury Department, Audit Staff, Bureau of Government Financial Operations, Washington, DC 20226.

### § 500.125 Qualifications and eligibility of insurance carrier or surety.

A policy of insurance or liability bond does not satisfy the financial responsibility of requirements of the Act and these regulations unless the insurer or surety furnishing the policy or bond to any farm labor contractor, agricultural employer or agricultural association is:

(a) Legally authorized to issue such policies or bonds in the State in which the transportation occurs; or

(b) Legally authorized to issue such policies or bonds in the State in which the farm labor contractor, agricultural employer or agricultural association has its principal place of business or permanent residence and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the transportation occurs; or

(c) Legally authorized to issue such policies or bonds in any State of the United States and eligible as an excess or surplus lines insurer in any State in which business is written and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the transportation occurs.

### § 500.126 Duration of insurance or liability bond.

Any insurance policy or liability bond which is obtained pursuant to the Act shall provide the required coverage for the full period during which the person shall be engaged in transporting any migrant or seasonal agricultural worker within the meaning of the Act.

### § 500.127 Limitations on cancellation of insurance or liability bond of registered farm labor contractors.

Any insurance policy or liability bond obtained by a farm labor contractor who is required to register with the Department of Labor shall provide that it shall not be cancelled, rescinded, or suspended, nor become void for any reason whatsoever during such period in which the insurance or liability bond is required by the Act to be effective, except upon the expiration of the term for which it is written; or unless the parties desiring to cancel shall have first given thirty (30) days notice to the Administrator. The notice will include a statement setting forth the reason for cancellation, rescission, suspension, or any other termination of such policy or bond. The notice shall be in writing and forwarded via certified or registered mail, addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Said thirty (30) days notice shall commence to run from the date notice is actually received by the Administrator.

### § 500.128 Cancellation of insurance policy or liability bond not relief from insurance requirements.

Cancellation, rescission, suspension, or any other termination of any insurance policy or liability bond required by the Act does not relieve a person who transports or causes to be transported any migrant or seasonal agricultural worker in any vehicle under his ownership or control of the responsibility to comply with the insurance requirements specified in §§ 500.121, 500.122 and 500.123.

## HOUSING SAFETY AND HEALTH

### § 500.130 Application and scope of safety and health requirement.

(a) Each person who owns or controls a facility or real property which is used as housing for any migrant agricultural worker must ensure that the facility or real property complies with

all substantive Federal and State safety and health standards applicable to such housing. If more than one person is involved in providing the housing for any migrant agricultural worker (for example, when an agricultural employer owns it and a farm labor contractor or any other person operates it), both persons are responsible for ensuring that the facility or real property meets the applicable Federal and State housing standards.

(b) A farm labor contractor, agricultural employer, agricultural association or any other person is deemed an ''owner'' of a housing facility or real property if said person has a legal or equitable interest in such facility or real property.

(c) A farm labor contractor, agricultural employer, agricultural association or any other person is in ''control'' of a housing facility or real property, regardless of the location of such facility, if said person is in charge of or has the power or authority to oversee, manage, superintend or administer the housing facility or real property either personally or through an authorized agent or employee, irrespective of whether compensation is paid for engaging in any of the aforesaid capacities.

(d) The Occupational Safety and Health Administration (OSHA) is the agency of the U.S. Department of Labor which administers the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) which provides for the establishment of safety and health standards generally.

(e) The Employment and Training Administration (ETA) is the agency of the U.S. Department of Labor which administers the U.S. Employment Service pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) including the interstate clearance order system.

### § 500.131 Exclusion from housing safety and health requirement.

The housing safety and health requirements do not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to any migrant agricultural worker of the same character and on the same or comparable terms and conditions as provided to the general public. Migrant labor housing shall not be brought within this exception simply by offering lodging to the general public.

### § 500.132 Applicable Federal standards: ETA and OSHA housing standards.

(a) The Secretary has determined that the applicable Federal housing standards are the standards promulgated by the Employment and Training Administration, at 20 CFR 654.404 *et seq.* and the standards promulgated by the Occupational Safety and Health Administration, at 29 CFR 1910.142. Except as provided in § 500.131, all migrant housing is subject to either the ETA standards or the OSHA standards, as follows:

(1) A person who owns or controls a facility or real property to be used for housing any migrant agricultural worker, the construction of which was begun on or after April 3, 1980, and which was not under a contract for construction as of March 4, 1980, shall comply with the substantive Federal safety and health standards promulgated by OSHA at 29 CFR 1910.142. These OSHA standards are enforceable under MSPA, irrespective of whether housing is, at any particular point in time, subject to inspection under the Occupational Safety and Health Act.

(2) A person who owns or controls a facility or real property to be used for housing any migrant agricultural worker which was completed or under construction prior to April 3, 1980, or which was under a contract for construction prior to March 4, 1980, may elect to comply with either the substantive Federal safety and health standards promulgated by OSHA at 29 CFR 1910.142 or the standards promulgated by ETA at 20 CFR 654.404 *et seq.* The ETA standards were established to provide housing requirements for migrant housing used by an employer obtaining migrant workers through the U.S. Employment Service. The owner or operator of such housing may continue to rely on those standards, rather than OSHA standards, even if the housing is not currently being provided pursuant to a USES job placement program.

### § 500.133 Substantive Federal and State safety and health standards defined.

Substantive safety and health standards include, but are not limited to, those that provide fire prevention, an adequate and sanitary supply of water, plumbing maintenance, structurally sound construction of buildings, effective maintenance of those buildings, provision of adequate heat as weather conditions require, and reasonable protections for inhabitants from insects and rodents. Substantive housing standards do not include technical or procedural violations of safety and health standards.

### § 500.134 Compliance with State standards.

Compliance with the substantive Federal housing safety and health standards shall not excuse noncompliance with applicable substantive State housing safety and health standards.

### § 500.135 Certificate of housing inspection.

(a) Except as provided in paragraph (c) of this section, a facility or real property to be used for housing a migrant agricultural worker shall not be occupied by any migrant agricultural worker unless either a State or local health authority or other appropriate agency, including a Federal agency, has certified that the facility or real property meets applicable safety and health standards.

(b) Except as provided in paragraph (c) of this section, the person who owns or controls a facility or real property shall not permit it to be occupied by any migrant agricultural worker unless a copy of a certificate of occupancy from the State, local or Federal agency which conducted the housing safety and health inspection is posted at the site of the facility or real property. The original of such certificate of occupancy shall be retained by such person for three years and made available for inspection in accordance with section 512 of the Act.

(c) If a request for an inspection of a facility or real property is made to the appropriate State, local or Federal agency at least forty-five (45) days prior to the date on which it is to be occupied by a migrant agricultural worker but the agency has not conducted an inspection by such date, the facility or property may be occupied by migrant agricultural workers unless prohibited by State law.

(d) Receipt and posting of a certificate of occupancy as provided under paragraph (b) of this section, or the failure of an agency to inspect a facility or property within the forty-five (45) day time period, shall not relieve the person who owns or controls a facility or property from the responsibility of ensuring that such facility or property meets the applicable State and Federal safety and health standards. Once such facility or property is occupied, such person shall supervise and continually maintain such facility or property so as to ensure that it remains in compliance with the applicable safety and health standards.

## Subpart E—Enforcement

### § 500.140 General.

Whenever the Secretary believes that the Act or these regulations have been violated he shall take such action and institute such proceedings as he deems appropriate, including (but not limited to) the following:

(a) Recommend to the Attorney General the institution of criminal proceedings against any person who willfully and knowingly violates the Act or these regulations;

(b) Recommend to the Attorney General the institution of criminal proceedings against any farm labor contractor who recruits, hires, employs, or uses, with knowledge, the services of any illegal alien, as defined in § 500.20(n) of these regulations, if such farm labor contractor has:

(1) Been refused issuance or renewal of, or has failed to obtain, a Certificate of Registration, or

(2) Is a farm labor contractor whose certificate has been suspended or revoked;

(c) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief to prohibit violation of the Act or these regulations by any person;

(d) Assess a civil money penalty against any person for any violation of the Act or these regulations;

(e) Refer any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery;

(f) Revoke or suspend or refuse to issue or renew any Certificate of Registration authorized by the Act or these regulations;

(g) Deny the facilities and services afforded by the Wagner-Peyser Act to any farm labor contractor who refuses or fails to produce, when asked, a valid Certificate of Registration;

(h) Institute action in any appropriate United States District Court against any person who, contrary to the provisions of section 505(a) of the Act, discriminates against any migrant or seasonal agricultural worker.

### § 500.141 Concurrent actions.

The taking of any one of the actions referred to in § 500.140 shall not be a bar to the concurrent taking of any other action authorized by the Act and these regulations.

### § 500.142 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act; but all such litigation shall be subject to the direction and control of the Attorney General.

(b) The Solicitor of Labor, through the authorized representatives identified in § 500.231, shall represent the Secretary in all administrative hearings under the Act and these regulations.

### § 500.143 Civil money penalty assessment.

(a) A civil money penalty may be assessed for each violation of the Act or these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the Act or these regulations the Secretary shall consider the type of violation committed and other relevant factors, including but not limited to the following:

(1) Previous history of violation or violations of this Act and the Farm Labor Contractor Registration Act;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the Act (such as when a joint employer agricultural employer/association provides employment-related benefits which comply with applicable law to agricultural workers, or takes reasonable measures to ensure farm labor contractor compliance with legal obligations);

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

[48 FR 36741, Aug. 12, 1983, as amended at 62 FR 11748, Mar. 12, 1997]

### § 500.144 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Secretary or in a final judgment issued by a United States District Court, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed either to the Administrator, in Washington, DC, or to the Wage and Hour Division Regional Office for the area in which the violations occurred.

### § 500.145 Registration determinations.

Section 500.51 set forth the standards under which the Secretary may refuse to issue or to renew, or may suspend or revoke, a Certificate of Registration

(including a Farm Labor Contractor Employee Certificate of Registration).

### § 500.146 Continuation of matters involving violations of FLCRA.

(a) Any matter involving the revocation, suspension, or refusal to renew a Certification of Registration issued under FLCRA and any matter involving the refusal to issue a certificate authorized under FLCRA shall continue through final administrative determination in accordance with the provisions of FLCRA and the regulations issued thereunder.

(b) Any matter involving the assessment of a civil money penalty for a violation of FLCRA will continue through final administrative determination in accordance with the provisions of FLCRA and the regulations issued thereunder.

(c) The rules of practice for implementation of administrative enforcement for violations of FLCRA referred to the Office of the Chief Administrative Law Judge on or after April 14, 1983, shall be the rules of practice provided in §§ 500.220 through 500.262 and the official record shall be maintained in accordance with §§ 500.270 and 500.271 of these regulations.

(d) The rules of practice for implementation of administrative enforcement for violations of FLCRA referred to the Office of the Chief Administrative Law Judge prior to April 14, 1983 shall be the rules of practice provided in 29 CFR 40.201 through 40.262.

### § 500.147 Continuation of matters involving violations of section 106 of MSPA.

Any matter involving the revocation, suspension, refusal to issue or to renew a certificate of registration or any matter involving the assessment of a civil money penalty, for a violation of section 106 of MSPA, which occurred prior to June 1, 1987, shall continue through final administrative determination in accordance with the provisions of MSPA and these regulations.

[54 FR 13329, Mar. 31, 1989]

## AGREEMENTS WITH FEDERAL AND STATE AGENCIES

### § 500.155 Authority.

Section 513 of the Act authorizes the Secretary to enter into agreements with Federal and State agencies (a) to use their facilities and services, (b) to delegate (subject to subsection 513(b) of the Act) to Federal and State agencies such authority (other than rulemaking) as he determines may be useful in carrying out the purposes of the Act, and (c) to allocate or transfer funds to, or otherwise pay or reimburse, such agencies for expenses incurred pursuant to paragraphs (a) or (b) of this section.

### § 500.156 Scope of agreements with Federal agencies.

Every agreement between the Secretary and any other Federal agency under the authority referred to in § 500.155 of this part shall contain terms and conditions mutually agreeable to both parties, and shall contain such delegation of authority as the Secretary deems useful.

### § 500.157 Scope of agreements with State agencies.

(a) Every agreement between the Secretary and any State agency under the authority referred to in § 500.155 of this part shall be in writing.

(b) Any delegation to a State agency by the Secretary under such authority shall be made pursuant to approval of a written State plan submitted in accordance with § 500.159 which shall: (1) Include a description of each function to be performed, the method of performing each such function, and the resources to be devoted to the performance of each such function, (2) provide assurances satisfactory to the Secretary that the State agency will comply with its description under paragraph (b)(1) of this section and that the State agency's performance of the delegated functions will be at least comparable to the performance of such functions by the Department of Labor; and (3) contain a certification of the Attorney General of such State, or, if the Attorney General is not authorized to make such a statement, the State official who is so authorized, that an

agreement pursuant to such State plan is valid under the laws of that State.

### § 500.158 Functions delegatable.

The Secretary may delegate to the State such functions as he deems useful including the

(a) Receipt, handling and processing of applications for certificates of registration;

(b) Issuance of certificates of registration;

(c) Conduct of various investigations; and

(d) Enforcement of the Act.

### § 500.159 Submission of plan.

(a) Any State agency desiring to enter into an agreement pursuant to section 513 of the Act shall submit a State plan in such form and in such detail as the Secretary shall direct.

(b) Each such plan shall include, at least, the following:

(1) The delegation sought;

(2) The State authority for performing such delegated functions;

(3) A description of the manner in which the State intends to carry out such functions; and

(4) The estimated cost of carrying out such functions.

### § 500.160 Approved State plans.

(a) The Secretary, in accordance with the authority referred to in § 500.155 of this part, has delegated the following functions to the States listed herein below:

| State | Function |
|---|---|
| Florida | Receive, handle, process applications and issue certificates of registration. |
| New Jersey | Receive, handle, process applications and issue certificates of registration. |
| Virginia | Receive, handle, process applications and issue certificates of registration. |

(b) Every State agreement entered into pursuant to the authority referred to in § 500.155 of this part shall be available for public inspection and copying in accordance with 29 CFR part 70.

(c) Every enumerated delegated function shall be valid in all states.

[48 FR 36741, Aug. 12, 1983, as amended at 49 FR 5112, Feb. 10, 1984; 50 FR 42163, Oct. 18, 1985]

### § 500.161 Audits.

The Secretary shall conduct audits as he deems necessary of the State plans, but on not less than an annual basis.

### § 500.162 Reports.

The Secretary shall require such reports as he deems necessary of activities conducted pursuant to State plans, but on not less than an annual basis.

CENTRAL PUBLIC REGISTRY

### § 500.170 Establishment of registry.

The Administrator shall establish a central public registry of all persons issued a Certificate of Registration or a Farm Labor Contractor Employee Certificate. The central public registry shall be available at the Regional Offices of the Wage and Hour Division and its National Office in Washington, DC. Information filed therein shall be made available upon request. Requests for information contained in the registry may also be directed by mail to the Administrator, Wage and Hour Division. Attn: MSPA, U.S. Department of Labor, Washington, DC 20210. Alternatively, requests for registry information may be made by telephone by calling 1–866–4US–WAGE (1–866–487–9243), a toll-free number, during the hours of 8 a.m. to 5 p.m., in your time zone, Monday through Friday.

[67 FR 76986, Dec. 16, 2002]

## Subpart F—Administrative Proceedings

GENERAL

### § 500.200 Establishment of procedures and rules of practice.

This subpart codifies and establishes the procedures and rules of practice necessary for the administrative enforcement of the Act.

### § 500.201 Applicability of procedures and rules.

(a) The procedures and rules contained herein prescribe the administrative process necessary for a determination:

(1) To suspend or revoke, or to refuse to issue or renew, a Certificate of Registration authorized under the Act and these regulations; and

(2) To impose an assessment of civil money penalties for violations of the Act or of these regulations.

(b) The procedures and rules contained herein also specify the administrative responsibility under section 102(5) of the Act with regard to a designation by a court of the Secretary as an agent of an applicant for a certificate of registration in any action against such applicant, if said applicant has left the jurisdiction in which the action is commenced or otherwise has become unavailable to accept service.

PROCEDURES RELATING TO HEARING

**§ 500.210 Written notice of determination required.**

(a) Whenever the Secretary determines to suspend or revoke, or to refuse to issue or renew, a Certificate of Registration, the applicant for or the holder of such certificate shall be notified in writing of such determination.

(1) In cases involving a determination relating to a Certificate of Registration applied for by, or issued to, a farm labor contractor, written notice shall also be given to every applicant for or holder of a Certificate of Registration as an employee of such contractor.

(2) In cases involving a determination relating to a Farm Labor Contractor Employee Certificate of Registration, written notice shall also be given to the farm labor contractor of such applicant or certificate holder.

(b) Whenever the Secretary determines to assess a civil money penalty for a violation of the Act or these regulations, the person against whom such penalty is assessed shall be notified in writing of such determination.

**§ 500.211 Contents of notice.**

The notice required by § 500.210 shall:

(a) Set forth the determination of the Secretary and the reason or reasons therefor.

(b) Set forth, in the case of a civil money penalty assessment:

(1) A description of each violation; and

(2) The amount assessed for each violation.

(c) Set forth the right to request a hearing on such determination.

(d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Secretary shall become final and unappealable.

(e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 500.212.

**§ 500.212 Request for hearing.**

(a) Any person desiring to request an administrative hearing on a determination referred to in § 500.210 shall make such request in writing to the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice. Such request must be made no later than thirty (30) days after the date of issuance of the notice referred to in § 500.210.

(b) The request for such hearing shall be delivered in person or by mail to the Wage and Hour Division office at the address appearing on the determination notice upon which the request for a hearing is based, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

(c) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written on size 8½″×11″ paper;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(d) Civil money penalties under FLCRA shall be treated as follows:

(1) Determinations to assess civil money penalties for violations of FLCRA made prior to April 14, 1983 shall continue until a final administrative determination shall have been made in accordance with 29 CFR part 40.

(2) Determinations to assess civil money penalties for violations of FLCRA arising prior to April 14, 1983, made on or after April 14, 1983, shall continue until a final administrative determination shall have been made in accordance with these regulations.

[48 FR 36741, Aug. 12, 1983, as amended at 54 FR 13329, Mar. 31, 1989; 57 FR 5942, Feb. 18, 1992; 71 FR 16665, Apr. 3, 2006]

PROCEDURES RELATING TO SUBSTITUTED SERVICE

### § 500.215 Change of address.

(a) Pursuant to section 105(1) of the Act, every holder of a Certificate of Registration shall notify the Secretary within thirty (30) days of each change of permanent place of residence. Said persons may also furnish additional mailing addresses.

(b) The notification required in paragraph (a) of this section shall be in writing, by certified mail and addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

(c) Such change of address shall be deemed effective upon receipt by the Administrator, unless a later date is specified in the notice.

### § 500.216 Substituted service.

(a) Pursuant to section 102(5) of the Act, the Secretary, when so designated by a court, shall accept service of summons in any action arising under the Act or these regulations against any applicant for or any holder of a Certificate of Registration who has left the jurisdiction in which such action is commenced or otherwise has become unavailable to accept such service.

(b) Acceptance of service of summons referred to in paragraph (a) of this section shall be under such terms and conditions as are set by the court in its designation of the Secretary for the purpose of section 102(5) of the Act.

(c) To be effective, such service shall be made by delivery personally or by certified mail, either to the Administrator of the Wage and Hour Division in Washington, DC, or to the Administrator's authorized representative located in the area in which the action has been commenced.

### § 500.217 Responsibility of Secretary for service.

Upon receipt of any substituted service, as described in § 500.216, the same shall be forwarded by certified mail to the permanent address furnished by the person for whom service is accepted and to such other address as may be determined appropriate by the Secretary. Such mailing shall complete the Secretary's responsibility in connection with the substituted service requirement of the Act.

RULES OF PRACTICE

### § 500.219 General.

Except as specifically provided in these regulations, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under MSPA.

[48 FR 36741, Aug. 21, 1983. Redesignated at 54 FR 13329, Mar. 31, 1989]

### § 500.220 Service of determinations and computation of time.

(a) Service of determinations to suspend, revoke, refuse to issue, or refuse to renew a certificate of registration or to assess a civil money penalty shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail or in person, service is complete upon receipt by the addressee or the addressee's representative;

(b) Time will be computed beginning with the day following the action and

includes the last day of the period unless it is a Saturday, Sunday, or Federally observed holiday, in which case the time period includes the next business day; and

(c) When a request for hearing is filed by mail, five (5) days shall be added to the prescribed period during which the party has the right to request a hearing on the determination.

[54 FR 13329, Mar. 31, 1989]

### § 500.221 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 500.212.

### § 500.222 Designation of record.

Except as provided in paragraph (c) of this section:

(a) Each administrative proceeding instituted under the Act and these regulations shall be identified of record by a number preceded by the year and the letters ''MSPA'' and followed by one or more of the following designations:

(1) Proceedings involving the ''refusal to issue or to renew, or to suspend or to revoke Certificate of Registration'' shall be designated as ''R''.

(2) Proceedings involving the ''assessment of civil money penalties'' shall be designated as ''P''.

(3) Proceedings involving both Certificate of Registration and assessment of civil money penalties shall be designated as ''R and P''.

(b) The number, letter(s), and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

(c) Each administrative proceeding involving violations of FLCRA prior to April 14, 1983 and filed with the Office of the Chief Administrative Law Judge on or after April 14, 1983, shall be identified of record by a number preceded by the year and the letters ''FLCRA-MSPA'' and followed by one or more of the letter designations provided in paragraphs (a)(1) through (a)(3) of this section, i.e., (*year*) –FLCRA-MSPA–(#)–(R and/or P).

### § 500.223 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In The Matter of ____, Respondent.

(b) For the purposes of such administrative proceeding the ''Secretary of Labor'' shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

REFERRAL FOR HEARING

### § 500.224 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 500.212, the Secretary, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer an authenticated copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations.

(b) In cases involving a denial, suspension, or revocation of a Certificate of Registration (Farm Labor Contractor Certificate; Farm Labor Contractor Employee Certificate) or ''certificate action,'' including those cases where the farm labor contractor has requested a hearing on civil money penalty(ies) as well as on the certificate action, the date of the hearing shall be not more than sixty (60) days from the date on which the Order of Reference is filed. No request for postponement

shall be granted except for compelling reasons.

(c) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

[48 FR 36741, Aug. 12, 1983, as amended at 61 FR 24866, May 16, 1996]

### § 500.225 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

### § 500.226 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

## PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

### § 500.231 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, and such other counsel, as designated, shall represent the Secretary in any proceeding under these regulations.

### § 500.232 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

## POST-HEARING PROCEDURES

### § 500.262 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers a decision on the issues referred by the Secretary.

(b) In cases involving certificate actions as described in § 500.224(b), the Administrative Law Judge shall issue a decision within ninety (90) calendar days after the close of the hearing.

(c) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations, and the appropriateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(d) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to § 500.212 which involve the modification, suspension or revocation of a Certificate of Registration issued under the Act and these Regulations, and/or the imposition of a civil money penalty assessed for a violation of the Act or these Regulations. The Administrative Law Judge shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act or Regulations issued thereunder in any proceeding under MSPA or these Regulations involving the refusal to issue or renew a Certificate of Registration.

(e) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(f) The Administrative Law Judge shall transmit to the Chief Administrative Law Judge the entire record including the decision. The Chief Administrative Law Judge shall serve copies of the decision on each of the parties.

(g) The decision when served shall constitute the final order of the Secretary unless the Secretary, pursuant to section 103(b)(2) or section 503(b)(2) of the Act, modifies or vacates the decision and order of the Administrative Law Judge.

(h) Except as provided in §§ 500.263 through 500.268, the administrative remedies available to the parties under the Act will be exhausted upon service of the decision of the Administrative Law Judge.

[48 FR 36741, Aug. 12, 1983, as amended at 61 FR 24866, May 16, 1996]

MODIFICATION OR VACATION OF ORDER OF ADMINISTRATIVE LAW JUDGE

### § 500.263 Authority of the Secretary.

The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever he concludes that the Decision and Order:

(a) Is inconsistent with a policy or precedent established by the Department of Labor,

(b) Encompasses determinations not within the scope of the authority of the Administrative Law Judge,

(c) Awards attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act which are unjustified or excessive, or

(d) Otherwise warrants modifying or vacating.

[54 FR 13330, Mar. 31, 1989]

### § 500.264 Procedures for initiating review.

(a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 500.265. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.

(b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

[54 FR 13330, Mar. 31, 1989]

### § 500.265 Implementation by the Secretary.

(a) Whenever, on the Secretary's own motion or upon acceptance of a party's petition, the Secretary believes that a

Decision and Order may warrant modifying or vacating, the Secretary shall issue a Notice of Intent to modify or vacate.

(b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

[54 FR 13330, Mar. 31, 1989]

### § 500.266 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate a Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within fifteen (15) days, index, certify and forward a copy of the complete hearing record to the Secretary.

[48 FR 36741, Aug. 21, 1983. Redesignated at 54 FR 13330, Mar. 31, 1989]

### § 500.267 Filing and service.

(a) *Filing*. All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) *Number of copies*. An original and two copies of all documents shall be filed.

(c) *Computation of time for delivery by mail*. Documents are not deemed filed with the Secretary until actually received by that office. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date.

(d) *Manner and proof of service*. A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

[54 FR 13330, Mar. 31, 1989]

### § 500.268 Final decision of the Secretary.

(a) The Secretary's final Decision and Order shall be issued within 120 days from the notice of intent granting the petition, except that in cases involving the review of an Administrative Law Judge decision in a certificate action as described in § 500.224(b), the Secretary's final decision shall be issued within ninety (90) days from the date such notice. The Secretary's Decision and Order shall be served upon all parties and the Chief Administrative Law Judge, in person or by certified mail.

(b) Upon receipt of an Order of the Secretary modifying or vacating the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall substitute such Order for the Decision and Order of the Administrative Law Judge.

[54 FR 13330, Mar. 31, 1989, as amended at 61 FR 24866, May 16, 1996]

### § 500.269 Stay pending decision of the Secretary.

(a) The filing of a petition seeking review by the Secretary of a Decision and Order of an Administrative Law Judge, pursuant to § 500.264, does not stop the running of the thirty-day time limit in which respondent may file an appeal to obtain a review in the United States District Court of an administrative order, as provided in section 103(b)(2) or section 503(b)(2) of the Act, unless the Secretary issues a Notice of Intent pursuant to § 500.265.

(b) In the event a respondent has filed a notice of appeal of the Administrative Law Judge's Decision and Order in a United States District Court and the Secretary issues a Notice of Intent, the Secretary will seek a stay of proceedings in the Court until such time as the Secretary issues the final decision, as provided in § 500.268.

(c) Where the Secretary has issued a Notice of Intent, the time for filing an appeal under sections 103(b)(2) or 503(b)(2) of the Act shall commence

from the date of the issuance of the Secretary's final decision, as provided in § 500.268.

[54 FR 13330, Mar. 31, 1989]

RECORD

### § 500.270 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

### § 500.271 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court pursuant to section 103(c) or 503(c) of the Act, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

# PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 216 OF THE IMMIGRATION AND NATIONALITY ACT

## Subpart A—General Provisions

Sec.
501.0 Introduction.
501.1 Purpose and scope.
501.2 Coordination of intake between DOL agencies.
501.3 Discrimination prohibited.
501.4 Waiver of rights prohibited.
501.5 Investigation authority of Secretary.
501.6 Prohibition on interference with Department of Labor officials.
501.7 Accuracy of information, statements, data.
501.10 Definitions.

## Subpart B—Enforcement of Work Contracts

501.15 Enforcement.
501.16 General.
501.17 Concurrent actions.
501.18 Representation of the Secretary.
501.19 Civil money penalty assessment.
501.20 Enforcement of Wage and Hour investigative authority.
501.21 Referral of findings to ETA.
501.22 Civil money penalties—payment and collection.

## Subpart C—Administrative Proceedings

501.30 Applicability of procedures and rules.

PROCEDURES RELATING TO HEARING

501.31 Written notice of determination required.
501.32 Contents of notice.
501.33 Request for hearing.

RULES OF PRACTICE

501.34 General.
501.35 Commencement of proceeding.
501.36 Caption of proceeding.

REFERRAL FOR HEARING

501.37 Referral to Administrative Law Judge.
501.38 Notice of docketing.
501.39 Service upon attorneys for the Department of Labor—number of copies.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

501.40 Consent findings and order.

POST-HEARING PROCEDURES

501.41 Decision and order of Administrative Law Judge.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

501.42 Procedures for initiating and undertaking review.
501.43 Responsibility of the Office of Administrative Law Judges.
501.44 Additional information, if required.
501.45 Final decision of the Secretary.

RECORD

501.46 Retention of official record.
501.47 Certification.

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

SOURCE: 74 FR 26008, May 29, 2009, unless otherwise noted.

## Subpart A—General Provisions

### § 501.0 Introduction.

These regulations cover the enforcement of all contractual obligations provisions applicable to the employment of H–2A workers under section 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of other

workers hired by employers of H–2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such other workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

### § 501.1 Purpose and scope.

(a) *Statutory standard.* Section 216(a) of the INA provides that—

(1) A petition to import an alien as an H–2A worker (as defined in subsection (i)(2) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

(A) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) *Role of the ETA, USES.* The issuance and denial of labor certification under section 216 of the INA has been delegated by the Secretary of Labor to the Employment and Training Administration (ETA). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are such issues as whether U.S. workers were available, whether positive recruitment was conducted, whether there was a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers' compensation insurance was provided, whether employment was offered to U.S. workers for up to 50 percent of the contract period and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the Employment and Training Administration are found in title 20 CFR part 655.

(c) *Role of ESA, Wage and Hour Division.* Section 216(g)(2) of the INA provides that—

[T]he Secretary of Labor is authorized to take such actions including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

Certain investigation, inspection and law enforcement functions to carry out the provisions of section 216 of the INA have been delegated by the Secretary of Labor to the Employment Standards Administration (ESA), Wage and Hour Division. In general, matters concerning the obligations of the work contract between an employer of H–2A workers and the H–2A workers and other workers in corresponding employment hired by H–2A employers are enforced by ESA. Included within the enforcement responsibility of ESA, Wage and Hour Division are such matters as the payment of required wages, transportation, meals and housing provided during the employment. The Wage and Hour Division has the responsibility to carry out investigations, inspections and law enforcement functions and in appropriate instances impose penalties, seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages.

(d) *Effect of regulations.* The amendments to the INA made by title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the Wage and Hour Division under the INA and these regulations apply to the employment of any H–2A worker and any other workers hired by H–2A employers in corresponding employment as the result of any petition or application filed with the Department on and after June 1, 1987.

### § 501.2 Coordination of intake between DOL agencies.

Complaints received by ETA, or any State Employment Service Agency regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate Wage and Hour office for appropriate action under these regulations.

**§501.3 Discrimination prohibited.**

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(a) Filed a complaint under or related to section 216 of the INA or these regulations;

(b) Instituted or caused to be instituted any proceedings related to section 216 of the INA or these regulations;

(c) Testified or is about to testify in any proceeding under or related to section 216 of the INA or these regulations;

(d) Exercised or asserted on behalf of himself or others any right or protection afforded by section 216 of the INA or these regulations.

(e) Consulted with an employee of a legal assistance program or an attorney on matters related to section 216 of the INA (8 U.S.C. 1186), or to this subpart or any other DOL regulation promulgated pursuant to section 216 of the INA.

Allegations of discrimination in employment against any person will be investigated by Wage and Hour. Where Wage and Hour has determined through investigation that such allegations have been substantiated appropriate remedies may be sought. Wage and Hour may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA that labor certification of any violator be denied in the future.

**§501.4 Waiver of rights prohibited.**

No person shall seek to have an H–2A worker, or other worker employed in corresponding employment by an H–2A employer, waive rights conferred under section 216 of the INA or under these regulations. Such waiver is against public policy. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

**§501.5 Investigation authority of Secretary.**

(a) *General.* The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places and vehicles (including housing) and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under section 216 of the INA or these regulations.

(b) *Failure to permit investigation.* Where any person using the services of an H–2A worker does not permit an investigation concerning the employment of his or her workers the Wage and Hour Division shall report such occurrence to ETA and may recommend denial of future labor certifications to such person. In addition, Wage and Hour may take such action as may be appropriate, including the seeking of an injunction or assessing civil money penalties, against any person who has failed to permit Wage and Hour to make an investigation.

(c) *Confidential investigation.* The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the work contract obligations of section 216 of the INA or these regulations to the Secretary by advising any local office of the Employment Service of the various States, any office of ETA, any office of the Wage and Hour Division, ESA, U.S. Department of Labor, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, ESA, for the area in which the reported violation is alleged to have occurred.

### § 501.6 Prohibition on interference with Department of Labor officials.

No person shall interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to the INA and these regulations during the performance of such duties. Wage and Hour will seek such action as it deems appropriate, including an injunction to bar any such interference with an investigation and/or assess a civil money penalty therefor. In addition Wage and Hour may refer a report of the matter to ETA with a recommendation that the person's labor certification be denied in the future. (Federal statutes which prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.)

### § 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to title 18, section 1001, of the U.S. Code, which provides:

> Section 1001. Statements or entries generally.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

### § 501.10 Definitions.

The definitions in paragraphs (a) through (d) are set forth for purposes of this part. In addition, the definitions in paragraphs (e) through (v) are promulgated at 20 CFR 655.100(b), are utilized herein, and are incorporated and set forth for information purposes.

(a) *Act and INA* mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), with reference particularly to section 216.

(b) *Administrative Law Judge (ALJ)* means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

(c) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under this part.

(d) *Work contract* means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those terms and conditions required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification Process for Temporary Agricultural Employment in the United States, and those contained in the Application for Alien Employment Certification and job offer under that subpart, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, entered into between the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification, and shall be enforced in accordance with these regulations.

(e) *Adverse effect wage rate (AEWR)* means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

(f) *Agricultural labor or services.* Pursuant to section 101(a)(15)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), ''agricultural labor or services'' is defined for the purposes of this subpart as either ''agricultural labor'' as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or ''agriculture'' as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be ''agricultural labor or services'', notwithstanding the

exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below.

(1) *Agricultural labor.* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) quoted as follows, defines the term ''agricultural labor'' to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term farm includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938), quoted as follows, defines agriculture to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(3) *Agricultural commodity.* Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended) quoted as follows, defines agricultural commodity to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of title 7.

(iv) *Gum rosin.* Section 92 of title 7, United States Code, quoted as follows, defines gum spirits of turpentine and gum rosin as—

(c) *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree.

(g) *Gum rosin* means rosin remaining after the distillation of gum spirits of turpentine.

(g) *Of a temporary or seasonal nature*—(1) *On a seasonal or other temporary basis.* For the purposes of this subpart of a temporary or seasonal nature

means on a seasonal or other temporary basis, as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). For informational purposes § 500.20 as it pertains to seasonal or temporary basis is quoted below.

(2) *MSPA definition*. For information purposes, the definition of on a seasonal or other temporary basis, as set forth at § 500.20 of this title, is provided below:

On a seasonal or other temporary basis means:

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

A worker is employed on other temporary basis where he is employed for a limited time only or the performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

*On a seasonal or other temporary* basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

*On a seasonal or other temporary basis* does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(3) *Temporary*. For the purpose of this subpart, the definition of ''temporary'' in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this title.

(h) *DOL* means the U.S. Department of Labor.

(i) *Employer* means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it alone has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

(j) *Employment Service (ES)* and *Employment Service (ES) System* mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

(k) *Employment Standards Administration* means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out certain functions of the Secretary under the INA.

(l) *Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the U.S. Employment Service (USES).

(m) *H–2A worker* means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

(n) *Immigration and Naturalization Service (INS)* means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

(o) *Job offer* means the offer made by an employer or potential employer of

H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

(p) *Secretary* means the Secretary of Labor or the Secretary's designee.

(q) *State agency* means the State employment service agency designated under section 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

(r) *Solicitor of Labor* means the Solicitor, U.S. Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

(s) *Temporary alien agricultural labor certification* means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214 (a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

(t) *United States Employment Service (USES)* means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

(u) *United States (U.S.) worker* means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at section 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

(v) *Wages* means all forms of cash remuneration to a worker by an employer in payment for personal services.

EDITORIAL NOTE: At 74 FR 26008, May 29, 2009, part 501 was redesignated as 502 and a new part 501 was added; in the newly added part, § 501.10 set out an incorrectly designated paragraph (iv) after (f)(3) and before paragraph (g).

## Subpart B—Enforcement of Work Contracts

### § 501.15 Enforcement.

The investigations, inspections and law enforcement functions to carry out the provisions of section 216 of the INA, as provided in these regulations for enforcement by the Wage and Hour Division, pertain to the employment of any H–2A worker and any other worker employed in corresponding employment by an H–2A employer. Such enforcement includes those work contract provisions as defined in § 501.10(d). The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR 655.102.

### § 501.16 General.

Whenever the Secretary believes that the H–2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Impose denial of labor certification against any person for a violation of the H–2A obligations of the INA or the regulations. ETA shall make all determinations regarding the issuance or denial of labor certification. ESA shall make all determinations regarding the enforcement functions listed in paragraphs (b) through (d) of this section.

(b) Institute appropriate administrative proceedings, including the recovery of unpaid wages, the enforcement of any other contractual obligations and the assessment of a civil money penalty against any person for a violation of the H–2A work contract obligations of the Act or these regulations.

(c) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including the withholding of unpaid wages, to restrain violation of the H–2A provisions of the Act or these regulations by any person.

(d) Petition any appropriate District Court of the United States for specific performance of contractual obligations.

### § 501.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H–2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

### § 501.18 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through the authorized representatives shall represent the Administrator and the Secretary in all administrative hearings under the H–2A provisions of the Act and these regulations.

### § 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator for each violation of the work contract or these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H–2A provisions of the Act or these regulations the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations of the H–2A provisions of the Act and these regulations;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H–2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker. A civil money penalty for discrimination or interference with Wage and Hour investigative authority will not exceed $1,000 for each such act of discrimination or interference.

### § 501.20 Enforcement of Wage and Hour investigative authority.

Sections 501.5 through 501.7 of this part prescribe the investigation authority conferred upon the Wage and Hour Division for the purpose of enforcing the contractual obligations. These sections indicate the actions which may be taken upon failure to permit or interference with an investigation. No person shall interfere with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.5, 501.6 and in 501.19 of this part, a civil money penalty may be assessed for each failure to permit an investigation or interference therewith, and other appropriate relief may be sought. In addition Wage and Hour shall report each such occurrence to ETA and may recommend to ETA denial of future labor certifications. The taking of any one action shall not bar the taking of any additional action.

### § 501.21 Referral of findings to ETA.

Where Wage and Hour finds violations Wage and Hour shall so notify the appropriate representative of ETA and shall forward appropriate information, including investigative information to such representative for review and consideration.

### § 501.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, by an Administrative Law Judge, or by the Secretary, the amount of the penalty is

immediately due and payable to the U.S. Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

## Subpart C—Administrative Proceedings

### § 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process which will be applied with respect to a determination to impose an assessment of civil money penalties and which may be applied to the enforcement of contractual obligations, including the collection of unpaid wages due as a result of any violation of the H–2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties, the Secretary may, in his discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

PROCEDURES RELATING TO HEARING

### § 501.31 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty or to proceed administratively to enforce contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

### § 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual obligations required and the amount of any civil money penalty assessment and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

### § 501.33 Request for hearing.

(a) Any person desiring to request an administrative hearing on a determination referred to in § 501.32 shall make such request in writing to the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice, no later than thirty (30) days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

RULES OF PRACTICE

### § 501.34 General.

Except as specifically provided in these regulations, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply

to administrative proceedings described in this part.

### § 501.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

### § 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of __, Respondent.

(b) For the purposes of such administrative proceedings the Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

REFERRAL FOR HEARING

### § 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33 the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

### § 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

### § 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

### § 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order

disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission*. On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition*. In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

POST-HEARING PROCEDURES

**§ 501.41 Decision and order of Administrative Law Judge.**

(a) The Administrative Law Judge shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Secretary in person or by certified mail. The decision when served by the Administrative Law Judge shall constitute the final order of the Administrator unless the Secretary, as provided for in § 501.42 below determines to review the decision.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

**§ 501.42 Procedures for initiating and undertaking review.**

(a) A respondent, the Administrator or any other party wishing review of the decision of an Administrative Law Judge shall, within 30 days of the decision of the Administrative Law Judge, petition the Secretary to review the decision. Copies of the petition shall be served on all parties and on the Administrative Law Judge. If the Secretary does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the Administrative Law Judge shall be deemed the final agency action.

(b) Whenever the Secretary either on the Secretary's own motion or by acceptance of a party's petition, determines to review the decision of an Administrative Law Judge, a notice of the same shall be served upon the Administrative Law Judge and upon all parties to the proceeding in person or by certified mail.

**§ 501.43 Responsibility of the Office of Administrative Law Judges.**

Upon receipt of the Secretary's Notice pursuant to § 501.42 of these regulations, the Office of Administrative Law Judges shall, promptly forward a copy of the complete hearing record to the Secretary.

**§ 501.44 Additional information, if required.**

Where the Secretary has determined to review such decision and order, the Secretary shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submission shall be made (i.e., briefs, oral argument, etc.); and the time within which such presentation shall be submitted.

### § 501.45 Final decision of the Secretary.

The Secretary's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the administrative law judge, in person or by certified mail.

RECORD

### § 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

### § 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

## PART 502—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

### Subpart A—General Provisions

Sec.
502.0 Introduction.
502.1 Purpose and scope.
502.2 Coordination of intake between DOL agencies.
502.3 Discrimination prohibited.
502.4 Waiver of rights prohibited.
502.5 Investigation authority of Secretary.
502.6 Cooperation with DOL officials.
502.7 Accuracy of information, statements, data.
502.8 Surety bond.
502.10 Definitions.

### Subpart B—Enforcement of Work Contracts

502.15 Enforcement.
502.16 Sanctions and Remedies—General.
502.17 Concurrent actions.
502.18 Representation of the Secretary.
502.19 Civil money penalty assessment.
502.20 Debarment and revocation.
502.21 Failure to cooperate with investigations.
502.22 Civil money penalties—payment and collection.

### Subpart C—Administrative Proceedings

502.30 Applicability of procedures and rules.

PROCEDURES RELATING TO HEARING

502.31 Written notice of determination required.
502.32 Contents of notice.
502.33 Request for hearing.

RULES OF PRACTICE

502.34 General.
502.35 Commencement of proceeding.
502.36 Caption of proceeding.

REFERRAL FOR HEARING

502.37 Referral to Administrative Law Judge.
502.38 Notice of docketing.
502.39 Service upon attorneys for the Department of Labor—number of copies.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

502.40 Consent findings and order.

POST-HEARING PROCEDURES

502.41 Decision and order of Administrative Law Judge.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

502.42 Procedures for initiating and undertaking review.
502.43 Responsibility of the Office of Administrative Law Judges.
502.44 Additional information, if required.
502.45 Final decision of the Administrative Review Board.

RECORD

502.46 Retention of official record.
502.47 Certification.

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

SOURCE: 73 FR 77229, Dec. 18, 2008, unless otherwise noted.

EFFECTIVE DATE NOTE: At 74 FR 26008, May 29, 2009, part 501 was redesignated as part 502, and newly designated part 502 was suspended, effective June 29, 2009.

## Subpart A—General Provisions

### § 502.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H–2A workers under sec. 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H–2A workers in the same occupations as the H–2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such U.S. workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

### § 502.1 Purpose and scope.

(a) *Statutory standard*. Section 218(a) of the INA provides that:

(1) A petition to import an alien as an H–2A worker (as defined in the INA) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the Secretary of the United States Department of Labor (Secretary) for a certification that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) [Reserved]

(b) *Role of the Employment and Training Administration (ETA)*. The issuance and denial of labor certification under sec. 218 of the INA has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing AEWR, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by sec. 218 of the INA and regulations at 20 CFR part 655, subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, subpart B.

(c) *Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD)*. (1) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under sec. 218 of the INA, the regulations at 20 CFR part 655, subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of sec. 218 of the INA have been delegated by the Secretary to the ESA, WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and U.S. workers hired in corresponding employment by H–2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under sec. 218 of the INA or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s) or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H–2A Labor Contractors

(H–2ALC), from the H–2ALC directly and/or from the insurer who issued the surety bond to the H–2ALC as required by 20 CFR part 655, subpart B and 29 CFR 501.8).

(d) *Effect of regulations*. The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations apply to the employment of any H–2A worker and any other U.S. workers hired by H–2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

### § 502.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

### § 502.3 Discrimination prohibited.

(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to sec. 218 of the INA or these regulations;

(2) Instituted or caused to be instituted any proceedings related to sec. 218 of the INA or these regulations;

(3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or these regulations;

(4) Exercised or asserted on behalf of himself or others any right or protection afforded by sec. 218 of the INA or these regulations; or

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to sec. 218 of the INA.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA debarment of any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

### § 502.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other U.S. worker hired in corresponding employment by an H–2A employer, waive any rights conferred under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

### § 502.5 Investigation authority of Secretary.

(a) *General*. The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places (including housing) and such vehicles, and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under sec. 218 of the INA or these regulations.

(b) *Failure to cooperate with an investigation*. Where any employer (or employer's agent or attorney) using the

services of an H–2A worker does not cooperate with an investigation concerning the employment of H–2A workers or U.S. workers hired in corresponding employment, the WHD shall report such occurrence to ETA and may recommend that ETA revoke the existing certification that is the basis for the employment of the H–2A workers giving rise to the investigation, and the WHD may recommend to ETA the debarment of the employer from future certification for up to 3 years. In addition, the WHD may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the WHD to make an investigation.

(c) *Confidential investigation*. The Secretary shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations*. Any person may report a violation of the work contract obligations of sec. 218 of the INA or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

### § 502.6 Cooperation with DOL officials.

All persons must cooperate with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefore. In addition, the WHD will report the matter to ETA, and the WHD may recommend to ETA the debarment of the employer from future certification and/or recommend that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

### § 502.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

### § 502.8 Surety bond.

(a) H–2ALCs shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655, subpart B for each labor certification being sought. The H–2ALC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, United States Department of Labor. It shall obligate the surety to pay any sums to the Administrator, WHD, for wages and benefits owed to H–2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the H–2ALC, and shall be amended to cover

any extensions of the labor certification requested by the H–2ALC. Surety bonds may not be canceled or terminated unless 30 days' notice is provided by the surety to the Administrator, WHD.

(c) The bond shall be in the amount of $5,000 for a labor certification for which a H–2ALC will employ fewer than 25 employees, $10,000 for a labor certification for which a H–2ALC will employ 25 to 49 employees, and $20,000 for a labor certification for which a H–2ALC will employ 50 or more employees. The amount of the bond may be increased by the Administrator, WHD after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

**§ 502.10 Definitions.**

(a) Definitions of terms used in this part. For the purpose of this part:

*Administrative Law Judge (ALJ)* means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth at 20 CFR 655.115.

*Administrator, WHD* means the Administrator of the Wage and Hour Division (WHD), ESA and such authorized representatives as may be designated to perform any of the functions of the Administrator, WHD under this part.

*Adverse effect wage rate (AEWR)* means the minimum wage rate that the Administrator of the Office of Foreign Labor Certification (OFLC) has determined must be offered and paid to every H–2A worker employed under the DOL-approved *Application for Temporary Employment Certification* in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H–2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

*Agent* means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that—

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section, with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101.

*Agricultural association* means any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an H–2A *Application for Temporary Employment Certification*, and may also act as the sole or joint employer of H–2A workers.

*Application for Temporary Employment Certification* means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form and the initial recruitment report.

*Area of intended employment* means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within

normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

*Department of Homeland Security (DHS)* means the Federal agency having control over certain immigration functions that, through its sub-agency, *United States Citizenship and Immigration Services (USCIS)*, makes the determination under the INA on whether to grant visa petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the U.S.

*DOL or Department* means the United States Department of Labor.

*Eligible worker* means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

*Employee* means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

*Employer* means a person, firm, corporation or other association or organization that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship with respect to H–2A employees or related U.S. workers under this part; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

*Employment Service (ES)* refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and OFLC, including the National Processing Centers (NPCs).

*Employment Standards Administration (ESA)* means the agency within DOL that includes the WHD, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

*Employment and Training Administration (ETA)* means the agency within the DOL that includes OFLC.

*Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

*Fixed-site employer* means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this part who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, *person* includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

*H–2A Labor Contractor (H–2ALC)* means any person who meets the definition of employer in this section and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to sec. 218 of the INA or these regulations.

*H–2A worker* means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

*INA/Act* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq*.

*Job offer* means the offer made by an employer or potential employer of H–2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

*Job opportunity* means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

*Joint employment* means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a ''joint employer'' of that employee.

*Office of Foreign Labor Certification (OFLC)* means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

*Positive recruitment* means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

*Prevailing* means with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; but only if

(2) This 50 percent or more of employers also employs in aggregate 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of H–2ALCs).

*Prevailing hourly wage* means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

*Prevailing piece rate* means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.) to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1½ bushels), a bushel of potatoes, and Eastern apple box (1½ metric bushels), a flat of strawberries (twelve quarts), etc.

*Representative* means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the *Application for Temporary Employment Certification*.

*Secretary* means the Secretary of the United States Department of Labor or the Secretary's designee.

*State Workforce Agency (SWA)* means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's One-Stop delivery system in accordance with the Wagner-Peyser Act, 29 U.S.C. 49, *et seq*. Separately, SWAs receive ETA grants, administered by OFLC, to assist them in performing certain activities related to foreign labor certification, including conducting housing inspections.

*Successor in interest* means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of this part, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the

firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

*Temporary agricultural labor certification* means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H–2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed as stated at 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

*United States (U.S.)*, when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII, the Commonwealth of the Northern Mariana Islands.

*U.S. worker* means a worker who is:

(1) A citizen or national of the U.S., or;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

*Wages* means all forms of cash remuneration to a worker by an employer in payment for personal services.

*Work contract* means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in subpart B of 20 CFR part 655, *Labor Certification for Temporary Agricultural Employment of H–2A Aliens in the U.S. (H–2A Workers)*, or these regulations, including those terms and conditions attested to by the H–2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

(b) *Definition of agricultural labor or services of a temporary or seasonal nature*. For the purposes of this part, *agricultural labor or services of a temporary or seasonal nature* means the following:

(1) *Agricultural labor or services*, pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), is defined as:

(i) *Agricultural labor* as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1954 at 26 U.S.C. 3121(g);

(ii) *Agriculture* as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) (Work performed by H–2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of

the FLSA as provided therein, including the overtime provisions in sec. 7(a) at 29 U.S.C. 207(a));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H–2B workers are employed to perform the same work at the same establishment; or

(vi) Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (b)(1)(i) and (ii) of this section is *agricultural labor or services*, notwithstanding the exclusion of that occupation from the other statutory definition.

(i) *Agricultural labor* for purposes of paragraph (b)(1)(i) of this section means all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended at 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)(*1*) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(*2*) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(*3*) The provisions of paragraphs (b)(2)(i)(D)(*1*) and (*2*) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(*4*) On a farm operated for profit if such service is not in the course of the employer's trade or business and is not domestic service in a private home of the employer.

(E) For the purposes of this section, the term *farm* includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. See sec. 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g)).

(ii) *Agriculture*. For purposes of paragraph (b)(1)(ii) of this section *agriculture* means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See sec.* 29 U.S.C. 203(f), as amended.

(iii) *Agricultural commodity*. For purposes of paragraph (b)(1)(ii) of this section, *agricultural commodity* includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. *See* 12 U.S.C. 1141j(g) (sec. 15(g) of the Agricultural Marketing Act, as amended), and 7 U.S.C. 92.

(3) *Of a temporary or seasonal nature*—(i) *On a seasonal or other temporary basis*. For the purposes of this part, *of a temporary or seasonal nature* means *on a seasonal or other temporary basis*, as defined in the WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition*. The definition of *on a seasonal or other temporary basis* found in MSPA is summarized as follows:

(A) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though the worker may continue to be employed during a major portion of the year.

(B) A worker is employed on *other temporary basis* where the worker is employed for a limited time only or the worker's performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) *On a seasonal or other temporary basis* does not include

(*1*) The employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or

(*2*) The employment of any worker who is living at his or her permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) *Temporary*. For the purposes of this part, the definition of *temporary* in paragraph (b)(3) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, including, but not limited, to a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to 20 CFR 655.110.

## Subpart B—Enforcement of Work Contracts

### § 502.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of sec. 218 of the INA, as provided in these regulations for enforcement by the WHD, pertain to the employment of any H–2A worker and any other U.S. worker hired in corresponding employment by an H–2A employer. Such enforcement includes work contract provisions as defined in § 501.10(a). The work contract also includes those employment benefits which are required to be stated in the

job offer, as prescribed in 20 CFR 655.104.

### § 502.16 Sanctions and remedies—General.

Whenever the Secretary believes that the H–2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute appropriate administrative proceedings, including: The recovery of unpaid wages, including wages owed to U.S. workers as a result of a layoff or displacement prohibited by these rules (either directly from the employer, a successor in interest, or in the case of an H–2ALC also by claim against any surety who issued a bond to the H–2ALC); the enforcement of covered provisions of the work contract as set forth in 29 CFR 501.10(a); the assessment of a civil money penalty; reinstatement; or the recommendation of debarment for up to 3 years.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including the withholding of unpaid wages and/or reinstatement, to restrain violation of the H–2A provisions of the INA, 20 CFR part 655, subpart B, or these regulations by any person.

(c) Petition any appropriate District Court of the U.S. for specific performance of covered contractual obligations.

### § 502.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H–2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

### § 502.18 Representation of the Secretary.

(a) Except as provided in 28 U.S.C. 518(a) relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator, WHD and the Secretary in all administrative hearings under the H–2A provisions of the Act and these regulations.

### § 502.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation of the work contract as set forth in § 501.10(a) of these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H–2A provisions of the Act or these regulations the Administrator, WHD shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation or violations of the H–2A provisions of the Act and these regulations;

(2) The number of H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H–2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment that is required by sec. 218 of the INA, 20 CFR 655, subpart B, or these regulations constituting a separate violation), with the following exceptions:

(1) For a willful failure to meet a covered condition of the work contract,

or for willful discrimination, the civil money penalty shall not exceed $5,000 for each such violation committed (with each willful failure to honor the terms or conditions of a worker's employment that are required by sec. 218 of the INA, 20 CFR 655, subpart B, or these regulations constituting a separate violation);

(2) For a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed $25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed $100,000 per worker.

(3) For purposes of paragraph (c)(2) of this section, the term *serious injury* means:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,000 per investigation;

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within 60 days of the date of need other than for a lawful, job-related reason, except that such layoff shall be permitted where all H–2A workers were laid off first, the civil penalty shall not exceed $10,000 per violation per worker.

### § 502.20 Debarment and revocation.

(a) The WHD shall recommend to the Administrator, OFLC the debarment of any employer and any successor in interest to that employer (or the employer's attorney or agent if they are a responsible party) if the WHD finds that the employer substantially violated a material term or condition of its temporary labor certification for the employment of domestic or nonimmigrant workers.

(b) For purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages, benefits required to be offered under the H–2A program, or working conditions of a significant number of the employer's U.S. or H–2A workers;

(ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a willful failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart; or

(iv) Reflect the employment of an H–2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;

(2) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(3) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(c) Procedures for Debarment Recommendation. The WHD will send to the employer a *Notice of Recommended Debarment*. The *Notice of Recommended Debarment* must be in writing, must state the reason for the debarment recommendation, including a detailed explanation of the grounds for and the duration of the recommended debarment. The debarment recommendation will be forwarded to the Administrator, OFLC. The *Notice of Recommended Debarment* shall be issued no later than 2 years after the occurrence of the violation.

(d) The WHD may recommend to the Administrator, OFLC the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Willfully violated a material term or condition of the approved temporary agricultural labor certification, work contract, or this part, unless otherwise provided under paragraphs (d)(2) through (4) of this section.

(2) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d);

(3) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order Secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).

(e) In considering a recommendation made by the WHD to debar an employer or to revoke a temporary agricultural labor certification, the Administrator, OFLC shall treat final agency determinations that the employer has committed a violation as res judicata and shall not reconsider those determinations.

### § 502.21 Failure to cooperate with investigations.

No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked. The taking of any one action shall not bar the taking of any additional action.

### § 502.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator, WHD by certified check or by money order, made payable to the order of *Wage and Hour Division, United States Department of Labor*. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

## Subpart C—Administrative Proceedings

### § 502.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties, and which may be applied to the enforcement of covered provisions of the work contract as set forth in § 501.10(a), including the collection of unpaid wages due as a result of any violation of the H–2A provisions of the Act or of these regulations. Except with respect

to the imposition of civil money penalties, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

PROCEDURES RELATING TO HEARING

### § 502.31 Written notice of determination required.

Whenever the Administrator, WHD decides to assess a civil money penalty or to proceed administratively to enforce covered contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

### § 502.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator, WHD including the amount of any unpaid wages due or actions necessary to fulfill a covered contractual obligation, the amount of any civil money penalty assessment and the reason or reasons therefore.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator, WHD shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

### § 502.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

RULES OF PRACTICE

### § 502.34 General.

Except as specifically provided in these regulations, the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

### § 502.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

### § 502.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

IN THE MATTER OF ____, RESPONDENT.

(b) For the purposes of such administrative proceedings the Administrator, WHD shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

REFERRAL FOR HEARING

### § 502.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the Administrator, WHD, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by *Order of Reference,* promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the *Order of Reference,* together with a copy of these regulations, shall be served by counsel for the Administrator, WHD upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

### § 502.38 Notice of docketing.

Upon receipt of an *Order of Reference,* the Chief Administrative Law Judge shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the *Order of Reference* was filed.

### § 502.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

### § 502.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and

an order is submitted within the time allowed therefor, the ALJ, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

POST-HEARING PROCEDURES

**§ 502.41 Decision and order of Administrative Law Judge.**

(a) The ALJ shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

(b) The decision of the ALJ shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Administrative Review Board (ARB) in person or by certified mail.

(d) The decision concerning civil money penalties and/or back wages when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

**§ 502.42 Procedures for initiating and undertaking review.**

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision concerning civil money penalties and/or back wages within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action. If the ARB does not issue a notice accepting a petition for review of the decision concerning the debarment recommendation within 30 days after the receipt of a timely filing of the petition, or if no petition has been received by the ARB within 30 days of the date of the decision, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be inoperative unless and until the ARB issues an order affirming the decision.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding in person or by certified mail.

**§ 502.43 Responsibility of the Office of Administrative Law Judges.**

Upon receipt of the ARB's Notice pursuant to § 501.42 of these regulations, the Office of ALJ shall promptly forward a copy of the complete hearing record to the ARB.

**§ 502.44 Additional information, if required.**

Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and

(c) The time within which such presentation shall be submitted.

**§ 502.45 Final decision of the Administrative Review Board.**

The ARB's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail.

RECORD

**§ 502.46 Retention of official record.**

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge, or, where the case has been the subject of administrative review, the ARB.

### § 502.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge or, where the case has been the subject of administrative review, the ARB shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

## PART 504—ATTESTATIONS BY FACILITIES USING NONIMMIGRANT ALIENS AS REGISTERED NURSES

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(i)(a) and 1182(m); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103; and sec. 341 (a) and (b), Pub. L. 103–182, 107 Stat. 2057.

SOURCE: 61 FR 51014, Sept. 30, 1996, unless otherwise noted.

### § 504.1 Cross-reference.

Regulations governing labor condition attestations by facilities using nonimmigrant aliens as registered nurses are found at 20 CFR part 655, subparts D and E.

## PART 505—LABOR STANDARDS ON PROJECTS OR PRODUCTIONS ASSISTED BY GRANTS FROM THE NATIONAL ENDOWMENTS FOR THE ARTS AND HUMANITIES

Sec.
505.1 Purpose and scope.
505.2 Definitions.
505.3 Prevailing minimum compensation.
505.4 Receipt of grant funds.
505.5 Adequate assurances.
505.6 Safety and health standards.
505.7 Failure to comply.

AUTHORITY: Sec. 5(j), Pub. L. 89–209, 79 Stat. 848 (20 U.S.C. 954(i)); sec. 7(g), Pub. L. 94–462, 90 Stat. 1971, as amended by sec. 107(4), Pub. L. 99–194, 99 Stat. 1337 (20 U.S.C. 956(g)); Secretary's Order 9–83 (48 FR 35736) and Secretary's Order 6–84 (49 FR 32473).

SOURCE: 53 FR 23541, June 22, 1988, unless otherwise noted.

### § 505.1 Purpose and scope.

(a) The regulations contained in this part set forth the procedures which are deemed necessary and appropriate to carry out the provisions of section 5(i) and section 7(g) of the National Foundation on the Arts and Humanities Act of 1965, as amended, 20 U.S.C. 954(i), 20 U.S.C. 956(g). As a condition to the receipt of any grant, the grantees must give adequate assurances that all professional performers and related or supporting professional personnel employed on projects or productions assisted by grants from the National Endowment for the Arts and the National Endowment for the Humanities shall receive not less than the prevailing minimum compensation as determined by the Secretary of Labor.

(b) Regulations and procedures relating to wages on construction projects as provided in section 5(j) and section 7(j) of the National Foundation on the Arts and Humanities Act of 1965, as amended, may be found in parts 3 and 5 of this title.

(c) Standards of overtime compensation for laborers or mechanics may be found in the Contract Work Hours and Safety Standards Act, 76 Stat. 357, 40 U.S.C. 327 *et seq.* and part 5 of this title.

### § 505.2 Definitions.

(a) The term *Act* means the National Foundation on the Arts and the Humanities Act of 1965, as amended, 79 Stat 848, as amended, 20 U.S.C. 951 *et seq.*

(b) The term *Secretary* means the Secretary of Labor.

(c) The term *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative, to whom is assigned the performance of functions of the Secretary pertaining to wages under the National Foundation on the Arts and the Humanities Act of 1965, as amended.

(d) The term *Assistant Secretary* means the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, or authorized representative, to whom is assigned the performance of functions of the Secretary pertaining to safety and health under the National Foundation on the Arts and the Humanities Act of 1965, as amended.

(e) *Professional* in the phrase *professional performer and related or supporting professional personnel* shall include all those who work for compensation on a project or production which is assisted by a grant from the National Endowment for the Arts or the National Endowment for the Humanities regardless of whether paid out of grant funds. It shall not include those whose status is *amateur* because their engagement for performance or supporting work contemplates no compensation. Compensation does not include reimbursement of expenses (i.e., meals, costumes, make-up etc.). The words *related or supporting . . . personnel* in the same phrase shall include all those whose work is related to the particular project or production such as musicians, stage hands, scenery designers, technicians, electricians and moving picture machine operators, as distinguished from those who operate a place for receiving an audience without reference to the particular project or production being exhibited, such as ushers, janitors, and those who sell and collect tickets. The phrase does not include laborers and mechanics employed by contractors or subcontractors on construction projects, whose compensation is regulated under section 5(j) and section 7(j) of the Act. The phrase *professional performers and related or supporting professional personnel* shall not include persons employed as regular faculty or staff of an educational institution primarily performing duties commonly associated with the teaching profession. It shall include persons employed by educational institutions primarily to engage in activities customarily performed by performing artists or by those who assist in the presentation of performances assisted by grants from the National Endowment for the Arts or the National Endowment for the Humanities.

### § 505.3 Prevailing minimum compensation.

(a)(1) In the absence of an alternative determination made by the Administrator under paragraph (b) of this section, and except as provided in paragraph (a)(2) of this section, the prevailing minimum compensation required to be paid under the Act to the various professional performers and related or supporting professional personnel employed on projects or productions assisted by grants from the National Endowment for the Arts and the National Endowment for the Humanities shall be the compensation (including fringe benefits) contained in collective bargaining agreements negotiated by the following national or international labor organizations or their local affiliates:

Actors' Equity Association.
Screen Actors Guild, Inc.
Screen Extras Guild, Inc.
American Guild of Musical Artists, Inc.
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators.
American Federation of Musicians.
National Association of Broadcast Employees and Technicians.
American Federation of Television and Radio Artists.
International Brotherhood of Electrical Workers.
American Guild of Variety Artists.
Writers Guild.

(2) Professional performers and related or supporting professional personnel who are to perform activities which do not come within the jurisdiction of any collective bargaining agreement negotiated by the labor organizations named in paragraph (a)(1) of this section shall be paid minimum compensation as determined by agreement of the grant applicant or grantee and the personnel who will perform such activities or their representatives. Evidence of the agreement reached by the parties shall be submitted by the grant applicant to the grant agency, together with evidence of the prevailing minimum compensation for similar activities. If the parties do not agree on the minimum compensation to be paid to such personnel, the matter shall be referred to the Administrator of the Wage and Hour Division for final determination.

(b)(1) Interested parties, including grant applicants, grantees, professional performers or related or supporting professional personnel and their representatives, may at any time submit to the Administrator a request for a determination of prevailing minimum compensation. The Administrator will make a determination concerning each

such request in accordance with paragraph (b)(4) of this section.

(2) Any request for a determination of prevailing minimum compensation shall include or be accompanied by information as to the locality or localities, the class or classes of professional performers or related or supporting professional personnel for the project or production in question, the names and addresses (to the extent known) of interested parties, and all available information relating to prevailing minimum compensation currently being paid to such persons or to persons employed in similar activities. No particular form is prescribed for submission of information under this section.

(3) If the information specified in paragraph (b)(2) of this section is not submitted with a request for an alternative determination of prevailing minimum compensation or is insufficient to permit a determination, the Administrator may deny the request or request additional information, at the Administrator's discretion. Pertinent information from any source may be considered by the Administrator in connection with any request.

(4) The Administrator will respond to a request for determination under this section within 30 days of receipt, by issuing a determination of alternative prevailing minimum compensation or denying the request or advising that additional time is necessary for a decision. If the Administrator determines from a preponderance of all relevant evidence obtained in connection with the request that the compensation provided for in the agreements negotiated by the labor organizations set forth in paragraph (a) of this section does not prevail for any professional performer or related or supporting professional personnel employed on similar activities in the locality, the Administrator will issue a determination of the prevailing minimum compensation required to be paid under the Act to such persons. If the Administrator finds that the compensation provided for in the agreements negotiated by the labor organizations set forth in paragraph (a) of this section does prevail for the professional performers or related or supporting professional personnel in question, the requesting party will be so notified.

(c) All professional performers and related or supporting professional personnel (other than laborers or mechanics with respect to whom labor standards are prescribed in section 5(j) and 7(j) of the Act) employed on projects or productions which are financed in whole or in part under section 5 or section 7 of the Act will be paid, without subsequent deduction or rebate on any account, not less than the prevailing minimum compensation determined in accordance with paragraph (a) of this section, unless an alternative determination is made under paragraph (b) of this section. Pending the decision of the Administrator on a request for determination under paragraph (b) of this section, the grantee may be required to set aside in a separate escrow account sufficient funds to satisfy the difference between the compensation (including fringe benefits) actually paid to the employee(s) in question, and the compensation (including fringe benefits) required under the applicable collective bargaining agreement negotiated by the labor organization named in paragraph (a) of this section, or furnish a bond with a surety or sureties satisfactory to the Administrator for the protection of the compensation of the affected employees.

### § 505.4 Receipt of grant funds.

(a) The grantee shall not receive funds authorized by section 5 or section 7 of the Act until adequate initial assurances have been filed with the Chairperson of the National Endowment for the Arts or the Chairperson of the National Endowment for the Humanities, pursuant to sections 5(i) (1) and (2) and sections 7(g) (1) and (2) of the Act as provided in § 505.5(a), that all professional performers and related or supporting professional personnel will be paid not less than the prevailing minimum compensation and that the safety and health requirements will be complied with. Neither shall the grantee receive any such funds if and after the Chairperson of the National Endowment for the Arts or Chairperson of the National Endowment for the Humanities is advised by

the Secretary that continuing assurances as provided in § 505.5(b) are inadequate or that labor standards contemplated by sections 5(i) (1) and (2) or sections 7(g) (1) and (2) of the Act have not been observed.

(b) In order to facilitate such assurances so that the grantee may receive the grant funds promptly, the Chairpersons of the National Endowment for the Arts and the National Endowment for the Humanities will transmit with the grant letter, to each grantee of a grant that will provide assistance to projects or productions employing professional performers or related or supporting professional personnel under section 5 or section 7 of the Act, a copy of these regulations together with two copies of the assurance form (Form No. ESA–38). The Chairperson will advise the grantee that before the grant may be received, the grantee must give assurances that all professional performers and related or supporting professional personnel (other than laborers or mechanics with respect to whom labor standards are prescribed in section 5(j) and section 7(j) of the Act), will be paid, without subsequent deduction or rebate on any account not less than the minimum compensation determined in accordance with § 505.3 (a) or (b) and that the safety and health requirements under § 505.6 will be met. The Chairpersons will maintain on file in Washington, DC, for a period of three (3) years and make available upon request of the Secretary the original signed Form ESA–38 and a copy of the grant letter together with any supplementary documents needed to give a description of the project or production to be financed in whole or in part under the grant.

### § 505.5 Adequate assurances.

(a) *Initial assurances.* The grantee shall give adequate initial assurances that not less than the prevailing minimum compensation determined in accordance with § 505.3 will be paid to all professional performers and related or supporting professional personnel, and that no part of the project or production will be performed under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees, by executing and filing with the Chairperson of the National Endowment for the Arts or the Chairperson of the National Endowment for the Humanities, as appropriate, Form ESA–38.

(b) *Continuing assurances.* (1) The grantee shall maintain and preserve sufficient records as an assurance of compliance with section 5(i) (1) and (2) and section 7(g) (1) and (2) of the Act and shall make such reports therefrom to the Secretary as necessary or appropriate to assure the adequacy of the assurances given. Such records shall be kept for a period of three (3) years after the end of the grant period to which they pertain. These records shall include the following information relating to each performer and related or supporting professional personnel to whom a prevailing minimum compensation determination applies pursuant to § 505.3. In addition the record required in paragraph (b)(1)(vii) of this section shall be kept for all employees engaged in the project or production assisted by the grant.

(i) Name.

(ii) Home address.

(iii) Occupation.

(iv) Basic unit of compensation (such as the amount of a weekly or monthly salary, talent or performance fee, hourly rate or other basis on which compensation is computed), including fringe benefits or amounts paid in lieu thereof.

(v) Work performed for each pay period expressed in terms of the total units of compensation fully and partially completed.

(vi) Total compensation paid each pay period, deductions made, and date of payment, including amounts paid for fringe benefits and the person to whom they were paid, and

(vii) Brief description of any injury incurred while performing under the grant and the dates and duration of disability.

(2) The grantee shall permit the Administrator and the Assistant Secretary or their representatives to investigate and gather data regarding the wages, hours, safety, health, and other conditions and practices of employment related to the project or production, and to enter and inspect such project or production and such records

(and make such transcriptions thereof), interview such employees during normal working hours, and investigate such facts, conditions, practices, or matters as may be deemed necessary or appropriate to determine whether the grantee has violated the labor standards contemplated by section 5(i) and section 7(g) of the Act.

(c) *Determination of adequacy*. The Administrator and Assistant Secretary shall determine the adequacy of assurances given pursuant to paragraphs (a) and (b) of this section within each of their respective areas of responsibilities, and may revise any such determination at any time.

(The requirements in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0017)

[53 FR 23541, June 22, 1988; 53 FR 24171, June 27, 1988]

### § 505.6 Safety and health standards.

(a) *Standards*. Section 5(i)(2) and section 7(g)(2) of the Act provide that ''no part of any project or production which is financed in whole or in part under this section will be performed or engaged in under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees engaged in such project or production. Compliance with the safety and sanitary laws in the State in which the performance or part thereof is to take place shall be prima facie evidence of compliance. * * *'' The applicable safety and health standards shall be those set forth in 29 CFR parts 1910 and 1926, including matters incorporated by reference therein. Evidence of compliance with State laws relating to health and sanitation will be considered prime facie evidence of compliance with the safety and health requirements of the Act, and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health standards set forth in 29 CFR parts 1910 and 1926, including matters incorporated by reference therein.

(b) *Variances*. (1) Variances from standards applied under paragraph (a) of this section may be granted under the same circumstances in which variances may be granted under section 6(b)(6)(A) or 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 655). The procedures for the granting of variances and for related relief are those published in part 1905 of this title.

(2) Any requests for variances shall also be considered requests for variances under the Williams-Steiger Occupational Safety and Health Act of 1970, and any variance from a standard applied under paragraph (a) of this section and in part 1910 of this title shall be deemed a variance from the standards under both the National Foundation on the Arts and Humanities Act of 1965 and the Williams-Steiger Occupational Safety and Health Act of 1970.

### § 505.7 Failure to comply.

The Secretary's representatives shall maintain a list of those grantees who are considered to be responsible for instances of failure to comply with the obligation of the grantees specified in section 5(i) (1) and (2) and section 7(g) (1) and (2) of the Act, which are considered to have been willful or of such nature as to cast doubt on the reliability of formal assurances subsequently given and there shall be maintained a similar list where adjustment of the violations satisfactory to the Secretary was not properly made. Assurances from persons or organizations placed on either such list or any organization in which they have a substantial interest shall be considered inadequate for purposes of receiving further grants for a period not to exceed three (3) years from the date of notification by the Secretary that they have been placed on the lists unless, by appropriate application to the Secretary, they demonstrate a current responsibility to comply with section 5(i) (1) and (2) and section 7(g) (1) and (2) of the Act, and demonstrate that correction of the violations has been made.

## PART 506—ATTESTATIONS BY EMPLOYERS USING ALIEN CREWMEMBERS FOR LONGSHORE ACTIVITIES IN U.S. PORTS

AUTHORITY: 8 U.S.C. 1288 (c) and (d).

SOURCE: 61 FR 51014, Sept. 30, 1996, unless otherwise noted.

### §506.1 Cross-reference.

Regulations governing attestations by employers using alien crewmembers for longshore activities in U.S. ports are found at 20 CFR part 655, subparts F and G.

## PART 507—LABOR CONDITION APPLICATIONS AND REQUIREMENTS FOR EMPLOYERS USING NONIMMIGRANTS ON H–1B SPECIALTY VISAS IN SPECIALTY OCCUPATIONS AND AS FASHION MODELS

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and sec. 341 (a) and (b), Pub. L. 103–182, 107 Stat. 2057.

SOURCE: 61 FR 51014, Sept. 30, 1996, unless otherwise noted.

### §507.1 Cross-reference.

Regulations governing labor condition applications requirements for employers using nonimmigrants on H–1B specialty visas in specialty occupations and as fashion models are found at 20 CFR part 655, subparts H and I.

## PART 508—ATTESTATIONS FILED BY EMPLOYERS UTILIZING F–1 STUDENTS FOR OFF-CAMPUS WORK

AUTHORITY: 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

SOURCE: 61 FR 51014, Sept. 30, 1996, unless otherwise noted.

### §508.1 Cross-reference.

Regulations governing attestations by employers using F–1 students in off-campus work are found at 20 CFR part 655, subparts J and K.

## PART 510—IMPLEMENTATION OF THE MINIMUM WAGE PROVISIONS OF THE 1989 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT IN PUERTO RICO

### Subpart A—General

Sec.
510.1 Summary.
510.2 Purpose and scope of regulations.
510.3 Definitions.

### Subpart B—Schedule of Minimum Wage Rates Applicable in Puerto Rico

510.10 Table of Wage Rates and Effective dates.

### Subpart C—Classification of Industries

510.20 Wage surveys in Puerto Rico.
510.21 SIC codes.
510.22 Industries eligible for minimum wage phase-in.
510.23 Agricultural activities eligible for minimum wage phase-in.
510.24 Governmental entities eligible for minimum wage phase-in.
510.25 Traditional functions of government.
APPENDIX A TO PART 510—MANUFACTURING INDUSTRIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN
APPENDIX B TO PART 510—NONMANUFACTURING INDUSTRIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN
APPENDIX C TO PART 510—GOVERNMENT CORPORATIONS ELIGIBLE FOR MINIMUM WAGE PHASE-IN
APPENDIX D TO PART 510—MUNICIPALITIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN

AUTHORITY: Sec. 4, Pub. L. 101–157, 103 Stat. 938; 29 U.S.C. 201 *et seq.*

SOURCE: 55 FR 12120, Mar. 30, 1990, unless otherwise noted.

## Subpart A—General

### §510.1 Summary.

(a) The Fair Labor Standards Amendments of 1989 (Pub. L. 101–157) were enacted into law on November 17, 1989. Among other provisions, these amendments to the Fair Labor Standards Act (FLSA) increased the minimum wage in section 6(a)(1) of the Act to $3.80 an hour effective April 1, 1990, and to $4.25 an hour effective April 1, 1991. With respect to certain industries and governmental entities in the Commonwealth

of Puerto Rico, the Amendments provided that these increases would be phased in over extended periods of time.

(b) Section 6(c) of the FLSA provides for four separate categories or tiers for implementing the minimum wage rate increases in Puerto Rico.

(1) For Tier 1, which includes employees of the United States, employees of hotels, motels, or restaurants, retail or service establishments that employ such employees primarily in connection with the preparation or offering of food or beverages for human consumption, and industries in which the average hourly wage is greater than $4.64, there shall be no phase-in. The wage rates and effective dates shall be those specified in section 6(a)(1) of FLSA, i.e., $3.80 per hour beginning April 1, 1990 and $4.25 per hour beginning April 1, 1991.

(2) For Tier 2, which includes industries in which the average hourly wage is not less than $4.00 but not more than $4.64, the increases in the minimum wage rates shall be phased-in in five annual increments (rounded to the nearest 5 cents) beginning April 1, 1990, and ending April 1, 1994.

(3) For Tier 3, which includes industries in which the average hourly wage is less than $4.00, the increases in the minimum wage shall be phased-in in six annual increments (rounded to the nearest 5 cents) beginning April 1, 1990, and ending April 1, 1995.

(4) For Tier 4, which includes certain employees of the Commonwealth of Puerto Rico, municipalities, and other governmental entities of the Commonwealth in which the average hourly wage is less than $4.00, the increases shall be phased-in in seven annual increments (rounded to the nearest 5 cents) beginning April 1, 1990 and ending April 1, 1996.

(c) The Amendments also eliminated reference to Puerto Rico in those sections of FLSA relating to the establishment and conduct of special industry committees which recommend minimum wage rates in certain territories. These sections now apply only to American Samoa. (Industry committee regulations pertaining to American Samoa are found in 29 CFR parts 511 and 697).

### § 510.2 Purpose and scope of regulations.

(a) The purpose of these regulations is to implement the 1989 Amendments to the FLSA with respect to minimum wage increases in Puerto Rico. These regulations establish the applicable wage rates and effective dates in the four statutory tiers and categorize industries and governmental entities in Puerto Rico in those tiers according to average hourly wage rates. In addition, these regulations explain the methodology used to determine appropriate tiers, including the use of standard industrial classification (SIC) codes to categorize industries.

(b) Subpart A of this part summarizes the provisions of the Amendments as applicable to Puerto Rico and defines the terms used herein. Subpart B of this part states the specific minimum wage rates for each tier and the effective dates of those rates. Subpart C of this part explains how industry and governmental categories were determined, the general methodology used to conduct the surveys which provided the data used to determine average hourly wage rates, and special issues in the classification of governmental entities. Appendix A of this part contains a listing of manufacturing industries by Standard Industrial Classification (SIC) code and indicates the tier to which each industry is subject. Appendix B of this part contains a listing of nonmanufacturing industries by SIC code and indicates the tier to which each industry is subject. Appendix C of this part contains a listing of government corporations and indicates the tier to which each such corporation is subject. Appendix D of this part contains a listing of municipalities and indicates the tier to which each municipality is subject.

(c) Nothing contained in this part should be construed as precluding the Puerto Rico Minimum Wage Board, which has been granted authority to promulgate minimum wage rates above the Federal statutory minimum, from providing for increases in any industry which would exceed the rates provided for in these regulations or in section 6(a)(1) of the Act.

**§ 510.3 Definitions.**

(a) *Act* or *FLSA* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*).

(b) *Amendments* or *1989 Amendments* means the Fair Labor Standards Amendments of 1989 (Pub. L. 101–157).

(c) *Secretary* means the Secretary of Labor, or a duly authorized representative of the Secretary.

(d) *Administrator* means the Administrator of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, or a duly authorized representative of the Administrator.

(e) *Department* means the U.S. Department of Labor.

(f) *Tier* means one of the four categories established for an extended phase-in of the statutory increases in the minimum wage under section 6(c) of the Act as amended.

(g) *Standard Industrial Classification (SIC)* refers to the classifications established in the *Standard Industrial Classification Manual, 1987*, published by the Office of Management and Budget, Executive Office of the President.

## Subpart B—Schedule of Minimum Wage Rates Applicable in Puerto Rico

**§ 510.10 Table of wage rates and effective dates.**

(a) The following table provides effective dates of minimum wage increases for the four statutory tiers. Appendices A and B to these regulations contain listings of manufacturing and nonmanufacturing industries in Puerto Rico by SIC code, and indicate which tier is applicable. Appendices C and D contain listings of government corporations and municipalities and indicate which tier is applicable.

EFFECTIVE DATES

| Tier | 4/1/90 | 4/1/91 | 4/1/92 | 4/1/93 | 4/1/94 | 4/1/95 | 4/1/96 |
|---|---|---|---|---|---|---|---|
| One | $3.80 | $4.25 | $4.25 | $4.25 | $4.25 | $4.25 | $4.25 |
| Two | 3.55 | 3.70 | 3.90 | 4.05 | 4.25 | 4.25 | 4.25 |
| Three | 3.50 | 3.65 | 3.80 | 3.95 | 4.10 | 4.25 | 4.25 |
| Four | 3.50 | 3.60 | 3.75 | 3.85 | 4.00 | 4.10 | 4.25 |

(b) Tier 1 applies to employees of the United States, employees of hotels, motels, or restaurants, retail or service establishments that employ such employees primarily in connection with the preparation or offering of food or beverages for human consumption, and industries in which the average hourly wage is greater than $4.64.

(c) Tier 2 applies to industries in which the average hourly wage is not less than $4.00 but not more than $4.64.

(d) Tier 3 applies to industries in which the average hourly wage is less than $4.00.

(e) Tier 4 applies to certain employees of the Commonwealth of Puerto Rico, municipalities, and other governmental entities of the Commonwealth in which the average hourly wage is less than $4.00.

## Subpart C—Classification of Industries

**§ 510.20 Wage surveys in Puerto Rico.**

(a) The legislative history to the 1989 Amendments (Conference Report 101–47 on H.R. 2, May 8, 1989) stated that for any industry to qualify for an extended minimum wage phase-in, the government of Puerto Rico would be required to furnish official survey data substantiating that an industry's average hourly wage is below either the $4.65 or $4.00 threshold level. Such data were to be compiled and submitted for review to the Department.

(b) *Manufacturing industries.* For purposes of implementing section 6(c) of the Act, as amended, Puerto Rico has submitted its Census of Manufacturing Industries. The Bureau of Labor Statistics of Puerto Rico regularly gathers data from manufacturing establishments regarding employment, hours and earnings. The data include hourly

earnings for production and related workers and are generally specific to the four-digit SIC code level.

(c) *Non-manufacturing industries.* The Bureau of Labor Statistics of Puerto Rico designed and executed a survey to supplement data regularly gathered for the U.S. Bureau of Labor Statistics (i.e., that included in the payroll establishment survey published in *Employment and Earnings*). The supplemental survey was carried out to determine average hourly earnings for production workers or non-supervisory employees in the private non-agricultural, non-manufacturing sector. Employment and payroll information was collected for the payroll period which included April 12, 1989. The data provided to the Department were generally specific to the four-digit SIC code level.

(d) *Agriculture.* At the request of the Department, the Bureau of Labor Statistics of Puerto Rico conducted a survey of wages paid to agricultural workers which included employment and earnings from at least a specified number of sugarcane farms, coffee farms, ornamental farms, vegetable farms, and other farms, following standard statistical random sampling techniques. The survey included information on earnings, employment, and hourly wage rates paid to workers for the workweek including March 11 through March 17, 1990. In addition, applicable collective bargaining agreements were reviewed for sugarcane farms.

(e) *Commonwealth government.* In the case of the Commonwealth Government of Puerto Rico, a census of hourly earnings was undertaken of all government departments, commissions and other agencies. A separate survey was conducted of government corporations. Managers, officials and employees in positions which require a college degree were excluded from the surveys.

(f) *Municipalities.* In the case of the municipalities of Puerto Rico, a census of hourly earnings was conducted. Managers, officials and employees in positions which require a college degree were excluded from the survey.

[55 FR 12120, Mar. 30, 1990, as amended at 55 FR 53247, Dec. 27, 1990]

**§ 510.21 SIC codes.**

(a) The Conference Report specifically cites Puerto Rico's annual Census of Manufacturing Industries as a source of average hourly wage data by industry. Industries in that census are organized by Standard Industrial Classification (SIC), the statistical classification system used for a variety of governmental and statistical purposes. With respect to non-manufacturing industries, or other industries not included in the Census of Manufacturing, the Conference Report stated that data ''should be at a level of specificity comparable to the four digit Standard Industry Code (SIC) code level.''

(b) The Standard Industrial Classification (SIC) codes listed in appendix A and B herein are designated in accordance with the Standard Industrial Classification (SIC) Manual, 1987, published by the Executive Office of the President, Office of Management and Budget. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Copies may be inspected at all federal depository libraries in the Commonwealth of Puerto Rico; at the district office of the Wage and Hour Division, U.S. Department of Labor, New San Juan Office Building, 159 Chardon St., room 102, Hato Rey, PR 00918; at the Commonwealth of Puerto Rico Department of Labor and Human Resources, Prudencio Rivera Building, Munoz Rivera Avenue 505, Mato Rey, PR 00918; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Establishments are classified according to their primary activity. The classification structure classifies industries by:

(1) Two-digit major group,

(2) Three digit industry group, or

(3) Four-digit industry code, according to the level of industrial detail which may be required.

Each operating establishment is assigned an industry code on the basis of its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990, as amended at 69 FR 18803, Apr. 9, 2004]

### § 510.22 Industries eligible for minimum wage phase-in.

(a) Appendix A contains a listing of all industries included in the Census of Manufacturing. Appendix B contains a listing of non-manufacturing industries. These listing are organized by SIC numbers, presented by:

(1) Major group (two-digit classification),

(2) Industry group (three-digit classification), and (3) industry (four-digit classification). In each instance the phase-in tier which applies to that industry or group is indicated.

(b) Employers are required to utilize the most detailed classification which applies to their industry. Where an employer's four-digit SIC code is listed, the tier applicable to that code determines the minimum wage phase-in schedule for that employer. (See § 510.10, above).

(c) Where an industry is not listed by four-digit SIC code, employers shall utilize the three-digit which applies to their industry. If a three-digit code is not listed, employers shall use the applicable two-digit code.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990]

### § 510.23 Agricultural activities eligible for minimum wage phase-in.

Agriculture activities eligible for an extended phase-in of the minimum wage in Major groups 01, 02, and 07 have been incorporated into Appendix B—Nonmanufacturing Industries Eligible for Minimum Wage Phase-In. Applicable wage rates are effective retroactive to April 1, 1990. Employers in the sugarcane farming industry (SIC Number 0133) who are subject to Tier 3 wage rates but who have paid wage rates based on Tier 2 wage rates may not take any action to recoup such payments where those actions would have the effect of reducing the wage rate being paid at the time of such recoupment to below that required under Tier 3.

[55 FR 53247, Dec. 27, 1990]

### § 510.24 Governmental entities eligible for minimum wage phase-in.

(a) The Commonwealth government of Puerto Rico has been determined to be eligible for treatment under Tier 2, on the basis of wage data supplied to the Department.

(b) Appendix C of this part contains a listing of Commonwealth government corporations, indicating the phase-in tier which applies. Entities which do not appear on the list are those for which no wage data were supplied. These entities are therefore categorized under Tier 1, and are ineligible for an extended phase-in.

(c) Appendix D of the part contains a listing of municipalities, indicating the phase-in tier which applies. Municipalities categorized under Tier 1 are those which failed to supply wage data.

(d) Employees of municipalities who have reason to believe that the municipality by which they are employed has been incorrectly categorized, e.g., categorized under Tier 3 instead of Tier 2, may no later than June 1, 1990, file with the Administrator a petition for review. The petition shall be accompanied by any information the employee may have to support a determination that the municipality is incorrectly categorized. In the event the Administrator determines that a tier other than that listed in appendix D of this part applies, the affected municipality shall be liable for retroactive payment of any back wages found to be due.

(e) Certain employees of municipalities or government corporations in which the average wage is less than $4.00 per hour are eligible to be paid under Tier 4, rather than Tier 3. Tier 4 applies only to those employees employed by municipalities or government corporations who are principally engaged in one or more of the ''traditional'' functions listed in § 510.24 (a) or

(b). All other employees of such entities must be paid in accordance with Tier 3.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990]

### § 510.25 Traditional functions of government.

(a) Section 6(c)(4) of the Act, as amended, limits the six-year phase-in of the statutory minimum wage (''Tier 4'') to those employees with an average wage of less than $4.00 per hour who were brought under minimum wage coverage ''pursuant to an amendment made by the Fair Labor Standards Amendments of 1985.'' The Department has interpreted this language as referring to section 2(c) of the 1985 FLSA Amendments, which provided for deferred liability for minimum wage violations (until April 15, 1986) ''with respect to any employee who would not have been covered under the Secretary's special enforcement policy'' published in 29 CFR 775.2 and 775.4. The latter subsection listed those functions of State or local government which were determined by the Supreme Court's ruling in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (subsequently overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)) to be integral operations of the governments in areas of traditional governmental functions. The listed ''traditional'' functions included the following:

(1) Schools.
(2) Hospitals.
(3) Fire prevention.
(4) Police protection.
(5) Sanitation.
(6) Public health.
(7) Parks and recreation.
(8) Libraries.
(9) Museums.

(b) The Supreme Court in *National League of Cities* clearly did not limit ''traditional'' functions of government to those set out in paragraph (a) of this section. The Court included within this concept all those governmental services which the States and their political subdivisions have traditionally afforded their citizens, which the States have regarded as integral parts of their governmental activities, and which State and local governments are created to provide. The Department interprets the Court's analysis of ''traditional'' functions as turning in large part upon whether the States or local governments had, prior to initial enactment of federal regulatory legislation applicable to a particular field of service or activity (such as FLSA), generally established themselves as providers of the services. The Department therefore views the following government functions as falling within the ''traditional'' category:

(1) Finance (including Auditor, Budget and Comptroller).
(2) Elections.
(3) Personnel.
(4) Public works.
(5) Office of the Mayor.
(6) Legal Affairs.
(7) Planning.
(8) Waterworks.
(9) Social services.
(10) Street and highway construction and maintenance.
(11) Automobile licensing.
(12) Sewage treatment.

(c) Employees whose primary function falls within one or more of the activities listed in paragraph (a) or (b) of this section, are therefore considered to be engaged in ''traditional'' functions of government. This would include employees who provide support functions for such activities, such as clerical, secretarial, supply and janitorial.

(d) No employees of a municipality or government corporation may be paid in accordance with the Tier 4 phase-in schedule unless the employee:

(1) Is engaged in one of the specific activities listed in paragraphs (a) and (b) of this section, and

(2) Is employed by a municipality or government corporation in which the average wage is less than $4.00 per hour.

## APPENDIX A TO PART 510—MANUFACTURING INDUSTRIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN

This appendix contains a listing of all manufacturing industries for which data were collected and compiled by the Commonwealth of Puerto Rico for purposes of implementing the 1989 Amendments to FLSA. This listing follows the order and classifications

used in the *SIC Manual*, *1987*, which is incorporated by reference in these regulations (§ 510.21).

The data in this appendix are presented by major industry group (two-digit classification), industry group number (three-digit classification), and industry number (four-digit classification). Tiers will not be listed for industry categories in which there were fewer than three employers, in conformance with standard procedures used by the Commonwealth of Puerto Rico in collecting and publishing these data until such time as Puerto Rico receives appropriate waivers of confidentiality from all employers in such categories. These categories are noted with an ''a'' on the following table. In addition, no tier will be listed where an industry was not included in the original survey, because it was not in existence, because the industry was too small to be included, or for other reasons.

Employers who do not find the four-digit classification for their industry shall refer to the appropriate three-digit classification under which their establishment falls. If the appropriate three-digit classification is not listed, employers shall refer to the appropriate two-digit classification. For example, no tier is listed for industry number 2034, dried and dehydrated fruits, vegetables, and soup mixes. Thus, an employer in industry 2034 must use the tier listed for industry group 203, i.e. Tier 2.

Further, employers who find the appropriate four-digit designation in this appendix *must* use that designation and cannot refer to a two- or three-digit classification. For example, an employer in industry number 2033, canned fruits, vegetables, preserves, jams, and jellies, which has a Tier 1 designation, cannot use the Tier 2 designation of industry group 203, canned, frozen, and preserved fruits, vegetables, and food specialties.

If no four-digit, three-digit, or two-digit classification is listed for an industry, employees in that group must pay the Tier 1 rates.

*Important:* In referring to this appendix to determine appropriate tier designations, please note that certain categories of employees are subject to treatment under Tier 1 regardless of the average hourly wage rate for the industry and the tier designation contained herein. These employees, as listed in the 1989 Amendments, are those employed by:

(a) The United States

(b) An establishment that is a hotel, motel, or restaurant, or

(c) Any other retail or service establishment that employs such employee in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of clubs.

Please note that these named categories may not correspond exactly to categories established by the SIC manual.

MANUFACTURING INDUSTRIES

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| 20 | | | 1 | Food and kindred products. |
| | 201 | | 2 | Meat products. |
| | | 2011 | 2 | Meat packing plants. |
| | | 2013 | 1 | Sausages and other prepared meat products. |
| | | 2015 | 2 | Poultry slaughtering and processing. |
| | 202 | | 1 | Dairy products. |
| | | 2022 | a | Natural, processed, and imitation cheese. |
| | | 2023 | 1 | Dry, condensed, and evaporated dairy products. |
| | | 2024 | 1 | Ice cream and frozen desserts. |
| | | 2026 | 1 | Fluid milk. |
| | 203 | | 2 | Canned, frozen, and preserved fruits, vegetables, and food specialties. |
| | | 2032 | a | Canned specialties. |
| | | 2033 | 1 | Canned fruits, vegetables, preserves, jams, and jellies. |
| | | 2035 | 3 | Pickled fruits and vegetables, vegetable sauces and seasonings, and salad dressings. |
| | | 2037 | 2 | Frozen fruits, fruit juices, and vegetables. |
| | | 2038 | 3 | Frozen specialties, not elsewhere classified. |
| | 204 | | 1 | Grain mill products. |
| | | 2041 | a | Flour and other grain mill products. |
| | | 2043 | a | Cereal breakfast foods. |
| | | 2044 | 1 | Rice milling. |
| | | 2045 | 1 | Prepared flour mixes and doughs. |
| | | 2046 | 1 | Wet corn milling. |
| | | 2048 | 1 | Prepared feeds and feed ingredients for animals and fowls, except dogs and cats. |
| | 205 | | 1 | Bakery products. |
| | | 2051 | 1 | Bread and other bakery products, except cookies and crackers. |
| | | 2052 | 1 | Cookies and crackers. |
| | | 2053 | a | Frozen bakery products, except bread. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 206 | | 1 | Sugar and confectionery products. |
| | | 2061 | 1 | Cane sugar, except refining. |
| | | 2062 | a | Cane sugar refining. |
| | | 2064 | 1 | Candy and other confectionery products. |
| | | 2066 | 3 | Chocolate and cocoa products. |
| | | 2067 | a | Chewing gum. |
| | 208 | | 1 | Beverages. |
| | | 2082 | 1 | Malt beverages. |
| | | 2084 | 3 | Wines, brandy, and brandy spirits. |
| | | 2085 | 1 | Distilled and blended liquors. |
| | | 2086 | 1 | Bottled and canned soft drinks and carbonated waters. |
| | | 2087 | 1 | Flavoring extracts and flavoring syrups, not elsewhere classified. |
| | 209 | | 1 | Miscellaneous food preparations and kindred products. |
| | | 2091 | 1 | Canned and cured fish and seafoods. |
| | | 2095 | 2 | Roasted coffee. |
| | | 2096 | 1 | Potato chips, corn chips, and similar snacks. |
| | | 2097 | 3 | Manufactured ice. |
| | | 2098 | a | Macaroni, spaghetti, vermicelli, and noodles. |
| | | 2099 | 2 | Food preparations, not elsewhere classified. |
| 21 | | | 1 | Tobacco products. |
| | 211 | | a | Cigarettes. |
| | | 2111 | a | Cigarettes. |
| | 212 | | 1 | Cigars. |
| | | 2121 | 1 | Cigars. |
| | 213 | | 1 | Chewing and smoking tobacco and snuff. |
| | | 2131 | 1 | Chewing and smoking tobacco and snuff. |
| | 214 | | a | Tobacco stemming and redrying. |
| | | 2141 | a | Tobacco stemming and redrying. |
| 22 | | | 1 | Textile mill products. |
| | 221 | | 1 | Broadwoven fabric mills, cotton. |
| | | 2211 | 1 | Broadwoven fabric mills, cotton. |
| | 224 | | 1 | Narrow fabric and other smallwares mills: cotton, wool, silk, and manmade fiber. |
| | | 2241 | 1 | Narrow fabric and other smallwares mills: cotton, wool, silk, and manmade fiber. |
| | 225 | | 2 | Knitting mills. |
| | | 2251 | 1 | Women's full-length and knee-length hosiery, except socks. |
| | | 2253 | 2 | Knit outerwear mills. |
| | | 2254 | 3 | Knit underwear and nightwear mills. |
| | 226 | | 1 | Dyeing and finishing textiles, except wool fabrics and knit goods. |
| | | 2261 | 3 | Finishers of broadwoven fabrics of cotton. |
| | | 2262 | 1 | Finishers of broadwoven fabrics of manmade fiber and silk. |
| | 227 | | 1 | Carpets and rugs. |
| | | 2273 | 1 | Carpets and rugs. |
| | 228 | | 3 | Yarn and thread mills. |
| | | 2281 | 3 | Yarn spinning mills. |
| 23 | | | 2 | Apparel and other finished products made from fabrics and similar materials. |
| | 231 | | 3 | Men's and boys' suits, coats, and overcoats. |
| | | 2311 | 3 | Men's and boys' suits, coats, and overcoats. |
| | 232 | | 2 | Men's and boys' furnishings, work clothing, and allied garments. |
| | | 2321 | 2 | Men's and boys' shirts except work shirts. |
| | | 2322 | 1 | Men's and boys' underwear and nightwear. |
| | | 2323 | 2 | Men's and boys' neckwear. |
| | | 2325 | 2 | Men's and boys' separate trousers and slacks. |
| | | 2326 | 3 | Men's and boys' work clothing. |
| | | 2329 | 3 | Men's and boys' clothing, not elsewhere classified. |
| | 233 | | 3 | Women's, misses', and juniors' outerwear. |
| | | 2331 | 3 | Women's, misses', and juniors' blouses and shirts. |
| | | 2335 | 3 | Women's, misses', and juniors dresses. |
| | | 2337 | 3 | Women's, misses, and juniors' suits, skirts, and coats. |
| | | 2339 | 2 | Women's, misses', and juniors' outerwear, not elsewhere classified. |
| | 234 | | 2 | Women's, misses', children's, and infants' undergarments. |
| | | 2341 | 2 | Women's, misses', children's, and infants' underwear and nightwear. |
| | | 2342 | 2 | Brassieres, girdles, and allied garments. |
| | 235 | | 3 | Hats, caps, and millinery |
| | | 2353 | 3 | Hats, caps, and millinery |
| | 236 | | 3 | Girls', children's, and infants' outerwear. |
| | | 2361 | 3 | Girls', children's, and infants' dresses, blouses, and shirts. |
| | | 2369 | 3 | Girls', children's, and infants' outerwear, not elsewhere classified. |
| | 238 | | 3 | Miscellaneous apparel and accessories. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 2385 | 3 | Waterproof outerwear. |
| | ..... | 2387 | 3 | Apparel belts. |
| | ..... | 2389 | 3 | Apparel and accessories, not elsewhere classified. |
| | 239 | ..... | 3 | Miscellaneous fabricated textile products. |
| | ..... | 2391 | 2 | Curtains and draperies. |
| | ..... | 2392 | 3 | Housefurnishings, except curtains and draperies. |
| | ..... | 2393 | 3 | Textile bags. |
| | ..... | 2395 | 2 | Pleating, decorative and novelty stitching, and tucking for the trade. |
| | ..... | 2396 | 2 | Automotive trimmings, apparel findings, and related products. |
| | ..... | 2399 | 3 | Fabricated textile products, not elsewhere classified. |
| 24 ..... | ..... | ..... | 2 | Lumber and wood products, except furniture. |
| | 242 | ..... | 3 | Sawmills and planing mills. |
| | ..... | 2421 | 3 | Sawmills and planing mills, general. |
| | 243 | ..... | 2 | Millwork, veneer, plywood, and structural wood members. |
| | ..... | 2431 | 2 | Millwork. |
| | ..... | 2434 | 2 | Wood kitchen cabinets. |
| | ..... | 2435 | a | Hardwood veneer and plywood. |
| | 244 | ..... | 3 | Wood containers. |
| | ..... | 2448 | 3 | Wood pallets and skids. |
| | 245 | ..... | 3 | Wood buildings and mobile homes. |
| | ..... | 2451 | 3 | Mobile homes. |
| | 249 | ..... | 2 | Miscellaneous wood products. |
| | ..... | 2491 | 2 | Wood preserving. |
| | ..... | 2499 | 2 | Wood products, not elsewhere classified. |
| 25 ..... | ..... | ..... | 2 | Furniture and fixtures. |
| | 251 | ..... | 3 | Household furniture. |
| | ..... | 2511 | 3 | Wood household furniture, except upholstered. |
| | ..... | 2512 | 3 | Wood household furniture, upholstered. |
| | ..... | 2514 | 3 | Metal household furniture. |
| | ..... | 2515 | 2 | Mattresses, foundations, and convertible beds. |
| | ..... | 2517 | 3 | Wood television, radio, phonograph, and sewing machine cabinets. |
| | ..... | 2519 | 3 | Household furniture, not elsewhere classified. |
| | 252 | ..... | 2 | Office furniture. |
| | ..... | 2521 | a | Wood office furniture. |
| | ..... | 2522 | 2 | Office furniture, except wood. |
| | 253 | ..... | 3 | Public building and related furniture. |
| | ..... | 2531 | 3 | Public building and related furniture. |
| | 254 | ..... | 1 | Partitions, shelving, lockers, and office and store fixtures. |
| | ..... | 2541 | 2 | Wood office and store fixtures, partitions, shelving, and lockers. |
| | ..... | 2542 | 1 | Office and store fixtures, partitions, shelving, and lockers, except wood. |
| | 259 | ..... | 2 | Miscellaneous furniture and fixtures. |
| | ..... | 2591 | 3 | Drapery hardware and window blinds and shades. |
| | ..... | 2599 | a | Furniture and fixtures, not elsewhere classified. |
| 26 ..... | ..... | ..... | 1 | Paper and allied products. |
| | 261 | ..... | 1 | Pulp mills. |
| | ..... | 2611 | 1 | Pulp mills. |
| | 262 | ..... | 2 | Paper mills. |
| | ..... | 2621 | 2 | Paper mills. |
| | 263 | ..... | a | Paperboard mills. |
| | ..... | 2631 | a | Paperboard mills. |
| | 265 | ..... | 1 | Paperboard containers and boxes. |
| | ..... | 2652 | 1 | Setup paperboard boxes. |
| | ..... | 2653 | 1 | Corrugated and solid fiber boxes. |
| | ..... | 2655 | 1 | Fiber cans, tubes, drums, and similar products. |
| | ..... | 2657 | 1 | Folding paperboard boxes, including sanitary. |
| | 267 | ..... | 1 | Converted paper and paperboard products, except containers and boxes. |
| | ..... | 2671 | 2 | Packaging paper and plastics film, coated and laminated. |
| | ..... | 2672 | a | Coated and laminated paper, not elsewhere classified. |
| | ..... | 2673 | 2 | Plastics, foil, and coated paper bags. |
| | ..... | 2674 | 1 | Uncoated paper and multiwall bags. |
| | ..... | 2676 | 1 | Sanitary paper products. |
| | ..... | 2677 | 1 | Envelopes. |
| | ..... | 2678 | 3 | Stationery, tablets, and related products. |
| | ..... | 2679 | a | Converted paper and paperboard products, not elsewhere classified. |
| 27 ..... | ..... | ..... | 1 | Printing, publishing, and allied industries. |
| | 271 | ..... | 1 | Newspapers: publishing, or publishing and printing. |
| | ..... | 2711 | 1 | Newspapers: publishing, or publishing and printing. |
| | 273 | ..... | a | Books. |
| | ..... | 2731 | a | Books: publishing, or publishing and printing. |
| | ..... | 2732 | 3 | Book printing. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 274 | ..... | 1 | Miscellaneous publishing. |
| | ..... | 2741 | 1 | Miscellaneous publishing. |
| | 275 | ..... | 1 | Commercial printing. |
| | ..... | 2752 | 1 | Commercial printing, lithographic. |
| | ..... | 2754 | 1 | Commercial printing, gravure. |
| | ..... | 2759 | 1 | Commercial printing, not elsewhere classified. |
| | 276 | ..... | 1 | Manifold business forms. |
| | ..... | 2761 | 1 | Manifold business forms. |
| | 278 | ..... | 1 | Blankbooks, looseleaf binders, and bookbinding and related work. |
| | ..... | 2782 | 1 | Blankbooks, looseleaf binders and devices. |
| | 279 | ..... | 1 | Service industries for the printing trade. |
| | ..... | 2796 | 1 | Platemaking and related services. |
| 28 ..... | ..... | ..... | 1 | Chemicals and allied products. |
| | 281 | ..... | 1 | Industrial inorganic chemicals. |
| | ..... | 2813 | 1 | Industrial gases. |
| | ..... | 2819 | 1 | Industrial inorganic chemicals, not elsewhere classified. |
| | 282 | ..... | 1 | Plastics materials and synthetic resins, synthetic rubber, cellulosic and other manmade fibers, except glass. |
| | ..... | 2821 | a | Plastics materials, synthetic resins, and nonvulcanizable elastomers. |
| | ..... | 2822 | 2 | Synthetic rubber (vulcanizable elastomers). |
| | 283 | ..... | 1 | Drugs. |
| | ..... | 2833 | 1 | Medicinal chemicals and botanical products. |
| | ..... | 2834 | 1 | Pharmaceutical preparations. |
| | ..... | 2835 | 1 | In vitro and in vivo diagnostic substances. |
| | ..... | 2836 | 1 | Biological products, except diagnostic substances. |
| | 284 | ..... | 1 | Soap, detergents, and cleaning preparations; perfumes, cosmetics, and other toilet preparations. |
| | ..... | 2841 | 1 | Soap and other detergents, except specialty cleaners. |
| | ..... | 2842 | 1 | Specialty cleaning, polishing, and sanitation preparations. |
| | ..... | 2844 | 1 | Perfumes, cosmetics, and other toilet preparations. |
| | 285 | ..... | 1 | Paints, varnishes, lacquers, enamels, and allied products. |
| | ..... | 2851 | 1 | Paints, varnishes, lacquers, enamels, and allied products. |
| | 286 | ..... | 1 | Industrial organic chemicals. |
| | ..... | 2865 | 1 | Cyclic organic crudes and intermediates, and organic dyes and pigments. |
| | ..... | 2869 | a | Industrial organic chemicals, not elsewhere classified. |
| | 287 | ..... | 1 | Agricultural chemicals. |
| | ..... | 2873 | 1 | Nitrogenous fertilizers. |
| | ..... | 2879 | 1 | Pesticides and agricultural chemicals, not elsewhere classified. |
| | 289 | ..... | 1 | Miscellaneous chemical products. |
| | ..... | 2891 | 1 | Adhesives and sealants. |
| | ..... | 2899 | 1 | Chemicals and chemical preparations, not elsewhere classified. |
| 29 ..... | ..... | ..... | 1 | Petroleum refining and related industries. |
| | 291 | ..... | 1 | Petroleum refining. |
| | ..... | 2911 | 1 | Petroleum refining. |
| | 295 | ..... | 1 | Asphalt paving and roofing materials. |
| | ..... | 2951 | 1 | Asphalt paving mixtures and blocks. |
| | ..... | 2952 | 1 | Asphalt felts and coatings. |
| | 299 | ..... | a | Miscellaneous products of petroleum and coal. |
| | ..... | 2992 | a | Lubricating oils and greases. |
| 30 ..... | ..... | ..... | 1 | Rubber and miscellaneous plastics products. |
| | 302 | ..... | 1 | Rubber and plastics footwear. |
| | ..... | 3021 | 1 | Rubber and plastics footwear. |
| | 305 | ..... | 2 | Gaskets, packing, and sealing devices and rubber and plastics hose and belting. |
| | ..... | 3052 | 2 | Rubber and plastics hose and belting. |
| | 306 | ..... | 2 | Fabricated rubber products, not elsewhere classified. |
| | ..... | 3069 | 2 | Fabricated rubber products, not elsewhere classified. |
| | 308 | ..... | 1 | Miscellaneous plastics products. |
| | ..... | 3081 | a | Unsupported plastics film and sheet. |
| | ..... | 3082 | 3 | Unsupported plastics profile shapes. |
| | ..... | 3083 | 1 | Laminated plastics plate, sheet, and profile shapes. |
| | ..... | 3084 | a | Plastics pipe. |
| | ..... | 3085 | 1 | Plastics bottles. |
| | ..... | 3086 | 2 | Plastics foam products. |
| | ..... | 3087 | 3 | Custom compounding of purchased plastics resin. |
| | ..... | 3088 | 1 | Plastics plumbing fixtures. |
| | ..... | 3089 | 1 | Plastics products, not elsewhere classified. |
| 31 ..... | ..... | ..... | 2 | Leather and leather products. |
| | 313 | ..... | 2 | Boot and shoe cut stock and findings. |
| | ..... | 3131 | 2 | Boot and shoe cut stock and findings. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 314 | ..... | 2 | Footwear, except rubber. |
| | ..... | 3142 | b | House slippers. |
| | ..... | 3143 | 2 | Men's footwear, except athletic. |
| | ..... | 3144 | 1 | Women's footwear, except athletic. |
| | ..... | 3149 | 2 | Footwear, except rubber, not elsewhere classified. |
| | 315 | ..... | 3 | Leather gloves and mittens. |
| | ..... | 3151 | 3 | Leather gloves and mittens. |
| | 316 | ..... | 3 | Luggage. |
| | ..... | 3161 | 3 | Luggage. |
| | 317 | ..... | 2 | Handbags and other personal leather goods. |
| | ..... | 3171 | 3 | Women's handbags and purses. |
| | ..... | 3172 | 1 | Personal leather goods, except women's handbags and purses. |
| 32 ..... | ..... | ..... | 1 | Stone, clay, glass, and concrete products. |
| | 321 | ..... | 2 | Flat glass. |
| | ..... | 3211 | 2 | Flat glass. |
| | 322 | ..... | 1 | Glass and glassware, pressed or blown. |
| | ..... | 3221 | 1 | Glass containers. |
| | 323 | ..... | 1 | Glass products, made of purchased glass. |
| | ..... | 3231 | 1 | Glass products, made of purchased glass. |
| | 324 | ..... | 1 | Cement, hydraulic. |
| | ..... | 3241 | 1 | Cement, hydraulic. |
| | 326 | ..... | 3 | Pottery and related products. |
| | ..... | 3261 | 3 | Vitreous china plumbing fixtures and china and earthenware fittings and bathroom accessories. |
| | ..... | 3269 | 3 | Pottery products, not elsewhere classified. |
| | 327 | ..... | 1 | Concrete, gypsum, and plaster products. |
| | ..... | 3271 | 2 | Concrete block and brick. |
| | ..... | 3272 | 1 | Concrete products, except block and brick. |
| | ..... | 3273 | 1 | Ready-mixed concrete. |
| | ..... | 3274 | 1 | Lime. |
| | ..... | 3275 | a | Gypsum products. |
| | 328 | ..... | 1 | Cut stone and stone products. |
| | ..... | 3281 | 1 | Cut stone and stone products. |
| | 329 | ..... | 1 | Abrasive, asbestos, and miscellaneous nonmetallic mineral products. |
| | ..... | 3295 | a | Minerals and earths, ground or otherwise treated. |
| | ..... | 3296 | 1 | Mineral wool. |
| 33 ..... | ..... | ..... | 1 | Primary metal industries. |
| | 331 | ..... | 1 | Steel works, blast furnaces, and rolling and finishing mills. |
| | ..... | 3312 | 1 | Steel works, blast furnaces (including coke ovens), and rolling mills. |
| | ..... | 3317 | 1 | Steel pipe and tubes. |
| | 334 | ..... | 1 | Secondary smelting and refining of nonferrous metals. |
| | ..... | 3341 | 1 | Secondary smelting and refining of nonferrous metals. |
| | 335 | ..... | 1 | Rolling, drawing, and extruding of nonferrous metals. |
| | ..... | 3351 | 1 | Rolling, drawing, and extruding of copper. |
| | ..... | 3353 | a | Aluminum sheet, plate, and foil. |
| | ..... | 3354 | 1 | Aluminum extruded products. |
| | 336 | ..... | a | Nonferrous foundries (castings). |
| | ..... | 3365 | a | Aluminum foundries. |
| | 339 | ..... | 1 | Miscellaneous primary metal products. |
| | ..... | 3398 | a | Metal heat treating. |
| | ..... | 3399 | 1 | Primary metal products, not elsewhere classified. |
| 34 ..... | ..... | ..... | 1 | Fabricated metal products, except machinery and transportation equipment. |
| | 341 | ..... | 1 | Metal cans and shipping containers. |
| | ..... | 3411 | 1 | Metal cans. |
| | ..... | 3412 | 1 | Metal shipping barrels, drums, kegs, and pails. |
| | 342 | ..... | 1 | Cutlery, handtools, and general hardware. |
| | ..... | 3421 | 3 | Cutlery. |
| | ..... | 3423 | a | Hand and edge tools, except machine tools and handsaws. |
| | ..... | 3429 | a | Hardware, not elsewhere classified. |
| | 343 | ..... | 2 | Heating equipment, except electric and warm air; and plumbing fixtures. |
| | ..... | 3433 | 2 | Heating equipment, except electric and warm air furnaces. |
| | 344 | ..... | 2 | Fabricated structural metal products. |
| | ..... | 3441 | 1 | Fabricated structural metal. |
| | ..... | 3442 | 2 | Metal doors, sash, frames, molding, and trim. |
| | ..... | 3443 | 1 | Fabricated plate work (boiler shops). |
| | ..... | 3444 | 2 | Sheet metal work. |
| | ..... | 3446 | 3 | Architectural and ornamental metal work. |
| | ..... | 3449 | 2 | Miscellaneous structural metal work. |
| | 345 | ..... | 1 | Screw machine products, and bolts, nuts, screws, rivets, and washers. |
| | ..... | 3452 | 1 | Bolts, nuts, screws, rivets, and washers. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 346 | ..... | 1 | Metal forgings and stampings. |
| | ..... | 3469 | 1 | Metal stampings, not elsewhere classified. |
| | 347 | ..... | 2 | Coating, engraving, and allied services. |
| | ..... | 3471 | 2 | Electroplating, plating, polishing, anodizing and coloring. |
| | 349 | ..... | 2 | Miscellaneous fabricated metal products. |
| | ..... | 3494 | 1 | Valves and pipe fittings, not elsewhere classified. |
| | ..... | 3495 | 2 | Wire springs. |
| | ..... | 3496 | 1 | Miscellaneous fabricated wire products. |
| | ..... | 3498 | a | Fabricated pipe and pipe fittings. |
| | ..... | 3499 | 2 | Fabricated metal products, not elsewhere classified. |
| 35 ..... | ..... | ..... | 1 | Industrial and commercial machinery and computer equipment. |
| | 353 | ..... | a | Construction, mining, and materials handling machinery and equipment. |
| | ..... | 3535 | a | Conveyors and conveying equipment. |
| | 354 | ..... | 1 | Metalworking machinery and equipment. |
| | ..... | 3541 | a | Machine tools, metal cutting types. |
| | ..... | 3544 | 1 | Special dies and tools, die sets, jigs and fixtures, and industrial molds. |
| | ..... | 3545 | 1 | Cutting tools, machine tool accessories, and machinists' precision measuring devices. |
| | 355 | ..... | 1 | Special industry machinery, except metalworking machinery. |
| | ..... | 3555 | 1 | Printing trades machinery and equipment. |
| | 356 | ..... | 1 | General industrial machinery and equipment. |
| | ..... | 3562 | a | Ball and roller bearings. |
| | ..... | 3563 | 1 | Air and gas compressors. |
| | ..... | 3564 | a | Industrial and commercial fans and blowers and air purification equipment. |
| | ..... | 3568 | 1 | Mechanical power transmission equipment, not elsewhere classified. |
| | ..... | 3569 | 1 | General industrial machinery and equipment, not elsewhere classified. |
| | 357 | ..... | 1 | Computer and office equipment. |
| | ..... | 3571 | 3 | Electronic computers. |
| | ..... | 3572 | 1 | Computer storage devices. |
| | ..... | 3577 | 1 | Computer peripheral equipment, not elsewhere classified. |
| | ..... | 3579 | 1 | Office machines, not elsewhere classified. |
| | 358 | ..... | 1 | Refrigeration and service industry machinery. |
| | ..... | 3585 | 1 | Air-conditioning and warm air heating equipment and commercial and industrial refrigeration equipment. |
| | ..... | 3589 | b | Service industry machinery, not elsewhere classified. |
| | 359 | ..... | 2 | Miscellaneous industrial and commercial machinery and equipment. |
| | ..... | 3592 | 2 | Carburetors, pistons, piston rings, and valves. |
| | ..... | 3596 | a | Scales and balances, except laboratory. |
| | ..... | 3599 | 1 | Industrial and commercial machinery and equipment, not elsewhere classified. |
| 36 ..... | ..... | ..... | 1 | Electronic and other electrical equipment and components, except computer equipment. |
| | 361 | ..... | 1 | Electronic transmission and distribution equipment. |
| | ..... | 3612 | 1 | Power, distribution, and specialty transformers. |
| | ..... | 3613 | 1 | Switchgear and switchboard apparatus. |
| | 362 | ..... | 1 | Electrical industrial apparatus. |
| | ..... | 3621 | 1 | Motors and generators. |
| | ..... | 3624 | 1 | Carbon and graphite products. |
| | ..... | 3625 | 1 | Relays and industrial controls. |
| | ..... | 3629 | 1 | Electrical industrial apparatus, not elsewhere classified. |
| | 363 | ..... | a | Household appliances. |
| | ..... | 3639 | a | Household appliances, not elsewhere classified. |
| | 364 | ..... | 1 | Electric lighting and wiring equipment. |
| | ..... | 3641 | 1 | Electric lamp bulbs and tubes. |
| | ..... | 3643 | 1 | Current-carrying wiring devices. |
| | ..... | 3644 | 1 | Noncurrent-carrying wiring devices. |
| | ..... | 3645 | a | Residential electric lighting fixtures. |
| | ..... | 3646 | 2 | Commercial, industrial, and institutional electric lighting fixtures. |
| | ..... | 3648 | 2 | Lighting equipment, not elsewhere classified. |
| | 365 | ..... | 1 | Household audio and video equipment, and audio recordings. |
| | ..... | 3651 | 1 | Household audio and video equipment. |
| | ..... | 3652 | a | Phonograph records and pre-recorded audio tapes and disks. |
| | 366 | ..... | 1 | Communications equipment. |
| | ..... | 3661 | 1 | Telephone and telegraph apparatus. |
| | ..... | 3663 | 1 | Radio and television broadcasting and communications equipment. |
| | ..... | 3669 | 1 | Communications equipment, not elsewhere classified. |
| | 367 | ..... | 1 | Electronic components and accessories. |
| | ..... | 3672 | 2 | Printed circuit boards. |
| | ..... | 3674 | 1 | Semiconductors and related devices. |
| | ..... | 3677 | 2 | Electronic coils, transformers and other inductors. |

MANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 3678 | 1 | Electronic connectors. |
| | ..... | 3679 | 1 | Electronic components, not elsewhere classified. |
| | 369 | ..... | 1 | Miscellaneous electrical machinery, equipment, and supplies. |
| | ..... | 3692 | 1 | Primary batteries, dry and wet. |
| | ..... | 3694 | 1 | Electrical equipment for internal combustion engines. |
| 37 ..... | ..... | ..... | 1 | Transportation Equipment. |
| | 371 | ..... | 1 | Motor vehicles and motor vehicle equipment. |
| | ..... | 3713 | 1 | Truck and bus bodies. |
| | ..... | 3714 | 1 | Motor vehicle parts and accessories. |
| | 372 | ..... | 1 | Aircraft and parts. |
| | ..... | 3721 | a | Aircraft. |
| | ..... | 3728 | 1 | Aircraft parts and auxiliary equipment, not elsewhere classified. |
| | 373 | ..... | 1 | Ship and boat building and repairing. |
| | ..... | 3731 | a | Ship building and repairing. |
| | ..... | 3732 | 2 | Boat building and repairing. |
| | 379 | ..... | a | Miscellaneous transportation equipment. |
| | ..... | 3792 | a | Travel trailers and campers. |
| 38 ..... | ..... | ..... | 1 | Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks. |
| | 381 | ..... | 1 | Search, detection, navigation, guidance, aeronautical, and nautical systems, instruments, and equipment. |
| | ..... | 3812 | 1 | Search, detection, navigation, guidance, aeronautical, and nautical systems, instruments, and equipment. |
| | 382 | ..... | 1 | Laboratory apparatus and analytical, optical, measuring, and controlling instrument. |
| | ..... | 3821 | 1 | Laboratory apparatus and furniture. |
| | ..... | 3822 | 1 | Automatic controls for regulating residential and commercial environments and appliances. |
| | ..... | 3823 | 1 | Industrial instruments for measurement, display, and control of process variables; and related products. |
| | ..... | 3824 | a | Totalizing fluid meters and counting devices. |
| | ..... | 3825 | 1 | Instruments for measuring and testing of electricity and electrical signals. |
| | ..... | 3829 | 2 | Measuring and controlling devices, not elsewhere classified. |
| | 384 | ..... | 1 | Surgical, medical, and dental instruments and supplies. |
| | ..... | 3841 | 1 | Surgical and medical instruments and apparatus. |
| | ..... | 3842 | 1 | Orthopedic, prosthetic, and surgical appliances and supplies. |
| | ..... | 3843 | 1 | Dental equipment and supplies. |
| | ..... | 3844 | a | X-ray apparatus and tubes and related irradiation apparatus. |
| | ..... | 3845 | 1 | Electromedical and electrotherapeutic apparatus. |
| | 385 | ..... | 1 | Ophthalmic goods. |
| | ..... | 3851 | 1 | Ophthalmic goods. |
| | 386 | ..... | a | Photographic equipment and supplies. |
| | ..... | 3861 | a | Photographic equipment and supplies. |
| | 387 | ..... | 1 | Watches, clocks, clockwork operated devices, and parts. |
| | ..... | 3873 | 1 | Watches, clocks, clockwork operated devices, and parts. |
| 39 ..... | ..... | ..... | 1 | Miscellaneous manufacturing industries. |
| | 391 | ..... | 1 | Jewelry, silverware, and plated ware. |
| | ..... | 3911 | 1 | Jewelry, precious metal. |
| | ..... | 3914 | a | Silverware, plated ware, and stainless steel ware. |
| | ..... | 3915 | 1 | Jewelers' findings and materials, and lapidary work. |
| | 394 | ..... | 2 | Dolls, toys, games, and sporting and athletic goods. |
| | ..... | 3942 | 2 | Dolls and stuffed toys. |
| | ..... | 3949 | 2 | Sporting and athletic goods, not elsewhere classified. |
| | 395 | ..... | 2 | Pens, pencils, and other artists' materials. |
| | ..... | 3951 | 3 | Pens, mechanical pencils, and parts. |
| | ..... | 3952 | a | Lead pencils, crayons, and artists' materials. |
| | ..... | 3953 | 1 | Marking devices. |
| | 396 | ..... | 1 | Costume jewelry, costume novelties, buttons, and miscellaneous notions, except precious metal. |
| | ..... | 3961 | 1 | Costume jewelry and costume novelties, except precious metal. |
| | ..... | 3965 | a | Fasteners, buttons, needles, and pins. |
| | 399 | ..... | 1 | Miscellaneous manufacturing industries. |
| | ..... | 3991 | a | Brooms and brushes. |
| | ..... | 3993 | 2 | Signs and advertising specialties. |
| | ..... | 3995 | 2 | Burial caskets. |
| | ..... | 3999 | 2 | Manufacturing industries, not elsewhere classified. |

a=Category contained less than three employers.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990, as amended at 55 FR 39575, Sept. 27, 1990; 57 FR 1103, Jan. 10, 1992]

## APPENDIX B TO PART 510—NONMANUFACTURING INDUSTRIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN

This appendix contains a listing of all nonmanufacturing industries (except those in major groups 01, 02, 08, and 09, pertaining to agriculture) for which data were collected and compiled by the Commonwealth of Puerto Rico for purposes of implementing the 1989 Amendments to FLSA. This listing follows the order and classifications used in the *SIC Manual, 1987*, which is incorporated by reference in these regulations (§ 510.21).

The data in this appendix are presented by major industry group (two-digit classification), industry group number (three-digit classification), and industry number (four-digit classification).

Tiers will not be listed for industry categories in which there were fewer than three responding employers, or one responding employer had more than 80 percent of the employment in the category, in conformance with practices of the U.S. Bureau of Labor Statistics in collecting and publishing similar data, until such time as Puerto Rico receives appropriate waivers of confidentiality from all employers in such categories. These categories are noted with an ''a'' on the following table. In situations where one or more employers declined to furnish a waiver, categories are noted with a ''b'' on the following table.

In addition, no tier will be listed where an industry was not included in the original survey because it was not in existence, because the industry was too small to be included, or for other reasons.

Employers who do not find the four-digit classification for their industry shall refer to the appropriate three-digit classification under which their establishment falls. If the appropriate three-digit classification is not listed, employers shall refer to the appropriate two-digit classification.

For example, no tier is listed for industry number 1423, crushed and broken granite. However, a tier is listed for industry group 142, crushed and broken stone, including riprap. Thus, an employer in industry 1423 must use the tier listed for industry group 142, *i.e.*, Tier 1. Furthermore, employers who find the appropriate four-digit designation in this appendix *must* use that designation and cannot refer to a two- or three-digit classification. For example, an employer with industry number 5719, miscellaneous homefurnishings stores, which has a Tier 1 designation, cannot refer to industry group number 571, home furniture and furnishings stores, which has a Tier 2 designation.

*Important:* In referring to this appendix to determine appropriate tier designations, please note that certain categories of employees are subject to treatment under Tier 1 regardless of the average hourly wage rate for the industry and the tier designation contained herein. These employees, as listed in the 1989 Amendments, are those employed by:

(a) The United States,

(b) An establishment that is a hotel, motel, or restaurant, or

(c) Any other retail or service establishment that employs such employee in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of clubs.

Please note that these named categories may not correspond exactly to categories established by the SIC manual.

If no four-digit, three-digit, or two-digit classification is listed for an industry, employers in that group must pay the Tier 1 rates.

NONMANUFACTURING INDUSTRIES

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| 01 | | | 3 | Agricultural production—crops. |
| | 011 | | 3 | Cash grains. |
| | | 0119 | 3 | Cash grains, not elsewhere classified. |
| | 013 | | 3 | Field crops, except cash grains. |
| | | 0133 | 3 | Sugarcane and sugar beets. |
| | | 0139 | 3 | Field crops, except cash grains, not elsewhere classified. |
| | 016 | | 3 | Vegetables and melons. |
| | | 0161 | 3 | Vegetables and melons. |
| | 017 | | 3 | Fruits and tree nuts. |
| | | 0174 | 3 | Citrus fruits. |
| | | 0179 | 3 | Fruits and tree nuts, not elsewhere classified. |
| | 018 | | 3 | Horticultural specialties. |
| | | 0181 | 3 | Ornamental floriculture and nursery products. |
| | 019 | | 3 | General farms, primarily crop. |
| | | 0191 | 3 | General farms, primarily crop. |
| 02 | | | 3 | Agricultural production—livestock and animal specialties. |
| | 021 | | 3 | Livestock, except dairy and poultry. |
| | | 0211 | 3 | Beef cattle feedlots. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 0213 | 3 | Hogs. |
| | 024 | ..... | 3 | Dairy farms. |
| | ..... | 0241 | 3 | Dairy farms. |
| | 025 | ..... | 3 | Poultry and eggs. |
| | ..... | 0251 | 3 | Broiler, fryer, and roaster chickens. |
| | ..... | 0252 | 3 | Chicken eggs. |
| | ..... | 0254 | 2 | Poultry hatcheries. |
| | 027 | ..... | 3 | Animal specialties. |
| | ..... | 0271 | 3 | Fur-bearing animals and rabbits. |
| | ..... | 0272 | 2 | Horse and other equines. |
| | ..... | 0273 | 3 | Animal aquaculture. |
| | ..... | 0279 | 3 | Animal specialties, not else where classified. |
| 07 | ..... | ..... | 3 | Agricultural services. |
| | 072 | ..... | 3 | Crop services. |
| | ..... | 0723 | 3 | Crop preparation services for market, except cotton ginning. |
| | 074 | ..... | 2 | Veterinary services. |
| | 075 | ..... | a | Animal services except veterinary. |
| | ..... | 0751 | a | Livestock services, except veterinary. |
| | 078 | ..... | 3 | Landscape and horticultural services. |
| 14 | ..... | ..... | 1 | Mining and quarrying of nonmetallic minerals, except fuels. |
| | ..... | 1422 | 2 | Crushed and broken limestone. |
| | ..... | 1429 | 1 | Crushed and broken stone, not elsewhere classified. |
| | 144 | ..... | 1 | Sand and gravel. |
| | ..... | 1442 | 1 | Construction sand and gravel. |
| 15 | ..... | ..... | 1 | Building construction-general contractors and operative builders. |
| | 152 | ..... | 1 | General building contractors-residential buildings. |
| | 154 | ..... | 1 | General building contractors-nonresidential buildings. |
| 16 | ..... | ..... | 1 | Heavy construction other than building construction-contractors. |
| | 161 | ..... | 1 | Highway and street construction, except elevated highways. |
| | ..... | 1611 | 1 | Highway and street construction, except elevated highways. |
| | 162 | ..... | 1 | Heavy construction, except highway and street construction. |
| | ..... | 1622 | 1 | Bridge, tunnel, and elevated highway construction. |
| | ..... | 1623 | 1 | Water, sewer, pipeline, and communications and power line construction. |
| | ..... | 1629 | a | Heavy construction, not elsewhere classified. |
| 17 | ..... | ..... | 1 | Construction-special trade contractors. |
| | 171 | ..... | 1 | Plumbing, heating and air-conditioning. |
| | ..... | 1711 | 1 | Plumbing, heating and air-conditioning. |
| | 172 | ..... | 2 | Painting and paper hanging. |
| | ..... | 1721 | 2 | Painting and paper hanging. |
| | 173 | ..... | 1 | Electrical work. |
| | ..... | 1731 | 1 | Electrical work. |
| | 174 | ..... | 1 | Masonry, stonework, tile setting, and plastering. |
| | ..... | 1741 | 1 | Masonry, stone setting, and other stone work. |
| | ..... | 1742 | 1 | Plastering, drywall, acoustical, and insulation work. |
| | ..... | 1743 | 1 | Terrazzo, tile, marble, and mosaic work. |
| | 175 | ..... | a | Carpentry and floor work. |
| | ..... | 1751 | a | Carpentry work. |
| | 176 | ..... | 2 | Roofing, siding, and sheet metal work. |
| | ..... | 1761 | 2 | Roofing, siding, and sheet metal work. |
| | 179 | ..... | 1 | Miscellaneous special trade contractors. |
| | ..... | 1791 | 1 | Structural steel erection. |
| | ..... | 1793 | 2 | Glass and glazing work. |
| | ..... | 1794 | a | Excavation work. |
| | ..... | 1795 | a | Wrecking and demolition work. |
| | ..... | 1796 | 1 | Installation or erection of building equipment, not elsewhere classified. |
| | ..... | 1799 | 1 | Special trade contractors, not elsewhere classified. |
| 41 | ..... | ..... | 3 | Local and suburban transit and interurban highway passenger transportation. |
| | 411 | ..... | 2 | Local and suburban passenger transportation. |
| | ..... | 4111 | 2 | Local and suburban transit. |
| | 412 | ..... | 3 | Taxicabs. |
| | ..... | 4121 | 3 | Taxicabs. |
| | 413 | ..... | 3 | Intercity and rural bus transportation. |
| | ..... | 4131 | 3 | Intercity and rural bus transportation. |
| | 415 | ..... | a | School buses. |
| | ..... | 4151 | a | School buses. |
| 42 | ..... | ..... | 1 | Motor freight transportation and warehousing. |
| | 421 | ..... | 1 | Trucking and courier services, except air. |
| | 422 | ..... | 1 | Public warehousing and storage. |
| | ..... | 4221 | 1 | Farm product warehousing and storage. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 4222 | a | Refrigerated warehousing and storage. |
| | ..... | 4225 | 1 | General warehousing and storage. |
| | ..... | 4226 | 1 | Special warehousing and storage, not elsewhere classified. |
| 44 | ..... | ..... | 1 | Water transportation. |
| | 442 | ..... | a | Deep sea domestic transportation of freight. |
| | ..... | 4424 | a | Deep sea domestic transportation of freight. |
| | 444 | ..... | 1 | Water transportation of freight, not elsewhere classified. |
| | ..... | 4449 | 1 | Water transportation of freight, not elsewhere classified. |
| | 449 | ..... | 1 | Services incidental to water transportation. |
| | ..... | 4491 | 1 | Marine cargo handling. |
| | ..... | 4492 | a | Towing and tugboat services. |
| | ..... | 4499 | 1 | Water transportation services, not elsewhere classified. |
| 45 | ..... | ..... | 1 | Transportation by air. |
| | 451 | ..... | 1 | Air transportation, scheduled, and air courier services. |
| | ..... | 4512 | 1 | Air transportation, scheduled. |
| | 452 | ..... | a | Air transportation, nonscheduled. |
| | ..... | 4522 | a | Air transportation, nonscheduled. |
| | 458 | ..... | a | Airports, flying fields, and airport terminal services. |
| | ..... | 4581 | a | Airports, flying fields, and airport terminal services. |
| 46 | ..... | ..... | a | Pipelines, except natural gas. |
| | 461 | ..... | 1 | Pipelines, except natural gas. |
| | ..... | 4613 | 1 | Refined petroleum pipelines. |
| 47 | ..... | ..... | 1 | Transportation services. |
| | 472 | ..... | 1 | Arrangement of passenger transportation. |
| | ..... | 4729 | 1 | Arrangement of passenger transportation, not elsewhere classified. |
| | 473 | ..... | 1 | Arrangement of transportation of freight and cargo. |
| | ..... | 4731 | 1 | Arrangement of transportation of freight and cargo. |
| | 478 | ..... | 1 | Miscellaneous services incidental to transportation. |
| | ..... | 4785 | 1 | Fixed facilities and inspection and weighing services for motor vehicle transportation. |
| 48 | ..... | ..... | 1 | Communications. |
| | 482 | ..... | b | Telegraph and other message communications. |
| | ..... | 4822 | b | Telegraph and other message communications. |
| | 483 | ..... | 1 | Radio and television broadcasting stations. |
| | ..... | 4832 | 1 | Radio broadcasting stations. |
| | ..... | 4833 | 1 | Television broadcasting stations. |
| | 489 | ..... | 3 | Communications services, not elsewhere classified. |
| | ..... | 4899 | 3 | Communications services, not elsewhere classified. |
| 49 | ..... | ..... | 1 | Electric, gas and sanitary services. |
| | 492 | ..... | 1 | Gas production and distribution. |
| | ..... | 4923 | 1 | Natural gas transmission and distribution. |
| | ..... | 4925 | 1 | Mixed, manufactured, or liquefied petroleum gas production and/or distribution. |
| | 495 | ..... | 1 | Sanitary services. |
| | ..... | 4953 | 1 | Refuse systems. |
| | 497 | ..... | a | Irrigation systems. |
| | ..... | 4971 | a | Irrigation systems. |
| 50 | ..... | ..... | 1 | Wholesale trade-durable goods. |
| | 501 | ..... | 1 | Motor vehicles and motor vehicle parts and supplies. |
| | ..... | 5012 | a | Automobiles and other motor vehicles. |
| | ..... | 5013 | 1 | Motor vehicle supplies and new parts. |
| | ..... | 5014 | 1 | Tires and tubes. |
| | 502 | ..... | 1 | Furniture and homefurnishings. |
| | ..... | 5021 | 2 | Furniture. |
| | ..... | 5023 | 1 | Homefurnishings. |
| | 503 | ..... | 2 | Lumber and other construction materials. |
| | ..... | 5031 | 2 | Lumber, plywood, millwork, and wood panels. |
| | ..... | 5039 | 1 | Construction materials, not elsewhere classified. |
| | 504 | ..... | 1 | Professional and commercial equipment and supplies. |
| | ..... | 5043 | 1 | Photographic equipment and supplies. |
| | ..... | 5046 | 1 | Commercial equipment, not elsewhere classified. |
| | ..... | 5049 | 1 | Professional equipment and supplies, not elsewhere classified. |
| | 505 | ..... | 1 | Metals and minerals, except petroleum. |
| | ..... | 5051 | 1 | Metals service centers and offices. |
| | 506 | ..... | 1 | Electrical goods. |
| | ..... | 5063 | 1 | Electrical apparatus and equipment, wiring supplies and construction materials. |
| | ..... | 5064 | 1 | Electrical appliances, television and radio sets. |
| | ..... | 5065 | 1 | Electronic parts and equipment, not elsewhere classified. |
| | 507 | ..... | 1 | Hardware, and plumbing and heating equipment and supplies. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 5072 | 1 | Hardware. |
| | ..... | 5074 | 1 | Plumbing and heating equipment and supplies (hydronics). |
| | ..... | 5075 | a | Warm air heating and air-conditioning equipment and supplies. |
| | ..... | 5078 | a | Refrigeration equipment and supplies. |
| | 508 | ..... | 1 | Machinery, equipment, and supplies. |
| | ..... | 5082 | 1 | Construction and mining (except petroleum) machinery and equipment. |
| | ..... | 5083 | a | Farm and garden machinery and equipment. |
| | ..... | 5084 | 1 | Industrial machinery and equipment. |
| | ..... | 5085 | 1 | Industrial supplies. |
| | ..... | 5087 | 2 | Service establishment equipment and supplies. |
| | 509 | ..... | 1 | Miscellaneous durable goods. |
| | ..... | 5091 | a | Sporting and recreational goods and supplies. |
| | ..... | 5092 | 1 | Toys and hobby goods and supplies. |
| | ..... | 5093 | 1 | Scrap and waste materials. |
| | ..... | 5094 | 1 | Jewelry, watches, precious stones, and precious metals. |
| | ..... | 5099 | 1 | Durable goods, not elsewhere classified. |
| 51 ..... | ..... | ..... | 1 | Wholesale trade—nondurable goods. |
| | 511 | ..... | 1 | Paper and paper products. |
| | ..... | 5111 | 1 | Printing and writing paper. |
| | ..... | 5112 | 3 | Stationery and office supplies. |
| | ..... | 5113 | 1 | Industrial and personal service paper. |
| | 512 | ..... | 1 | Drugs, drug proprietaries, and druggists' sundries. |
| | ..... | 5122 | 1 | Drugs, drug proprietaries, and druggists' sundries. |
| | 513 | ..... | 2 | Apparel, piece goods, and notions. |
| | ..... | 5131 | 2 | Piece goods, notions, and other dry goods. |
| | ..... | 5136 | 1 | Men's and boys' clothing and furnishings. |
| | ..... | 5137 | 3 | Women's, children's, and infants' clothing and accessories. |
| | ..... | 5139 | 2 | Footwear. |
| | 514 | ..... | 1 | Groceries and related products. |
| | ..... | 5141 | 1 | Groceries, general line. |
| | ..... | 5142 | 1 | Packaged frozen foods. |
| | ..... | 5143 | a | Dairy products, except dried or canned. |
| | ..... | 5144 | 3 | Poultry and poultry products. |
| | ..... | 5145 | a | Confectionery. |
| | ..... | 5146 | a | Fish and seafoods. |
| | ..... | 5147 | a | Meats and meat products. |
| | ..... | 5148 | 1 | Fresh fruits and vegetables. |
| | ..... | 5149 | 1 | Groceries and related products, not elsewhere classified. |
| | 515 | ..... | a | Farm-product raw materials. |
| | ..... | 5154 | a | Livestock. |
| | 516 | ..... | 1 | Chemicals and allied products. |
| | ..... | 5169 | 1 | Chemicals and allied products, not elsewhere classified. |
| | 517 | ..... | 1 | Petroleum and petroleum products. |
| | ..... | 5171 | 1 | Petroleum bulk stations and terminals. |
| | ..... | 5172 | 1 | Petroleum and petroleum products wholesalers, except bulk stations and terminals. |
| | 518 | ..... | 1 | Beer, wine and distilled alcoholic beverages. |
| | ..... | 5181 | 1 | Beer and ale. |
| | 519 | ..... | 1 | Miscellaneous nondurable goods. |
| | ..... | 5191 | 3 | Farm supplies. |
| | ..... | 5194 | 3 | Tobacco and tobacco products. |
| | ..... | 5198 | b | Paints, varnishes, and supplies. |
| | ..... | 5199 | 1 | Nondurable goods, not elsewhere classified. |
| 52 ..... | ..... | ..... | 2 | Building materials, hardware, garden supply, and mobile home dealers. |
| | 521 | ..... | 3 | Lumber and other building materials dealers. |
| | ..... | 5211 | 3 | Lumber and other building materials dealers. |
| | 523 | ..... | 1 | Paint, glass, and wallpaper stores. |
| | ..... | 5231 | 1 | Paint, glass, and wallpaper stores. |
| | 525 | ..... | 2 | Hardware stores. |
| | ..... | 5251 | 2 | Hardware stores. |
| | 526 | ..... | 3 | Retail nurseries, lawn and garden supply stores. |
| | ..... | 5261 | 3 | Retail nurseries, lawn and garden supply stores. |
| 53 ..... | ..... | ..... | 1 | General merchandise stores. |
| | 531 | ..... | 1 | Department stores. |
| | ..... | 5311 | 1 | Department stores. |
| | 533 | ..... | 2 | Variety stores. |
| | ..... | 5331 | 2 | Variety stores. |
| | 539 | ..... | 3 | Miscellaneous general merchandise stores. |
| | ..... | 5399 | 3 | Miscellaneous general merchandise stores. |
| 54 ..... | ..... | ..... | 2 | Food stores. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 541 | ..... | 2 | Grocery stores. |
| | ..... | 5411 | 2 | Grocery stores. |
| | 542 | ..... | 1 | Meat and fish (seafood) markets, including freezer provisioners. |
| | ..... | 5421 | 1 | Meat and fish (seafood) markets, including freezer provisioners. |
| | ..... | 5421 | a | Meat and fish (seafood) markets, including freezer provisioners. |
| | 543 | ..... | 3 | Fruit and vegetable markets. |
| | ..... | 5431 | 3 | Fruit and vegetable markets. |
| | 546 | ..... | 3 | Retail bakeries. |
| | ..... | 5461 | 3 | Retail bakeries. |
| | 549 | ..... | 3 | Miscellaneous food stores. |
| | ..... | 5499 | 3 | Miscellaneous food stores. |
| 55 ..... | ..... | ..... | 1 | Automotive dealers and gasoline service stations. |
| | 551 | ..... | 1 | Motor vehicle dealers (new and used). |
| | ..... | 5511 | 1 | Motor vehicle dealers (new and used). |
| | 552 | ..... | 2 | Motor vehicle dealers (used only). |
| | ..... | 5521 | 2 | Motor vehicle dealers (used only). |
| | 553 | ..... | 1 | Auto and home supply stores. |
| | ..... | 5531 | 1 | Auto and home supply stores. |
| | 554 | ..... | 3 | Gasoline service stations. |
| | ..... | 5541 | 3 | Gasoline service stations. |
| 56 ..... | ..... | ..... | 3 | Apparel and accessory stores. |
| | 561 | ..... | 3 | Men's and boys' clothing and accessory stores. |
| | ..... | 5611 | 3 | Men's and boys' clothing and accessory stores. |
| | 562 | ..... | 3 | Women's clothing stores. |
| | ..... | 5621 | 3 | Women's clothing stores. |
| | 563 | ..... | 3 | Women's accessory and specialty stores. |
| | ..... | 5632 | 3 | Women's accessory and specialty stores. |
| | 564 | ..... | 3 | Children's and infants' wear stores. |
| | ..... | 5641 | 3 | Children's and infants' wear stores. |
| | 565 | ..... | 3 | Family clothing stores. |
| | ..... | 5651 | 3 | Family clothing stores. |
| | 566 | ..... | 2 | Shoe stores. |
| | ..... | 5661 | 2 | Shoe stores. |
| | 569 | ..... | 3 | Miscellaneous apparel and accessory stores. |
| | ..... | 5699 | 3 | Miscellaneous apparel and accessory stores. |
| 57 ..... | ..... | ..... | 2 | Home furniture, furnishings, and equipment stores. |
| | 571 | ..... | 2 | Home furniture and furnishings stores. |
| | ..... | 5712 | 2 | Furniture stores. |
| | ..... | 5713 | a | Floor covering stores. |
| | ..... | 5714 | 3 | Drapery, curtain, and upholstery stores. |
| | ..... | 5719 | 1 | Miscellaneous homefurnishings stores. |
| | 572 | ..... | 1 | Household appliance stores. |
| | ..... | 5722 | 1 | Household appliance stores. |
| | 573 | ..... | 2 | Radio, television, consumer electronics, and music stores. |
| | ..... | 5731 | a | Radio, television, and consumer electronics stores. |
| | ..... | 5735 | 1 | Record and prerecorded tape stores. |
| 58 ..... | ..... | ..... | 1 | Eating and drinking places. |
| | [1] 581 | ..... | 1 | Eating and drinking places. |
| 59 ..... | ..... | ..... | 1 | Miscellaneous retail. |
| | 591 | ..... | 1 | Drug stores and proprietary stores. |
| | ..... | 5912 | 1 | Drug stores and proprietary stores. |
| | 592 | ..... | a | Liquor stores. |
| | ..... | 5921 | a | Liquor stores. |
| | 593 | ..... | 3 | Used merchandise stores. |
| | ..... | 5932 | 3 | Used merchandise stores. |
| | 594 | ..... | 1 | Miscellaneous shopping goods stores. |
| | ..... | 5941 | 1 | Sporting goods stores and bicycle shops. |
| | ..... | 5942 | 1 | Book stores. |
| | ..... | 5943 | 2 | Stationery stores. |
| | ..... | 5944 | 1 | Jewelry stores. |
| | ..... | 5945 | 3 | Hobby, toy, and game shops. |
| | ..... | 5946 | 2 | Camera and photographic supply stores. |
| | ..... | 5947 | 3 | Gift, novelty, and souvenir shops. |
| | ..... | 5949 | 3 | Sewing, needlework, and piece goods stores. |
| | 596 | ..... | a | Nonstore retailers. |
| | ..... | 5962 | a | Automatic merchandising machine operators. |
| | ..... | 5963 | a | Direct selling establishments. |
| | 598 | ..... | 2 | Fuel dealers. |
| | ..... | 5984 | 2 | Liquefied petroleum gas (bottled gas) dealers. |
| | 599 | ..... | 1 | Retail stores, not elsewhere classified. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 5992 | 3 | Florists. |
| | ..... | 5999 | 1 | Miscellaneous retail stores, not elsewhere classified. |
| 60 ..... | ..... | ..... | 1 | Depository institutions. |
| | 602 | ..... | 1 | Commercial banks. |
| | ..... | 6021 | 1 | National commercial banks. |
| | ..... | 6022 | 1 | State commercial banks. |
| | ..... | 6029 | 1 | Commercial banks, not elsewhere classified. |
| | 603 | ..... | 1 | Savings institutions. |
| | ..... | 6035 | 1 | Savings institutions, Federally chartered. |
| | ..... | 6036 | 1 | Savings institutions, not Federally chartered. |
| | 606 | ..... | 1 | Credit unions. |
| | ..... | 6061 | 1 | Credit unions, Federally chartered. |
| | ..... | 6062 | 1 | Credit unions, not Federally chartered. |
| | 609 | ..... | 2 | Functions related to depository banking. |
| | ..... | 6099 | 2 | Functions related to depository banking, not elsewhere classified. |
| 61 ..... | ..... | ..... | 1 | Nondepository credit institutions. |
| | 614 | ..... | 1 | Personal credit institutions. |
| | ..... | 6141 | 1 | Personal credit institutions. |
| | 615 | ..... | 1 | Business credit institutions. |
| | | 6153 | b | Short-term business credit institutions, except agricultural. |
| | ..... | 6159 | 1 | Miscellaneous business credit institutions. |
| | 616 | ..... | 1 | Mortgage bankers and brokers. |
| | ..... | 6162 | 1 | Mortgage bankers and loan correspondents. |
| 62 ..... | ..... | ..... | 1 | Security and commodity brokers, dealers, exchanges, and services. |
| | 621 | ..... | 1 | Security brokers, dealers, and flotation companies. |
| | ..... | 6211 | 1 | Security brokers, dealers, and flotation companies. |
| | 622 | ..... | a | Commodity contracts brokers and dealers. |
| | ..... | 6221 | a | Commodity contracts brokers and dealers. |
| 63 ..... | ..... | ..... | 1 | Insurance carriers. |
| | 631 | ..... | 1 | Life insurance. |
| | ..... | 6311 | 1 | Life insurance. |
| | 632 | ..... | 1 | Accidental and health insurance and medical service plans. |
| | ..... | 6321 | 1 | Accident and health insurance. |
| | ..... | 6324 | b | Hospital and medical service plans. |
| | 633 | ..... | 1 | Fire, marine, and casualty insurance. |
| | ..... | 6331 | 1 | Fire, marine, and casualty insurance. |
| | 635 | ..... | 1 | Surety insurance. |
| | ..... | 6351 | 1 | Surety insurance. |
| | 636 | ..... | b | Title insurance. |
| | ..... | 6361 | b | Title insurance. |
| | 637 | ..... | 1 | Pension, health, and welfare funds. |
| | ..... | 6371 | 1 | Pension, health, and welfare funds. |
| 64 ..... | ..... | ..... | 1 | Insurance agents, brokers, and service. |
| | 641 | ..... | 1 | Insurance agents, brokers, and service. |
| | ..... | 6411 | 1 | Insurance agents, brokers, and service. |
| 65 ..... | ..... | ..... | 1 | Real estate. |
| | 651 | ..... | 1 | Real estate operators (except developers) and lessors. |
| | 653 | ..... | 1 | Real estate agents and managers. |
| | ..... | 6531 | 1 | Real estate agents and managers. |
| | 655 | ..... | 1 | Land subdividers and developers. |
| | ..... | 6552 | 1 | Land subdividers and developers, except cemeteries. |
| | ..... | 6553 | a | Cemetery subdividers and developers. |
| 70 ..... | ..... | ..... | 1 | Hotels, rooming houses, camps, and other lodging places. |
| | 701 | ..... | 1 | Hotels and motels. |
| | ..... | 7011 | 1 | Hotels and motels. |
| | 702 | ..... | 1 | Rooming and boarding houses. |
| | ..... | 7021 | 1 | Rooming and boarding houses. |
| 72 ..... | ..... | ..... | 1 | Personal services. |
| | 721 | ..... | 2 | Laundry, cleaning, and garment services. |
| | 722 | ..... | 3 | Photographic studios, portrait. |
| | ..... | 7221 | 3 | Photographic studios, portrait. |
| | 723 | ..... | 1 | Beauty shops. |
| | ..... | 7231 | 1 | Beauty shops. |
| | 724 | ..... | 1 | Barber shops |
| | ..... | 7241 | 1 | Barber shops. |
| | 725 | ..... | 2 | Shoe repair shops and shoeshine parlors. |
| | ..... | 7251 | 2 | Shoe repair shops and shoeshine parlors. |
| | 726 | ..... | 1 | Funeral service and crematories. |
| | ..... | 7261 | 1 | Funeral service and crematories. |
| | 729 | ..... | 1 | Miscellaneous personal services. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 7299 | 1 | Miscellaneous personal services, not elsewhere classified. |
| 73 ..... | ..... | ..... | 2 | Business services. |
| | 731 | ..... | 1 | Advertising. |
| | ..... | 7311 | 1 | Advertising agencies. |
| | ..... | 7312 | 1 | Outdoor advertising services. |
| | ..... | 7319 | a | Advertising, not elsewhere classified. |
| | 732 | ..... | b | Consumer credit reporting agencies, mercantile reporting agencies, and adjustment and collection agencies. |
| | ..... | 7323 | b | Credit reporting services. |
| | 733 | ..... | 2 | Mailing, reproduction, commercial art and photography, and stenographic services. |
| | ..... | 7338 | 2 | Secretarial and court reporting services. |
| | 734 | ..... | 3 | Services to dwellings and other buildings. |
| | ..... | 7342 | 3 | Disinfecting and pest control services. |
| | ..... | 7349 | 3 | Building cleaning and maintenance services, not elsewhere classified. |
| | 735 | ..... | 1 | Miscellaneous equipment rental and leasing. |
| | ..... | 7359 | 1 | Equipment rental and leasing, not elsewhere classified. |
| | 736 | ..... | 2 | Personnel supply services. |
| | ..... | 7361 | 2 | Employment agencies. |
| | ..... | 7363 | 2 | Help supply services. |
| | 737 | ..... | 1 | Computer programming, data processing, and other computer related services. |
| | ..... | 7372 | 1 | Prepackaged software. |
| | ..... | 7374 | 1 | Computer processing and data preparation and processing services. |
| | ..... | 7379 | 1 | Computer related services, not elsewhere classified. |
| | 738 | ..... | 3 | Miscellaneous business services. |
| | ..... | 7382 | 3 | Security systems services. |
| | ..... | 7384 | 1 | Photofinishing laboratories. |
| | ..... | 7389 | 1 | Business services, not elsewhere classified. |
| 75 ..... | ..... | ..... | 1 | Automotive repair, services, and parking. |
| | 751 | ..... | 1 | Automotive rental and leasing, without drivers. |
| | ..... | 7513 | 3 | Truck rental and leasing, without drivers. |
| | ..... | 7514 | 1 | Passenger car rental. |
| | 752 | ..... | 3 | Automobile parking. |
| | ..... | 7521 | 3 | Automobile parking. |
| | 753 | ..... | 1 | Automotive repair shops. |
| | ..... | 7532 | 2 | Top, body, and upholstery repair shops and paint shops. |
| | ..... | 7534 | 1 | Tire retreading and repair shops. |
| | ..... | 7538 | 3 | General automotive repair shops. |
| | ..... | 7539 | 2 | Automotive repair shops, not elsewhere classified. |
| | 754 | ..... | 3 | Automotive services, except repair. |
| | ..... | 7542 | 3 | Carwashes. |
| | ..... | 7549 | 3 | Automotive services, except repair and carwashes. |
| 76 ..... | ..... | ..... | 1 | Miscellaneous repair services. |
| | 762 | ..... | 1 | Electrical repair shops. |
| | ..... | 7622 | 3 | Radio and television repair shops. |
| | ..... | 7623 | 1 | Refrigeration and air-conditioning service and repair shops. |
| | ..... | 7629 | 1 | Electrical and electronic repair shops, not elsewhere classified. |
| | 763 | ..... | 2 | Watch, clock, and jewelry repair. |
| | ..... | 7631 | 2 | Watch, clock, and jewelry repair. |
| | 764 | ..... | 3 | Reupholstery and furniture repair. |
| | ..... | 7641 | 3 | Reupholstery and furniture repair. |
| | 769 | ..... | 1 | Miscellaneous repair shops and related services. |
| | ..... | 7692 | 2 | Welding repair. |
| | ..... | 7694 | 1 | Armature rewinding shops. |
| | ..... | 7699 | 1 | Repair shops and related services, not elsewhere classified. |
| 78 ..... | ..... | ..... | 1 | Motion pictures. |
| | 781 | ..... | 1 | Motion picture production and allied services. |
| | ..... | 7812 | 1 | Motion picture and video tape production. |
| | 782 | ..... | 2 | Motion picture distribution and allied services. |
| | ..... | 7822 | 2 | Motion picture and video tape distribution. |
| | 783 | ..... | 3 | Motion picture theaters. |
| | ..... | 7832 | 3 | Motion picture theaters, except drive-in. |
| | ..... | 7833 | a | Drive-in motion picture theaters. |
| 79 ..... | ..... | ..... | 1 | Amusement and recreation services. |
| | 791 | ..... | 2 | Dance studios, schools, and halls. |
| | ..... | 7911 | 2 | Dance studios, schools, and halls. |
| | 792 | ..... | a | Theatrical producers (except motion picture), bands, orchestras, and entertainers. |
| | ..... | 7929 | a | Bands, orchestras, actors, and other entertainers and entertainment groups. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | 793 | ..... | 3 | Bowling centers. |
| | ..... | 7933 | 3 | Bowling centers. |
| | 794 | ..... | a | Commercial sports. |
| | ..... | 7941 | a | Professional sports clubs and promoters. |
| | ..... | 7948 | a | Racing, including track operation. |
| | 799 | ..... | 2 | Miscellaneous amusement and recreation services. |
| | ..... | 7993 | 2 | Coin-operated amusement devices. |
| | ..... | 7997 | 1 | Membership sports and recreation clubs. |
| | ..... | 7999 | 2 | Amusement and recreation services not elsewhere classified. |
| 80 ..... | ..... | ..... | 1 | Health services. |
| | 801 | ..... | 1 | Offices and clinics of doctors of medicine. |
| | ..... | 8011 | 1 | Offices and clinics of doctors of medicine. |
| | 802 | ..... | 1 | Offices and clinics of dentists. |
| | ..... | 8021 | 1 | Offices and clinics of dentists. |
| | 803 | ..... | a | Offices and clinics of doctors of osteopathy. |
| | ..... | 8031 | a | Offices and clinics of doctors of osteopathy. |
| | 804 | ..... | 1 | Offices and clinics of other health practitioners. |
| | ..... | 8049 | 1 | Offices and clinics of health practitioners, not elsewhere classified. |
| | 805 | ..... | b | Nursing and personal care facilities. |
| | ..... | 8059 | b | Nursing and personal care facilities, not elsewhere classified. |
| | 806 | ..... | 1 | Hospitals. |
| | ..... | 8062 | 1 | General medical and surgical hospitals. |
| | ..... | 8063 | 1 | Psychiatric hospitals. |
| | ..... | 8069 | 1 | Specialty hospitals, except psychiatric. |
| | 807 | ..... | 1 | Medical and dental laboratories. |
| | ..... | 8071 | 1 | Medical laboratories. |
| | ..... | 8072 | a | Dental laboratories. |
| | 809 | ..... | 1 | Miscellaneous health and allied services, not elsewhere classified. |
| | ..... | 8099 | 1 | Health and allied services, not elsewhere classified. |
| 81 ..... | ..... | ..... | 1 | Legal services. |
| | 811 | ..... | 1 | Legal services. |
| | ..... | 8111 | 1 | Legal services. |
| 82 ..... | ..... | ..... | 1 | Educational services. |
| | 821 | ..... | 2 | Elementary and secondary schools. |
| | ..... | 8211 | 2 | Elementary and secondary schools. |
| | 822 | ..... | 1 | Colleges, universities, professional schools, and junior colleges. |
| | ..... | 8221 | 1 | Colleges, universities, and professional schools. |
| | ..... | 8222 | 1 | Junior colleges and technical institutes. |
| | 824 | ..... | 2 | Vocational schools. |
| | ..... | 8243 | a | Data processing schools. |
| | ..... | 8244 | 2 | Business and secretarial schools. |
| | ..... | 8249 | 2 | Vocational schools, not elsewhere classified. |
| | 829 | ..... | 1 | Schools and educational services, not elsewhere classified. |
| | ..... | 8299 | 1 | Schools and educational services, not elsewhere classified. |
| 83 ..... | ..... | ..... | 1 | Social services. |
| | 832 | ..... | 1 | Individual and family social services. |
| | ..... | 8322 | 1 | Individual and family social services. |
| | 833 | ..... | 3 | Job training and vocational rehabilitation services. |
| | ..... | 8331 | 3 | Job training and vocational rehabilitation services. |
| | 835 | ..... | 1 | Child day care services. |
| | ..... | 8351 | 1 | Child day care services. |
| | 836 | ..... | 2 | Residential care. |
| | ..... | 8361 | 2 | Residential care. |
| | 839 | ..... | a | Social services, not elsewhere classified. |
| | ..... | 8399 | a | Social services, not elsewhere classified. |
| 84 ..... | ..... | ..... | 3 | Museums, art galleries, and botanical and zoological gardens. |
| | 841 | ..... | 3 | Museums and art galleries. |
| | ..... | 8412 | 3 | Museums and art galleries. |
| 86 ..... | ..... | ..... | 1 | Membership organizations. |
| | 861 | ..... | 1 | Business associations. |
| | ..... | 8611 | 1 | Business associations. |
| | 862 | ..... | 1 | Professional membership organizations. |
| | ..... | 8621 | 1 | Professional membership organizations. |
| | 863 | ..... | 1 | Labor unions and similar labor organizations. |
| | ..... | 8631 | 1 | Labor unions and similar labor organizations. |
| | 864 | ..... | 2 | Civic, social, and fraternal associations. |
| | ..... | 8641 | 2 | Civic, social, and fraternal associations. |
| | 866 | ..... | 2 | Religious organizations. |
| | ..... | 8661 | 2 | Religious organizations. |
| | 869 | ..... | 2 | Membership organizations, not elsewhere classified. |

NONMANUFACTURING INDUSTRIES—Continued

| Major group | Industry group number | Industry number | Tier | Industry |
|---|---|---|---|---|
| | ..... | 8699 | 2 | Membership organizations, not elsewhere classified. |
| 87 ..... | ..... | ..... | 1 | Engineering, accounting, research, management, and related services. |
| | 871 | ..... | 1 | Engineering, architectural, and surveying services. |
| | ..... | 8711 | 1 | Engineering services. |
| | 872 | ..... | 1 | Accounting, auditing, and bookkeeping services. |
| | ..... | 8721 | 1 | Accounting, auditing, and bookkeeping services. |
| | 873 | ..... | 1 | Research, development, and testing services. |
| | ..... | 8733 | 1 | Noncommercial research organizations. |
| 88 ..... | ..... | ..... | 3 | Private households. |
| | 881 | ..... | 3 | Private households. |
| | ..... | 8811 | 3 | Private households. |

"a"=Category contained less than three responding employers or one responding employer had more than 80 percent of the employment in the category.
"b"=Firm(s) declined to furnish waivers in these categories.
[1] Survey data reported on the basis of SIC code 5810. Data were not broken down by SIC 5812, Eating places, and 5813 Drinking places (Alcoholic beverages).

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990, as amended at 55 FR 39577, Sept. 27, 1990; 55 FR 53248, Dec. 27, 1990; 57 FR 1104, Jan. 10, 1992]

## APPENDIX C TO PART 510—GOVERNMENT CORPORATIONS ELIGIBLE FOR MINIMUM WAGE PHASE-IN

This appendix contains a listing of the public organizations (corporations) in Puerto Rico for which data have been provided by the Commonwealth for purposes of implementing the 1989 Amendments to FLSA. Such Corporations are subject to Tiers 1, 2, or 3, as set forth below. Corporations which are listed under Tier 3 may pay rates specified under Tier 4 to employees engaged in traditional activities, as defined in §510.25 of the regulations. All other employees are subject to Tier 3. Organizations for which no data were provided are subject to Tier 1 treatment.

| Tier | Organization |
|---|---|
| 1 | Automobile Accidents Compensation Administration. |
| 1 | Cardiovascular Center Corporation of Puerto Rico and the Caribbean. |
| 2 | Culebra Conservation and Development Authority. |
| 3 | Government Development Bank of Puerto Rico. |
| 1 | Highway Authority. |
| 2 | Industries for the Blind, Mentally Retarded, and other Disabled Persons of Puerto Rico. |
| 1 | Institute of Puerto Rican Culture. |
| 2 | Corporation for the Development and Administration of Marine, Lacustrine, and Fluvial Resources of Puerto Rico. |
| 1 | Metropolitan Bus Authority. |
| 2 | Puerto Rico Mineral Resource Development Corporation. |
| 1 | Musical Arts Corporation. |
| 1 | Public Building Authority. |
| 1 | Puerto Rico Institute of Cinematographic and Television Arts and Industries. |
| 1 | Puerto Rico Aqueducts and Sewer Authority. |
| 1 | Puerto Rico Communications Authority. |
| 1 | Puerto Rico Land Administration. |
| 1 | Puerto Rico Marine Shipping Authority. |
| 1 | Puerto Rico Medical Service Administration. |
| 1 | Puerto Rico Ports Authority. |
| 1 | Puerto Rico Musical Performing Arts Corporation. |
| 2 | Puerto Rico Rural Development Corporation. |
| 3 | Puerto Rico Sugar Board. |
| 1 | Puerto Rico Telephone Company. |
| 2 | Puerto Rico Solid Waste Management Authority. |
| 1 | Puerto Rico Housing Bank. |
| 1 | Puerto Rico Tourism Company. |
| 3 | Puerto Rico Renewal and Housing Corporation. |
| 3 | Puerto Rico Industrial Development Bank. |
| 3 | Recreational Development Company. |
| 2 | Right to Work Administration. |

## APPENDIX D TO PART 510—MUNICIPALITIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN

This appendix contains a listing of the municipalities in Puerto Rico and the tier applicable to each. Municipalities with average hourly earnings below $4.65 but equal to or greater than $4.00 are subject to Tier 2, as set forth below. Municipalities with average hourly earnings under $4.00 are subject to Tier 3. Municipalities which are listed under Tier 3 may pay the rates specified under Tier 4 to employees engaged in traditional activities, as defined in §510.25 of the regulations. All other employees are subject to Tier 3. Municipalities which did not submit data are subject to Tier 1. The tiers set forth below are subject to petitions for review by affected employees, if filed prior to June 1, 1990. If upon review it is determined that the municipality should have been subject to Tier 1 or 2, back wages will have to be paid to April 1, 1990, to make up the difference between what municipal employees were paid and what they should have been paid.

| Tier | Municipality |
|---|---|
| 3 | Adjuntas. |
| 3 | Aguada. |
| 3 | Aguadilla. |
| 3 | Aguas Buenas. |
| 3 | Aibonito. |
| 3 | Añasco. |
| 3 | Arecibo. |
| 3 | Arroyo. |
| 3 | Barceloneta. |
| 3 | Barranquitas. |
| 3 | Bayamon. |
| 3 | Cabo Rojo. |
| 3 | Caguas. |
| 3 | Camuy. |
| 2 | Canovanas. |
| 3 | Carolina. |
| 3 | Cataño. |
| 3 | Cayey. |
| 2 | Ceiba. |
| 3 | Ciales. |
| 3 | Cidra. |
| 3 | Coamo. |
| 2 | Comerio. |
| 3 | Corozal. |
| 3 | Culebra. |
| 2 | Dorado. |
| 3 | Fajardo. |
| 3 | Florida. |
| 3 | Guanica. |
| 3 | Guyama. |
| 2 | Guayanilla. |
| 3 | Guaynabo. |
| 3 | Guarbo. |
| 3 | Hatillo. |
| 3 | Hormigueros. |
| 3 | Humacao. |
| 3 | Isabela. |
| 3 | Jayuya. |
| 3 | Juana Diaz. |
| 3 | Juncos. |
| 2 | Lajas. |
| 3 | Lares. |
| 3 | Las Marias. |
| 3 | Las Piedras. |
| 3 | Loiza. |
| 3 | Luquillo. |
| 1 | Manati. |
| 3 | Maricao. |
| 3 | Maunabo. |
| 3 | Mayaguez. |
| 2 | Moca. |
| 3 | Morovis. |
| 3 | Naguabo. |
| 2 | Naranjito. |
| 3 | Orocovis. |
| 3 | Patillas. |
| 3 | Peñuelas. |
| 3 | Ponce. |
| 3 | Quebradillas. |
| 3 | Rincon. |
| 3 | Rio Grande. |
| 3 | Sabana Grande. |
| 3 | Salinas. |
| 3 | San German. |
| 2 | San Juan. |
| 3 | San Lorenzo. |
| 3 | San Sebastian. |
| 3 | Santa Isabel. |
| 3 | Toa Alta. |
| 3 | Toa Baja. |
| 2 | Trujillo Alto. |
| 3 | Utuado. |
| 3 | Vega Alta. |
| 3 | Vega Baja. |
| 3 | Vieques. |
| 3 | Villalba. |
| 3 | Yabucoa. |
| 3 | Yauco. |

# PART 511—WAGE ORDER PROCEDURE FOR AMERICAN SAMOA

Sec.

511.1 General method for issuance of wage orders.
511.2 Initiation of proceedings; notices of hearings.
511.3 Composition and appointment of committees.
511.4 Compensation of committee members.
511.5 Vacancies and dissolution of committees.
511.6 Investigation.
511.7 Committee staff.
511.8 Prehearing statements.
511.9 Requirements for quorum and decisions.
511.10 Subjects and issues.
511.11 Pertinent data.
511.12 Committee and subcommittee meetings.
511.13 Evidence.
511.14 Procedure for receiving evidence.
511.15 Submittals prior to reports.
511.16 Reports.
511.17 Records.
511.18 Publication and effective date of wage order.
511.19 Petitions.

AUTHORITY: 29 U.S.C. 205, 206, 208; 5 U.S.C. 551–559.

SOURCE: 21 FR 7669, Oct. 6, 1956, unless otherwise noted.

## §511.1 General method for issuance of wage orders.

Pursuant to authority delegated by the Secretary of Labor, the Administrator of the Wage and Hour Division publishes the orders that are required by statute to make the recommendations of industry committees effective as wage orders under section 6(a)(3) of the Fair Labor Standards Act. The wage orders issued by the Administrator must by law give effect to the recommendations of the industry committees. All wage order proceedings will be conducted in accordance with the standards provided in the Administrative Procedure Act as interpreted and applied in this part.

[55 FR 53298, Dec. 28, 1990]

### § 511.2 Initiation of proceedings; notices of hearings.

(a) Wage order proceedings are initiated by order of the Secretary, published in the FEDERAL REGISTER, giving notice of hearings by industry committees to recommend the minimum rate or rates of wages to be paid under section 6 of the Act to employees in American Samoa engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce. These orders will contain a definition of the particular industry in American Samoa, for which the committee is to make its recommendations, or these orders will direct the committee to recommend the minimum rate or rates of wages for all industry in American Samoa. All such orders will make provision for convening the committee. Any particular industry defined in such an order may be a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(b) These orders will also give reasonable notice (1) of the time and place of the commencement of the hearing of such witnesses and receiving of such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under the Act, (2) of the general nature of the wage order proceedings and the authority under which they are proposed, (3) of the subjects and issues involved, and (4) that the committee will take official notice of the economic report (note § 511.13) and the parties will have an opportunity at the hearing to show any contrary or additional facts.

[26 FR 6513, July 20, 1961, as amended at 55 FR 12120, Mar. 30, 1990]

### § 511.3 Composition and appointment of committees.

An industry committee will be composed of residents of American Samoa and residents of the United States outside of American Samoa. The Secretary will appoint as members of each committee an equal number of persons representing:

(a) The public,

(b) Employees in the industry, and

(c) Employers in the industry.

The public members shall be disinterested, and the Secretary will designate one as chairperson. For purposes of this section only, the definition of the industry shall be considered to include all such industry throughout the United States, its territories and possessions.

[55 FR 53298, Dec. 28, 1990]

### § 511.4 Compensation of committee members.

Each member of an industry committee will be allowed per diem compensation at the rate specified in Chapter 304 of the Department of Labor Supplement to the Federal Personnel Manual for each day actually spent in the work of the committee, and will, in addition, be reimbursed for necessary transportation and other expenses incident to traveling in accordance with Standard Government Travel Regulations then in effect. All travel expenses will be paid on travel vouchers certified by the Administrator or an authorized representative. Any other necessary expenses that are incidental to the work of the committee may be incurred by the committee upon approval of, and shall be paid upon, certification of the Administrator or an authorized representative.

[58 FR 34524, June 28, 1993]

### § 511.5 Vacancies and dissolution of committees.

The Secretary will appoint persons to fill any vacancies occurring in industry committees. If an industry committee is unable to arrive at a recommendation within a reasonable time, or refuses to make a recommendation, it may be dissolved by the Secretary. An industry committee shall cease to perform further functions when it has filed with the Administrator its report containing its findings of fact and recommendations with respect to the matters referred to it, and shall not again perform any functions with respect to any matter reported on, unless and until directed by the Administrator. An industry committee shall be dissolved automatically when its recommendations are no longer subject to review under section 10 of the Act.

[27 FR 10651, Nov. 1, 1962]

### §511.6 Investigation.

The Administrator shall prepare an economic report containing such data as can be assembled pertinent to the matters to be referred to a committee. A copy of these regulations will be sent to all members of the committee following their appointment, and a copy of the economic report when completed will be furnished promptly. Before making its report the committee will decide whether it will conduct any further investigation, apart from the hearing and the review of the economic report, in connection with the matters referred to it.

[55 FR 53298, Dec. 28, 1990]

### §511.7 Committee staff.

Each industry committee will be furnished a lawyer, to serve as committee counsel, and an economist, to serve as committee economist. Committee counsel shall advise the committee on the issues of law, including interpretations of these regulations and the legal scope of the committee's discretion, which arise during the committee proceedings. The committee counsel and economist shall be available to advise and assist the committee at all of its meetings. The Administrator shall furnish the committee with adequate stenographic, clerical, and other assistance.

### §511.8 Prehearing statements.

(a) Every employer, employee, trade association, trade union, or group of employers, employees, associations, or unions in the industry as defined, or in such industry elsewhere in the United States, and every other person who, in the judgment of the committee has an interest sufficient to justify the participation proposed by such party, shall be considered an interested person. No member of the committee may participate as an interested person.

(b) Any interested person who wishes to participate on his or her own behalf or by counsel shall file a written prehearing statement within such period of time as may be prescribed in a notice of hearing, or other notice published in the FEDERAL REGISTER. The number of copies of such statements and the time and places for filing them will be specified in notices of hearings. The prehearing statement shall describe the person's interest in the proceeding and shall contain:

(1) The prepared statement he or she proposes to give, if any;

(2) A statement of the individual classifications and minimum wage rates, if any, he or she proposes to support;

(3) The written data he or she proposes to introduce in evidence, including all tangible objective data to be submitted pursuant to §511.13;

(4) The names and addresses of the witnesses he or she proposes to call and a summary of the evidence he or she proposes to develop;

(5) The name and address of the individual who will present his or her case; and

(6) A statement of the approximate length of time his or her case will take.

If the prehearing statement is in conformity with the above requirements, the person shall have the right to participate as a party. In accordance with section 6(c) of the Administrative Procedure Act, the industry committee shall, after considering the advice of committee counsel, issue subpoenas, authorized by section 9 of the Fair Labor Standards Act of 1938, to parties who make a request therefor accompanied by a clear showing of general relevance and reasonable scope of the evidence sought.

(c) Prehearing statements of parties shall be made available for examination at the offices where they are filed. Each person who files a prehearing statement should, if requested, make himself or herself available for conference with the committee staff to make any needed clarification of his or her prehearing statement, and arrange details of presenting his or her testimony or case.

(d) In exceptional circumstances a person who has not filed the prehearing statement required by this section and who does not appear on a witness list filed by a party may nevertheless be permitted, in the discretion of the committee, to offer testimony.

[25 FR 14024, Dec. 31, 1960, as amended at 55 FR 53298, Dec. 28, 1990]

### § 511.9 Requirements for quorum and decisions.

Two-thirds of the members of an industry committee shall constitute a quorum. Approval by a majority of all of the members of an industry committee or subcommittee shall be required for its report. Except as otherwise provided in this part, the chairperson of the industry committee or subcommittee may make other decisions for the committee or subcommittee, but each such decision shall be subject to approval of a majority of the members present if any member objects.

[55 FR 53298, Dec. 28, 1990]

### § 511.10 Subjects and issues.

(a) The declared policy of the Act with respect to industries or enterprises in American Samoa engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the object of the minimum wage rate that would apply in each such industry under paragraph (1) of section 6(a) but for section 6(a)(3) of the Act. Each industry committee shall recommend to the Administrator the highest minimum wage rates for the industry that it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry and will not give any industry in American Samoa a competitive advantage over any industry in the United States outside of American Samoa; except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a)(1), that would be applicable but for section 6(a)(3), unless there is evidence in the record that establishes that the industry, or a predominant portion thereof, is unable to pay that wage due to such economic and competitive conditions.

(b) Whenever the industry committee finds that a higher minimum wage may be determined for employees engaged in certain activities or in the manufacture of certain products in the industry than may be determined for other employees in the industry, the industry committee shall recommend such reasonable classifications within the industry as it determines to be necessary for the purpose of fixing for each classification the highest minimum wage rate (not in excess of that prescribed in paragraph (1) of section 6(a) of the Act) that can be determined for it under the principles set out in this section that will not substantially curtail employment in such classification and will not give a competitive advantage to any group in that industry. No classification shall be made, however, and no minimum wage rate shall be fixed solely on a regional basis or on the basis of age or sex. In determining whether there should be classifications within an industry, in making such classifications, and in determining the minimum wage rate for each classification, the committee shall consider, among other relevant factors, the following:

(1) Competitive conditions as affected by transportation, living and production costs;

(2) The wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) The wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

[55 FR 53298, Dec. 28, 1990]

### § 511.11 Pertinent data.

Among the types of data which may be considered pertinent to the subjects and issues delineated in § 511.10, are those revealing:

(a) Employment and labor conditions and trends in American Samoa, and on the mainland, particularly since the promulgation of the presently applicable wage order, including such items as present and past employment, present wage rates and fringe benefits, changes in average hourly earnings or wage structure, provisions of collective bargaining agreements, hours of work, labor turnover, absenteeism, productivity, learning periods, rejection rates, and similar factors;

(b) Market conditions and trends in American Samoa, and on the mainland, including changes in the volume and value of production, market outlets, price changes, style factors, consumer

demand, competitive relationships, tariff rates, and similar marketing factors;

(c) Comparative production costs in American Samoa, on the mainland, and in foreign countries, together with the factors responsible for differences;

(d) Financial conditions and trends since promulgation of the present wage order as reflected in profit and loss statements and balance sheets; and

(e) Data bearing on proper definitions of classifications within an industry.

[55 FR 12120, Mar. 30, 1990]

### §511.12 Committee and subcommittee meetings.

(a) The full committee, or a quorum thereof, will convene at the time and place appointed for an initial prehearing meeting as provided in the Secretary's order initiating the proceedings (note §511.2). The full committee acting through a quorum will decide at that meeting whether it will preside at the reception at the hearing or will authorize a subcommittee to preside. Any resolution authorizing a subcommittee to hold the hearing shall provide a period of 30 days after:

(1) The subcommittee has filed its recommended report and

(2) A transcript of the subcommittee hearing is made available to the parties, for the parties to file exceptions to the recommended report, and the committee shall meet promptly thereafter on call of its chairperson or the Administrator to consider exceptions and prepare its final report.

(b) A committee may adjourn its meeting or hearing, or both, from time to time, and meet again, at hearing or otherwise, pursuant to the terms of adjournment, or on call of its chairperson or the Administrator.

[55 FR 53299, Dec. 28, 1990]

### §511.13 Evidence.

In accordance with the notice of hearing, the committee and any authorized subcommittee will take official notice of the facts stated in the economic report to the extent they are not refuted by evidence received at the hearing. Other pertinent evidence available to the Department of Labor may be presented at the hearing. The committee itself may call witnesses not otherwise scheduled to testify. Oral or documentary evidence may be received, but the committee shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every interested person who has met the requirements for participation as a party shall have the right to present his or her case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination of witnesses called by others as may be required for a full and true disclosure of the facts. Testimony on behalf of an employer or group of employers as to inability to pay the minimum wage rate specified in paragraph (1) of section 6(a) of the Act, or as to inability to adjust to a higher minimum wage rate than prescribed by any applicable wage order of the Secretary, shall be supported by tangible objective data filed as part of the prehearing statement under §511.8. Financial or other data shall include data for the most recent year or fraction thereof for which data are available. Financial statements filed in accordance with this provision, except those relating to a period of less than a full fiscal year or a fiscal year ending less than 90 days prior to the filing of the prehearing statement, shall be certified by an independent public accountant or shall be sworn to conform to and be consistent with the corresponding income tax returns covering the same years. Evidence of witnesses not present at the hearing may be submitted only by affidavits received with, or as a part of, a prehearing statement that meets the requirements of §511.8 and satisfactorily explains why each affiant cannot be present. Such affidavits will be received in evidence to the same extent that testimony from affiants would have been admitted had they been present. The committee will give such weight to these statements as it considers appropriate, and the fact that such affiants have not been subject to cross-examination may be considered, along with other relevant facts, in assessing the weight to be given such evidence.

[55 FR 53299, Dec. 28, 1990]

### § 511.14 Procedure for receiving evidence.

(a) All testimony shall be given under oath or affirmation. Any party shall have the right to appear in person, by counsel, or by other specified representative. Misconduct at any hearing shall be grounds for summary exclusion from the hearing. The committee shall limit the testimony of any witness where appropriate to prevent the hearing from becoming unduly prolonged. The refusal of a witness to answer any question which has been ruled to be proper shall, in the discretion of the committee, be ground for striking all testimony given by the witness on related matters.

(b) Unless otherwise directed by the committee, witnesses shall be called in the following order: The committee economist qualified to testify concerning the content and preparation of the economic report, other witnesses called by the Department of Labor, witnesses called by the parties, other witnesses. Unless otherwise directed by the committee, all witnesses other than those called by the parties shall be examined in the following order: By committee counsel, by committee economist, by committee members, by the parties or their representatives. Witnesses called by the parties shall be examined first by the party calling them or by the party's specified representative, and then in the order herein indicated for all other witnesses. Redirect examination may be permitted at the discretion of the committee. Rebuttal evidence may be offered in the order and manner in this section provided for other evidence. To the extent not specified in this section, the order for calling and examining witnesses shall be specified by the chairperson of the committee or subcommittee.

[21 FR 7669, Oct. 6, 1956, as amended at 55 FR 53299, Dec. 28, 1990]

### § 511.15 Submittals prior to reports.

As soon as the receipt of evidence is concluded, a committee or subcommittee presiding at a hearing shall receive any proposed findings of fact and recommendations together with the reasons therefor submitted by any party. These submittals shall be oral unless otherwise directed by the committee or subcommittee. If, in the discretion of the committee or subcommittee such proposals should be in writing, it may grant such additional time as it deems essential.

### § 511.16 Reports.

Promptly after receipt of submissions under § 511.15, the committee or subcommittee will resolve the issues before it and prepare a report containing its findings of fact and recommendations. The report shall contain the committee's or the subcommittee's findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record. When a committee, acting through a quorum, has presided at the reception of evidence, this report shall be its final report on the matters referred to it. Where, however, a subcommittee has presided at the reception of evidence, this report shall be an initial report, and the committee shall meet thereafter to review the report and rule on exceptions in its final report. Where the committee presides at the reception of evidence and proceeds to final decision, every party shall be regarded as having objected to any wage rate or classification at variance with any the party proposed in the party's prehearing statements unless the party accepted such a rate or classification in any submittal made pursuant to § 511.15. A copy of the report shall be signed by each member of the committee who approves it, either at a meeting of the committee or by circulation of one or more copies among the members of the committee. At any time within 3 days after the committee report is signed by those who approve it, members dissenting therefrom may collectively or individually submit signed reports stating the reasons for their dissent.

[55 FR 53299, Dec. 28, 1990]

### § 511.17 Records.

Each industry committee shall keep a journal recording the time and place of all its meetings, the members present, the votes, and other formal

proceedings, including the appointment of subcommittees. Subcommittees shall keep a similar journal. No report of committee or subcommittee discussions need be included. All hearings shall be recorded. The record of any hearing before any subcommittee shall be transcribed. All hearings before a committee shall also be transcribed in whole or in part whenever the Administrator so directs upon his or her own motion or upon the motion of any party or any person compelled to submit data or evidence and upon the payment of costs prescribed by the Administrator. Promptly after completion of the committee's final report, the committee chairperson shall certify the report and transmit it to the Administrator. As soon as practicable thereafter, the committee staff shall transmit to the Administrator:

(a) All committee and subcommittee journals;

(b) All applications for leave to participate as parties together with the record of action thereon; and,

(c) The record, including any transcript of the testimony and exhibits, together with all papers and requests filed in the proceedings.

These documents shall be available for inspections and copying by interested persons at the Office of the Administrator during usual business hours.

[55 FR 53300, Dec. 28, 1990]

### §511.18 Publication and effective date of wage order.

Promptly after receipt of the committee report the Administrator shall publish the committee recommendations in the FEDERAL REGISTER and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

### §511.19 Petitions.

Any interested person may at any time file a petition with the Administrator for an amendment to the regulations contained in this part or for an amendment to a wage order applicable to that person. In view of the statutory requirement that the minimum rates of wages established by order under section 6 of the Act be reviewed by an industry committee at least biennially, substantial cause must be shown in support of any petition for an amendment of a wage order out of regular course. Any interested person may also file a petition at any time with the Administrator for a public hearing under section 13(e) of the Act to determine whether economic conditions warrant rules or regulations providing reasonable limitations or allowing reasonable variations, tolerances, or exemptions to or from any or all of the provisions of section 7 of the Act with respect to employees in American Samoa for whom the Secretary of Labor has established minimum wage rates under section 6(a)(3) of the Act and the regulations contained in this part. Whenever it appears to the Secretary of Labor, by reason of such a petition or otherwise, to be probable that such a hearing is likely to reveal that economic conditions warrant such action, notice of such hearing specifying the procedure to be followed will be published in the FEDERAL REGISTER.

[55 FR 53300, Dec. 28, 1990]

## PART 515—UTILIZATION OF STATE AGENCIES FOR INVESTIGATIONS AND INSPECTIONS

Sec.

515.1 Definitions.
515.2 Agreements with State agencies.
515.3 Qualifications of the State agency.
515.4 Submission of plan.
515.5 Additional requirements.
515.6 Audits.
515.7 Transmission of official mail.
515.8 Enforcement.
515.9 Agreements and approved plans.
515.10 Amendments and repeal.

AUTHORITY: Sec. 4, 49 Stat. 2038, sec. 11(b), 52 Stat. 1066; 29 U.S.C. 211(b), 41 U.S.C. 38.

SOURCE: 13 FR 2161, 2163, Apr. 22, 1948, unless otherwise noted.

### §515.1 Definitions.

As used in this part:

(a) *Acts*. The term *Acts* means the Fair Labor Standards Act of 1938 (Act of June 25, 1938; Chapter 676, 52 Stat. 1060, 29 U.S.C. 201) and the Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 U.S.C. 35–45).

(b) *Administrator*. The term *Administrator* means the Administrator of the

Wage and Hour Division of the United States Department of Labor.

(c) *Division*. The term *Division* means the Wage and Hour Division of the United States Department of Labor.

(d) *State*. The term *State* means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(e) *State agency*. The term *State agency* means the agency in the State charged with the administration of labor laws which necessitate inspection of places of employment for (1) enforcement of State child-labor regulations and (2) enforcement of State maximum-hour or State minimum-wage regulations.

(f) *Official forms*. The term *official forms* means forms prescribed by the Administrator or the Secretary of Labor.

### § 515.2 Agreements with State agencies.

(a) *Purpose*. The Secretary and the Administrator may enter into agreements with State agencies for the utilization of services of State and local agencies and their employees in making investigations and inspections under the Acts and for reimbursement therefor, when such State agencies have submitted plans of cooperation for such purposes and such plans have been found to be reasonably appropriate and adequate to carry out the respective functions of the Secretary and the Administrator.

(b) *Certificates of attorneys general*. No such agreement shall become effective and operative until a statement of the Attorney General of the State, or, if the Attorney General is not authorized to make such a statement, the State official who is so authorized, has been received by the Division and the Secretary of Labor certifying that the agreement is valid in the form as executed under the laws of the State.

### § 515.3 Qualifications of the State agency.

The State agency shall have as its primary function the administration of State labor laws and shall be under the direction of an executive who gives full time to the work of the agency. The agency shall be engaged in inspecting places of employment for (a) enforcement of State child-labor laws and regulations, and (b) enforcement of State maximum hour or minimum-wage laws and regulations. An administrative division of the State agency shall be designated to make investigations and inspections under the Acts; qualified staff, under adequate supervision, shall be specifically assigned for work connected with State and Federal child-labor, maximum-hour and minimum-wage laws and regulations; and provision shall be made to inspect any establishment subject to the Acts.

### § 515.4 Submission of plan.

The State agency shall submit a plan, in quadruplicate, which shall include the following:

(a) A copy of the Act establishing the State agency, copies of the laws administered by the State agency, and if there is an act specifically authorizing the State to cooperate with the Division or the Secretary of Labor, or both, a copy of such Act.

(b) A description of the organization of the State agency, illustrated by organization charts, showing the delegation of responsibility and lines of authority to be followed within the agency in the enforcement of the act and State labor laws.

(c) A description: (1) Of the manner in which investigations and inspections under the Acts will be coordinated with the investigations and inspections for enforcement of State child-labor, maximum-hour and minimum-wage laws and regulations; (2) of the location of offices of the administrative division designated to make inspections under the Acts, with the job titles of employees located in each such office and employees assigned to work in connection with the Acts so designated; and (3) of the manner in which the work of inspectors will be supervised.

(d) Provisions for the establishment and maintenance of personnel administration, with respect to personnel engaged in work under the Acts for the Division and the Secretary of Labor in accordance with the following standards:

(1) Job classifications based upon an analysis of the duties and responsibilities of positions;

(2) A compensation schedule adjusted to State salary schedules for similar positions: *Provided, however,* That all salaries paid by the State for services rendered in accordance with an agreement entered into pursuant to §515.2 shall be on the basis of applicable State laws or regulations, or in the absence of such applicable laws or regulations, on the approved and usual scale pair by the State for similar services and shall in no case exceed salaries paid for comparable Federal positions in the competitive classified service. Allowances for necessary traveling expenses shall be on the basis of State laws and regulations governing travel allowances;

(3) Assignment of personnel to Federal work only when their qualifications conform substantially with qualifications of Federal employees engaged in similar work, such assignment to be made only after submission to and approval by the Division and the Secretary of Labor of a statement of the training and experience of each person who will engage in Federal work;

(4) Appointment of new personnel on the basis of merit, either (i) from lists of eligible persons certified in the order of merit, secured under a merit system through State-wide competitive examinations which prescribe requirements of training and experience in substantial conformity with Federal civil service requirements for similar positions or (ii) from lists taken from Federal registers established through competitive examinations for similar positions, it being understood that such registers may be broken down by States;

(5) Adequate training of staff;

(6) Promotion on the basis of qualifications and performance;

(7) Security of tenure assured satisfactory employees, including right of notice and hearing prior to demotion or dismissal;

(8) Prohibition against employees engaging in political activities other than the exercise of their right to vote and to express privately their opinions on political questions.

(e) A budget which shall show, in detail, estimated expenditures by the State agency on behalf of the Division and the Secretary of Labor for services to be rendered in connection with the administration of the Acts and a budget which shall show estimated expenditure for the enforcement of comparable State laws and regulations during the period covered by the agreement; a statement showing funds appropriated to or allocated for meeting the budget for estimated State expenditures; and a statement showing expenditures by the State agency for the enforcement of comparable State laws and regulations during the last fiscal year.

(f) A statement of State requirements in regard to fiscal practices and to appointment of personnel, together with copies of the laws and regulations setting forth such requirements.

(g) A statement from the Attorney General of the State or, if the Attorney General is not authorized to make such a statement, from the State official who is so authorized certifying that the State agency has authority to enter into an Agreement with the Division and the Secretary of Labor in accordance with this part.

### §515.5 Additional requirements.

(a) The State Agency shall follow the procedure set forth in the Inspection Manual for the enforcement of the act and such supplements to or provisions thereof as may be issued from time to time by the Division or the Secretary of Labor; use official forms for recording findings; make reports as required; and carry on the work connected with the administration of the Acts in conformity with the plans and budget agreed upon and with the instructions and policies of the Division and the Secretary of Labor.

(b) Representatives of the Division and the Secretary of Labor may at any time, upon notifying the State agency, make such inspections and investigations and secure such information as may be necessary for the administration of the Acts.

### §515.6 Audits.

The accounting records and the supporting data pertaining to expenditures for investigations and inspections under the Acts shall be subject to audit by the Division and the Secretary of Labor, annually, or so often as the Administrator and the Secretary of Labor, may require.

### § 515.7 Transmission of official mail.

Subject to the requirements of law and of the regulations of the Post Office Department, franked self-addressed envelopes may be used for communications from the field staff to a State official designated by the Division and the Secretary of Labor, and for communication from the State agency to the Division or the Secretary of Labor.

### § 515.8 Enforcement.

All litigation relating to the enforcement of the Acts, other than civil actions for the recovery of wages due instituted pursuant to section 16(b) of the Fair Labor Standards Act of 1938 and all administrative proceedings instituted pursuant to section 5 of the Public Contracts Act shall be undertaken by and be under the direction and control of the Federal Government. Any State agency intending to institute a civil action in behalf of an employee or employees for the recovery of wages due, pursuant to section 16(b) of the Fair Labor Standards Act of 1938 shall notify the Division and the Secretary of Labor prior to the institution of such action.

### § 515.9 Agreements and approved plans.

Agreements and approved plans incorporated therein may be amended upon the consent of the parties thereto.

### § 515.10 Amendments and repeal.

This part may be amended or repealed by appropriate joint regulations issued by the Secretary of Labor and the Administrator: *Provided, however,* That no such amendment or repeal shall be effective as to any agreement previously entered into by a State agency without its consent thereto.

## PART 516—RECORDS TO BE KEPT BY EMPLOYERS

INTRODUCTORY

Sec.
516.0 Display of OMB control numbers.
516.1 Form of records; scope of regulations.

### Subpart A—General Requirements

516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.
516.3 Bona fide executive, administrative, and professional employees (including academic administrative personnel and teachers in elementary or secondary schools), and outside sales employees employed pursuant to section 13(a)(1) of the Act.
516.4 Posting of notices.
516.5 Records to be preserved 3 years.
516.6 Records to be preserved 2 years.
516.7 Place for keeping records and their availability for inspection.
516.8 Computations and reports.
516.9 Petitions for exceptions.
516.10 [Reserved]

### Subpart B—Records Pertaining to Employees Subject to Miscellaneous Exemptions Under the Act; Other Special Requirements

516.11 Employees exempt from both minimum wage and overtime pay requirements under section 13(a) (2), (3), (4), (5), (8), (10), (12) or 13(d) of the Act.
516.12 Employees exempt from overtime pay requirements pursuant to section 13(b) (1), (2), (3), (5), (9), (10), (15), (16), (17), (20), (21), (24), (27) or (28) of the Act.
516.13 Livestock auction employees exempt from overtime pay requirements under section 13(b)(13) of the Act.
516.14 Country elevator employees exempt from overtime pay requirements under section 13(b)(14) of the Act.
516.15 Local delivery employees exempt from overtime pay requirements pursuant to section 13(b)(11) of the Act.
516.16 Commission employees of a retail or service establishment exempt from overtime pay requirements pursuant to section 7(i) of the Act.
516.17 Seamen exempt from overtime pay requirements pursuant to section 13(b)(6) of the Act.
516.18 Employees employed in certain tobacco, cotton, sugar cane or sugar beet services, who are partially exempt from overtime pay requirements pursuant to section 7(m), 13(h), 13(i) or 13(j) of the Act.
516.19 [Reserved]
516.20 Employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided in section 7(b)(1) or section 7(b)(2) of the Act.
516.21 Bulk petroleum employees partially exempt from overtime pay requirements pursuant to section 7(b)(3) of the Act.

516.22 Employees engaged in charter activities of carriers pursuant to section 7(n) of the Act.
516.23 Employees of hospitals and residential care facilities compensated for overtime work on the basis of a 14-day work period pursuant to section 7(j) of the Act.
516.24 Employees employed under section 7(f) ''Belo'' contracts.
516.25 Employees paid for overtime on the basis of ''applicable'' rates provided in sections 7(g)(1) and 7(g)(2) of the Act.
516.26 Employees paid for overtime at premium rates computed on a ''basic'' rate authorized in accordance with section 7(g)(3) of the Act.
516.27 ''Board, lodging, or other facilities'' under section 3(m) of the Act.
516.28 Tipped employees.
516.29 Employees employed by a private entity operating an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System who are partially exempt from overtime pay requirements pursuant to section 13(b)(29) of the Act.
516.30 Learners, apprentices, messengers, students, or handicapped workers employed under special certificates as provided in section 14 of the Act.
516.31 Industrial homeworkers.
516.32 [Reserved]
516.33 Employees employed in agriculture pursuant to section 13(a)(6) or 13(b)(12) of the Act.
516.34 Exemption from overtime pay for time spent by certain employees receiving remedial education pursuant to section 7(q) of the Act.

AUTHORITY: Sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211. Section 516.33 also issued under 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 516.34 also issued under Sec. 7, 103 Stat. 944, 29 U.S.C. 207(q).

SOURCE: 52 FR 24896, July 1, 1987, unless otherwise noted.

INTRODUCTORY

## §516.0 Display of OMB control numbers.

| Subpart or section where information collection requirement is located | Currently assigned OMB control No. |
|---|---|
| Subpart A (except 516.8) | 1215.0017 |
| 516.8 | 1215.0006 |
| Subpart B (except 516.31) | 1215.0017 |
| 516.31 | 1215.0013 |
| 516.34 | 1215.0175 |

[52 FR 24896, July 1, 1987, as amended at 71 FR 16665, Apr. 3, 2006]

## §516.1 Form of records; scope of regulations.

(a) *Form of records.* No particular order or form of records is prescribed by the regulations in this part. However, every employer subject to any provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the ''Act''), is required to maintain records containing the information and data required by the specific sections of this part. The records may be maintained and preserved on microfilm or other basic source document of an automatic word or data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.

(b) *Scope of regulations.* The regulations in this part are divided into two subparts.

(1) Subpart A of this part contains the requirements generally applicable to all employers employing covered employees, including the requirements relating to the posting of notices, the preservation and location of records, and the recordkeeping requirements for employers of employees to whom both the minimum wage provisions of section 6 or the minimum wage provisions of section 6 and the overtime pay provisions of section 7(a) of the Act apply. In addition, §516.3 contains the requirements relating to executive, administrative, and professional employees (including academic administrative personnel or teachers in elementary or secondary schools), and outside sales employees.

(2) Subpart B of this part deals with the information and data which must be kept for employees (other than executive, administrative, etc., employees) who are subject to any of the exemptions provided in the Act. This section also specifies the records needed for deductions from and additions to wages for ''board, lodging, or other facilities,'' industrial homeworkers and employees whose tips are credited toward wages. The sections in subpart B of this part require the recording of more, less, or different items of information

or data than required under the generally applicable recordkeeping requirements of subpart A.

(c) *Relationship to other recordkeeping and reporting requirements.* Nothing in 29 CFR part 516 shall excuse any party from complying with any recordkeeping or reporting requirement imposed by any other Federal, State or local law, ordinance, regulation or rule.

## Subpart A—General Requirements

### § 516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the ''regular rate'' (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a ''workday'' is any fixed period of 24 consecutive hours and a ''workweek'' is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) *Records of retroactive payment of wages.* Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the

Administrator or an authorized representative within 10 days after payment is made.

(c) *Employees working on fixed schedules.* With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works. Also,

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

### §516.3 Bona fide executive, administrative, and professional employees (including academic administrative personnel and teachers in elementary or secondary schools), and outside sales employees employed pursuant to section 13(a)(1) of the Act.

With respect to each employee in a bona fide executive, administrative, or professional capacity (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools), or in outside sales, as defined in part 541 of this chapter (pertaining to so-called ''white collar'' employee exemptions), employers shall maintain and preserve records containing all the information and data required by §516.2(a) except paragraphs (a) (6) through (10) and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites. (This may be shown as the dollar amount of earnings per month, per week, per month plus commissions, etc. with appropriate addenda such as ''plus hospitalization and insurance plan A,'' ''benefit package B,'' ''2 weeks paid vacation,'' etc.)

### §516.4 Posting of notices.

Every employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not apply because of an exemption of broad application to an establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply. For example:

Overtime Provisions Not Applicable to Taxicab Drivers (section 13(b)(17)).

### §516.5 Records to be preserved 3 years.

Each employer shall preserve for at least 3 years:

(a) *Payroll records.* From the last date of entry, all payroll or other records containing the employee information and data required under any of the applicable sections of this part, and

(b) *Certificates, agreements, plans, notices, etc.* From their last effective date, all written:

(1) Collective bargaining agreements relied upon for the exclusion of certain costs under section 3(m) of the Act,

(2) Collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act, and any amendments or additions thereto,

(3) Plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act,

(4) Individual contracts or collective bargaining agreements under section 7(f) of the Act. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement,

(5) Written agreements or memoranda summarizing the terms of oral agreements or understandings under section 7(g) or 7(j) of the Act, and

(6) Certificates and notices listed or named in any applicable section of this part.

(c) *Sales and purchase records.* A record of (1) total dollar volume of sales or business, and (2) total volume of goods purchased or received during

such periods (weekly, monthly, quarterly, etc.), in such form as the employer maintains records in the ordinary course of business.

### § 516.6 Records to be preserved 2 years.

(a) Supplementary basic records: Each employer required to maintain records under this part shall preserve for a period of at least 2 years.

(1) *Basic employment and earnings records.* From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) *Wage rate tables.* From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation.

(b) Order, shipping, and billing records: From the last date of entry, the originals or true copies of all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (not including individual sales slips, cash register tapes or the like) which the employer retains or makes in the usual course of business operations.

(c) Records of additions to or deductions from wages paid:

(1) Those records relating to individual employees referred to in § 516.2(a)(10) and

(2) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

### § 516.7 Place for keeping records and their availability for inspection.

(a) *Place of records.* Each employer shall keep the records required by this part safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or a duly authorized and designated representative.

(b) *Inspection of records.* All records shall be available for inspection and transcription by the Administrator or a duly authorized and designated representative.

### § 516.8 Computations and reports.

Each employer required to maintain records under this part shall make such extension, recomputation, or transcription of the records and shall submit to the Wage and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in the records as the Administrator or a duly authorized and designated representative may request in writing.

### § 516.9 Petitions for exceptions.

(a) *Submission of petitions for relief.* Any employer or group of employers who, due to peculiar conditions under which they must operate, desire authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified in this part, may submit a written petition to the Administrator requesting such authority, setting forth the reasons therefor.

(b) *Action on petitions.* If, after review of the petition, the Administrator finds that the authority requested will not hinder enforcement of the Act, the Administrator may grant such authority limited by any conditions determined necessary and subject to subsequent revocation. Prior to revocation of such authority because of noncompliance with any of the prescribed conditions, the employer will be notified of the reasons and given an opportunity to come into compliance.

(c) *Compliance after submission of petitions.* The submission of a petition or

the delay of the Administrator in acting upon such petition will not relieve any employer or group of employers from any obligations to comply with all the applicable requirements of the regulations in this part. However, the Administrator will provide a response to all petitions as soon as possible.

**§ 516.10 [Reserved]**

## Subpart B—Records Pertaining to Employees Subject to Miscellaneous Exemptions Under the Act; Other Special Requirements

**§ 516.11 Employees exempt from both minimum wage and overtime pay requirements under section 13(a)(2), (3), (4), (5), (8), (10), (12), or 13(d) of the Act.**

With respect to each and every employee exempt from both the minimum wage and overtime pay requirements of the Act pursuant to the provisions of section 13(a) (2), (3), (4), (5), (8), (10), (12), or 13(d) of the Act, employers shall maintain and preserve records containing the information and data required by § 516.2(a) (1) through (4).

**§ 516.12 Employees exempt from overtime pay requirements pursuant to section 13(b) (1), (2), (3), (5), (9), (10), (15), (16), (17), (20), (21), (24), (27), or (28) of the Act.**

With respect to each employee exempt from the overtime pay requirements of the Act pursuant to the provisions of section 13(b) (1), (2), (3), (5), (9), (10), (15), (16), (17), (20), (21), (24), (27), or (28) of the Act, shall maintain and preserve payroll or other records, containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition, information and data regarding the basis on which wages are paid (such as the monetary amount paid, expressed as earnings per hour, per day, per week, etc.).

**§ 516.13 Livestock auction employees exempt from overtime pay requirements under section 13(b)(13) of the Act.**

With respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(13), the employer shall maintain and preserve records containing the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition, for each workweek in which the employee is employed both in agriculture and in connection with livestock auction operations:

(a) The total number of hours worked by each such employee,

(b) The total number of hours in which the employee was employed in agriculture and the total number of hours employed in connection with livestock auction operations, and

(c) The total straight-time earnings for employment in livestock auction operations.

**§ 516.14 Country elevator employees exempt from overtime pay requirements under section 13(b)(14) of the Act.**

(a) With respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(14), the employer shall maintain and preserve records containing the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition, for each workweek, the names and occupations of all persons employed in the country elevator, whether or not covered by the Act, and

(b) Information demonstrating that the ''area of production'' requirements of part 536 of this chapter are met.

**§ 516.15 Local delivery employees exempt from overtime pay requirements pursuant to section 13(b)(11) of the Act.**

With respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(11), the employer shall maintain and preserve payroll or other records, containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition, information and data regarding the basis on which wages are paid (such as the dollar amount paid per trip; the dollar amount of earnings per week plus 3 percent commission on all cases delivered). Records shall also contain the following information:

(a) A copy of the Administrator's finding under part 551 of this chapter with respect to the plan under which such employees are compensated;

(b) A statement or description of any changes made in the trip rate or other delivery payment plan of compensation for such employees since its submission for such finding;

(c) Identification of each employee employed pursuant to such plan and the work assignments and duties; and

(d) A computation for each quarter-year of the average weekly hours of full-time employees employed under the plan during the most recent representative annual period as described in § 551.8(g) (1) and (2) of this chapter.

### § 516.16 Commission employees of a retail or service establishment exempt from overtime pay requirements pursuant to section 7(i) of the Act.

With respect to each employee of a retail or service establishment exempt from the overtime pay requirements of the Act pursuant to the provisions of section 7(i), employers shall maintain and preserve payroll and other records containing all the information and data required by § 516.2(a) except paragraphs (a) (6), (8), (9), and (11), and in addition:

(a) A symbol, letter or other notation placed on the payroll records identifying each employee who is paid pursuant to section 7(i).

(b) A copy of the agreement or understanding under which section 7(i) is utilized or, if such agreement or understanding is not in writing, a memorandum summarizing its terms including the basis of compensation, the applicable representative period and the date the agreement was entered into and how long it remains in effect. Such agreements or understandings, or summaries may be individually or collectively drawn up.

(c) Total compensation paid to each employee each pay period (showing separately the amount of commissions and the amount of noncommission straight-time earnings).

### § 516.17 Seamen exempt from overtime pay requirements pursuant to section 13(b)(6) of the Act.

With respect to each employee employed as a seaman and exempt from the overtime pay requirements of the Act pursuant to section 13(b)(6), the employer shall maintain and preserve payroll or other records, containing all the information required by § 516.2(a) except paragraphs (a) (5) through (9) and, in addition, the following:

(a) Basis on which wages are paid (such as the dollar amount paid per hour, per day, per month, etc.)

(b) Hours worked each workday and total hours worked each pay period (for purposes of this section, a ''workday'' shall be any fixed period of 24 consecutive hours; the ''pay period'' shall be the period covered by the wage payment, as provided in section 6(a)(4) of the Act),

(c) Total straight-time earnings or wages for each such pay period, and

(d) The name, type, and documentation, registry number, or other identification of the vessel or vessels upon which employed.

### § 516.18 Employees employed in certain tobacco, cotton, sugar cane or sugar beet services, who are partially exempt from overtime pay requirements pursuant to section 7(m), 13(h), 13(i) or 13(j) of the Act.

With respect to each employee providing services in connection with certain types of green leaf or cigar leaf tobacco, cotton, cottonseed, cotton ginning, sugar cane, sugar processing or sugar beets who are partially exempt from the overtime pay requirements of the Act pursuant to 7(m), 13(h), 13(i) or 13(j), the employer shall, in addition to the records required in § 516.2, maintain and preserve a record of the daily and weekly overtime compensation paid. Also, the employer shall note in the payroll records the beginning date of each workweek during which the establishment operates under the particular exemption.

### § 516.19 [Reserved]

### § 516.20 Employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided in section 7(b)(1) or section 7(b)(2) of the Act.

(a) The employer shall maintain and preserve all the information and data required by § 516.2 and shall record daily as well as weekly overtime compensation for each employee employed:

(1) Pursuant to an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employees shall be employed more than 1,040 hours during any period of 26 consecutive weeks as provided in section 7(b)(1) of the Act, or

(2) Pursuant to an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall be employed not more than 2,240 hours during a specified period of 52 consecutive weeks and shall be guaranteed employment as provided in section 7(b)(2) of the Act.

(b) The employer shall also keep copies of such collective bargaining agreement and such National Labor Relations Board certification as part of the records and shall keep a copy of each amendment or addition thereto.

(c) The employer shall also make and preserve a record, either separately or as a part of the payroll:

(1) Listing each employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto.

(2) Indicating the period or periods during which the employee has been or is employed pursuant to an agreement under section 7(b)(1) or 7(b)(2) of the Act, and

(3) Showing the total hours worked during any period of 26 consecutive weeks, if the employee is employed in accordance with section 7(b)(1) of the Act, or during the specified period of 52 consecutive weeks, if employed in accordance with section 7(b)(2) of the Act.

### § 516.21 Bulk petroleum employees partially exempt from overtime pay requirements pursuant to section 7(b)(3) of the Act.

With respect to each employee partially exempt from the overtime provisions of the Act pursuant to section 7(b)(3), the employer shall maintain and preserve records containing all the information and data required by § 516.2(a), and, in addition, shall record the daily as well as the weekly overtime compensation paid to the employees, the rate per hour and the total pay for time worked between the 40th and 56th hour of the workweek.

### § 516.22 Employees engaged in charter activities of carriers pursuant to section 7(n) of the Act.

With respect to each employee employed in charter activities for a street, suburban or interurban electric railway or local trolley or motorbus carrier pursuant to section 7(n) of the Act, the employer shall maintain and preserve records containing all the information and data required by § 516.2(a) and, in addition, the following:

(a) Hours worked each workweek in charter activities; and

(b) A copy of the employment agreement or understanding stating that in determining the hours of employment for overtime pay purposes, the hours spent by the employee in charter activities will be excluded and, also, the date this agreement or understanding was entered into.

### § 516.23 Employees of hospitals and residential care facilities compensated for overtime work on the basis of a 14-day work period pursuant to section 7(j) of the Act.

With respect to each employee of hospitals and institutions primarily engaged in the care of the sick, the aged, or mentally ill or defective who reside on the premises compensated for overtime work on the basis of a work period of 14 consecutive days pursuant to an agreement or understanding under section 7(j) of the Act, employers shall maintain and preserve.

(a) The records required by § 516.2 except paragraphs (a) (5) and (7) through (9), and in addition:

(1) Time of day and day of week on which the employee's 14-day work period begins,

(2) Hours worked each workday and total hours worked each 14-day work period,

(3) Total straight-time wages paid for hours worked during the 14-day period,

(4) Total overtime excess compensation paid for hours worked in excess of 8 in a workday and 80 in the work period.

(b) A copy of the agreement or understanding with respect to using the 14-

day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect.

### § 516.24 Employees employed under section 7(f) "Belo" contracts.

With respect to each employee to whom both sections 6 and 7(f) of the Act apply, the employer shall maintain and preserve payroll or other records containing all the information and data required by § 516.2(a) except paragraphs (a) (8) and (9), and, in addition, the following:

(a) Total weekly guaranteed earnings,

(b) Total weekly compensation in excess of weekly guaranty,

(c) A copy of the bona fide individual contract or the agreement made as a result of collective bargaining by representatives of employees, or where such contract or agreement is not in writing, a written memorandum summarizing its terms.

### § 516.25 Employees paid for overtime on the basis of "applicable" rates provided in sections 7(g)(1) and 7(g)(2) of the Act.

With respect to each employee compensated for overtime work in accordance with section 7(g)(1) or 7(f)(2) of the Act, employers shall maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition, the following:

(a)(1) Each hourly or piece rate at which the employee is employed, (2) basis on which wages are paid, and (3) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the ''regular rate,''

(b) The number of overtime hours worked in the workweek at each applicable hourly rate or the number of units of work performed in the workweek at each applicable piece rate during the overtime hours,

(c) Total weekly overtime compensation at each applicable rate which is over and above all straight-time earnings or wages earned during overtime worked,

(d) The date of the agreement or understanding to use this method of compensation and the period covered. If the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to use this method of compensation a single notation of the date of the agreement or understanding and the period covered will suffice.

### § 516.26 Employees paid for overtime at premium rates computed on a "basic" rate authorized in accordance with section 7(g)(3) of the Act.

With respect to each employee compensated for overtime hours at a ''basic'' rate which is substantially equivalent to the employee's average hourly earnings, as authorized in accordance with section 7(g)(3) of the Act and part 548 of this chapter, employers shall maintain and preserve records containing all the information and data required by § 516.2 except paragraph (a)(6) thereof and, in addition, the following:

(a)(1) The hourly rates, piece rates, or commission rates applicable to each type of work performed by the employee,

(2) The computation establishing the basic rate at which the employee is compensated for overtime hours (if the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to accept this method of compensation, a single entry of this computation will suffice),

(3) The amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the ''regular rate.''

(b)(1) Identity of representative period for computing the basic rate, (2) the period during which the established basic rate is to be used for computing overtime compensation, (3) information which establishes that there is no significant difference between the pertinent terms, conditions and circumstances of employment in the period selected for the computation of the basic rate and those in the period for which the basic rate is used for computing overtime compensation, which could affect the representative character of the period from which the basic rate is derived.

(c) A copy of the written agreement or, if there is no such agreement, a memorandum summarizing the terms of and showing the date and period covered by the oral agreement or understanding to use this method of computation. If the employee is one of a group, all of whom have agreed to use this method of computation, a single memorandum will suffice.

### § 516.27 "Board, lodging, or other facilities" under section 3(m) of the Act.

(a) In addition to keeping other records required by this part, an employer who makes deductions from the wages of employees for ''board, lodging, or other facilities'' (as these terms are used in sec. 3(m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such ''board, lodging, or other facilities'' to employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility except as noted in paragraph (c) of this section. Separate records of the cost of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance, utilities, and repairs for all the houses may be shown together. Original cost and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishing similar or closely related facilities, moreover, may be shown in combined records. Where cost records are kept for a ''class'' of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; e.g., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc.

(1) Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost, as defined in part 531 of this chapter, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets. If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined.

(2) No particular degree of itemization is prescribed. However, the amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or authorized representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to § 516.6(c)(2).

(b) If additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid on other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or (2) if the employee works in excess of the applicable maximum hours standard and (i) any additions to the wages paid are a part of wages, or (ii) any deductions made are claimed as allowable deductions under sec. 3(m) of the Act, the employer shall maintain records showing on a workweek basis those additions to or deductions from wages. (For legal deductions not claimed under sec. 3(m) and which need not be maintained on a workweek basis, see part 531 of this chapter.)

(c) The records specified in this section are not required with respect to an employee in any workweek in which the employee is not subject to the overtime provisions of the Act and receives not less than the applicable statutory minimum wage in cash for all hours worked in that workweek. (The application of section 3(m) of the Act in nonovertime weeks is discussed in part 531 of this chapter.)

**§ 516.28 Tipped employees.**

(a) With respect to each tipped employee whose wages are determined pursuant to section 3(m) of the Act, the employer shall maintain and preserve payroll or other records containing all the information and data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter or other notation placed on the pay records identifying each employee whose wage is determined in part by tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

(3) Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of 40 percent of the applicable statutory minimum wage). The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

(4) Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.

(5) Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

(b) [Reserved]

**§ 516.29 Employees employed by a private entity operating an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System who are partially exempt from overtime pay requirements pursuant to section 13(b)(29) of the Act.**

With respect to each employee who is partially exempt from the overtime pay requirements of the Act pursuant to section 13(b)(29), the employer shall maintain and preserve the records required in § 516.2, except that the record of the regular hourly rate of pay in § 516.2(a)(6) shall be required only in a workweek when overtime compensation is due under section 13(b)(29).

**§ 516.30 Learners, apprentices, messengers, students, or handicapped workers employed under special certificates as provided in section 14 of the Act.**

(a) With respect to persons employed as learners, apprentices, messengers or full-time students employed outside of their school hours in any retail or service establishment in agriculture, or in institutions of higher education, or handicapped workers employed at special minimum hourly rates under Special Certificates pursuant to section 14 of the Act, employers shall maintain and preserve records containing the same information and data required with respect to other employees employed in the same occupations.

(b) In addition, each employer shall segregate on the payroll or pay records the names and required information and data with respect to those learners, apprentices, messengers, handicapped workers and students, employed under Special Certificates. A symbol or letter may be placed before each such name on the payroll or pay records indicating that that person is a ''learner,'' ''apprentice,'' ''messenger,'' ''student,'' or ''handicapped worker,'' employed under a Special Certificate.

**§ 516.31 Industrial homeworkers.**

(a) *Definitions*—(1) *Industrial homeworker* and *homeworker*, as used in this section, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(2) *Industrial homework*, as used in this section, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(3) The meaning of the terms person, employ, employer, employee, goods, and production as used in this section is the same as in the Act.

(b) *Items required*. In addition to all of the records required by § 516.2, every employer of homeworkers shall maintain and preserve payroll or other

records containing the following information and data with respect to each and every industrial homeworker employed (excepting those homeworkers to whom section 13(d) of the Act applies and those homeworkers in Puerto Rico to whom part 545 of this chapter applies, or in the Virgin Islands to whom part 695 of this chapter applies):

(1) With respect to each lot of work:

(i) Date on which work is given out to worker, or begun by worker, and amount of such work given out or begun;

(ii) Date on which work is turned in by worker, and amount of such work;

(iii) Kind of articles worked on and operations performed;

(iv) Piece rates paid;

(v) Hours worked on each lot of work turned in;

(vi) Wages paid for each lot of work turned in.

(2) With respect to any agent, distributor, or contractor: The name and address of each such agent, distributor, or contractor through whom homework is distributed or collected and the name and address of each homeworker to whom homework is distributed or from whom it is collected by each such agent, distributor, or contractor.

(c) *Homeworker handbook*. In addition to the information and data required in paragraph (b) of this section, a separate handbook (to be obtained by the employer from the Wage and Hour Division and supplied by such employer to each worker) shall be kept for each homeworker. The employer is required to insure that the hours worked and other information required therein is entered by the homeworker when work is performed and/or business-related expenses are incurred. This handbook must remain in the possession of the homeworker except at the end of each pay period when it is to be submitted to the employer for transcription of the hours worked and other required information and for computation of wages to be paid. The handbooks shall include a provision for written verification by the employer attesting that the homeworker was instructed to accurately record all of the required information regarding such homeworker's employment, and that, to the best of his or her knowledge and belief, the information was recorded accurately. Once no space remains in the handbook for additional entries, or upon termination of the homeworker's employment, the handbook shall be returned to the employer. The employer shall then preserve this handbook for at least two years and make it available for inspection by the Wage and Hour Division on request.

[52 FR 24896, July 1, 1987, as amended at 53 FR 45726, Nov. 10, 1988]

### § 516.32 [Reserved]

### § 516.33 Employees employed in agriculture pursuant to section 13(a)(6) or 13(b)(12) of the Act.

(a) No records, except as required under paragraph (f) of this section, need be maintained by an employer who did not use more than 500 man-days[1] of agricultural labor in any quarter of the preceding calendar year, unless it can reasonably be anticipated that more than 500 man-days of agricultural labor will be used in at least one calendar quarter of the current calendar year. The 500 man-day test includes the work of agricultural workers supplied by crew leaders, or farm labor contractors, if the farmer is an employer of such workers, or a joint employer of such workers with the crew leader or farm labor contractor. However, members of the employer's immediate family are not included. (A ''man-day'' is any day during which an employee does agricultural work for 1 hour or more.)

(b) If it can reasonably be anticipated that the employer will use more than 500 man-days of agricultural labor in at least one calendar quarter of the current calendar year, the employer shall maintain and preserve for each employee records containing all the information and data required by § 516.2(a) (1), (2) and (4) and, in addition, the following:

(1) Symbols or other identifications separately designating those employees who are

[1] Sections 3(u) and 13(a)(6) of the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*) set forth and define the term ''man-day.''

(i) Members of the employer's immediate family as defined in section 13(a)(6)(B) of the Act,

(ii) Hand harvest laborers as defined in section 13(a)(6) (C) or (D), and

(iii) Employees principally engaged in the range production of livestock as defined in section 13(a)(6)(E).

(2) For each employee, other than members of the employer's immediate family, the number of man-days worked each week or each month.

(c) For the entire year following a year in which the employer used more than 500 man-days of agricultural labor in any calendar quarter, the employer shall maintain, and preserve in accordance with §§ 516.5 and 516.6, for each covered employee (other than members of the employer's immediate family, hand harvest laborers and livestock range employees as defined in sections 13(a)(6) (B), (C), (D), and (E) of the Act) records containing all the information and data required by § 516.2(a) except paragraphs (a) (3) and (8).

(d) In addition to other required items, the employer shall keep on file with respect to each hand harvest laborer as defined in section 13(a)(6)(C) of the Act for whom exemption is taken, a statement from each such employee showing the number of weeks employed in agriculture during the preceding calendar year.

(e) With respect to hand harvest laborers as defined in section 13(a)(6)(D), for whom exemption is taken, the employer shall maintain in addition to paragraph (b) of this section, the minor's date of birth and name of the minor's parent or person standing in place of the parent.

(f) Every employer (other than parents or guardians standing in the place of parents employing their own child or a child in their custody) who employs in agriculture any minor under 18 years of age on days when school is in session or on any day if the minor is employed in an occupation found to be hazardous by the Secretary shall maintain and preserve records containing the following data with respect to each and every such minor so employed:

(1) Name in full,

(2) Place where minor lives while employed. If the minor's permanent address is elsewhere, give both addresses,

(3) Date of birth.

(g) Where a farmer and a bona fide independent contractor or crew leader are joint employers of agricultural laborers, each employer is responsible for maintaining and preserving the records required by this section. Duplicate records of hours and earnings are not required. The requirements will be considered met if the employer who actually pays the employees maintains and preserves the records specified in paragraphs (c) and (f) of this section.

### § 516.34 Exemption from overtime pay for time spent by certain employees receiving remedial education pursuant to section 7(q) of the Act.

With respect to each employee exempt from the overtime pay requirements of the Act for time spent receiving remedial education pursuant to section 7(q) of the Act and § 778.603 of this title, the employer shall maintain and preserve records containing all the information and data required by § 516.2 and, in addition, shall also make and preserve a record, either separately or as a notation on the payroll, showing the hours spent each workday and total hours each workweek that the employee is engaged in receiving such remedial education that does not include any job-specific training but that is designed to provide reading and other basic skills at or below the eighth-grade level or to fulfill the requirements for a high school diploma (or General Educational Development certificate), and the compensation (at not less than the employee's regular rate of pay) paid each pay period for the time so engaged.

[56 FR 61101, Nov. 29, 1991]

## PART 519—EMPLOYMENT OF FULL-TIME STUDENTS AT SUBMINIMUM WAGES

### Subpart A—Retail or Service Establishments, and Agriculture

Sec.

519.1 Applicability of the regulations in this subpart.
519.2 Definitions.
519.3 Application for a full-time student certificate.
519.4 Procedure for action upon an application.

519.5 Conditions governing issuance of full-time student certificates.
519.6 Terms and conditions of employment under full-time student certificates and under temporary authorization.
519.7 Records to be kept.
519.8 Amendment or replacement of a full-time student certificate.
519.9 Reconsideration and review.

### Subpart B—Institutions of Higher Education

519.11 Applicability of the regulations in this subpart.
519.12 Definitions.
519.13 Application for a full-time student certificate.
519.14 Procedure for action upon an application.
519.15 Conditions governing issuance of full-time student certificates.
519.16 Terms and conditions of employment under full-time student certificates and under temporary authorization.
519.17 Records to be kept.
519.18 Amendment or replacement of a full-time student certificate.
519.19 Reconsideration and review.

AUTHORITY: Secs. 11 and 14, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501 and 602, 80 Stat. 843, 844 (29 U.S.C. 211, 214).

SOURCE: 40 FR 6329, Feb. 11, 1975, unless otherwise noted.

## Subpart A—Retail or Service Establishments, and Agriculture

### §519.1 Applicability of the regulations in this subpart.

(a) *Statutory provisions*. Under section 14 of the Fair Labor Standards Act of 1938, as amended, and the authority and responsibility delegated to him/her by the Secretary of Labor (36 FR 8755) and by the Assistant Secretary for Employment Standards (39 FR 33841) the Administrator of the Wage and Hour Division is authorized and directed, to the extent necessary in order to prevent curtailment of opportunities for employment, to provide by regulation or order for the employment, under certificates, of full-time students in retail or service establishments, or in agriculture. That section contains provisions requiring a wage rate in such certificates of not less than 85 percent of the minimum wage applicable under section 6 of the Act, limiting weekly hours of employment, stipulating compliance with the applicable child-labor standards, and safeguarding against the reduction of the full-time employment opportunities of employees other than full-time students employed under certificates.

(b) *Source of limitations*. Some of the limitations in this subpart are specifically required in section 14(b) of the Act. The other limitations implement the provisions in that section relating to employment opportunities, *i.e.*, the ''extent necessary to prevent curtailment of opportunities for employment'' and the avoidance of a ''substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized'' under section 14(b) is applicable.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### §519.2 Definitions.

(a) *Full-time students*. A *full-time student* for the purpose of this subpart is defined as a student who receives primarily daytime instruction at the physical location of a bona fide educational institution, in accordance with the institution's accepted definition of a full-time student. A full-time student retains that status during the student's Christmas, summer and other vacations. An individual who was such a student immediately prior to vacation will be presumed not to have discontinued such status during vacation if local law requires his/her attendance at the end of the vacation. In the absence of such requirement his/her status during vacation will be governed by his/her intention as last communicated to his/her employer. The phrase in section 14(b) of the statute ''regardless of age but in compliance with applicable child-labor laws,'' among other things, restricts the employment in a retail or service establishment to full-time students who are at least 14 years of age because of the application of section 3(1) of the Act. There is a minimum age requirement of 16 years in agriculture for employment during school hours and in any occupation declared hazardous by the Secretary of Labor (subpart E–1 of part 570 of this title.) In addition, there is a minimum age restriction of 14 years generally for employment in agriculture of a full-time student outside school hours for the

school district where such employee is living while so employed, except (1) Minors 12 or 13 years of age may be employed with written parental or guardian consent or they may work on farms where their parents or guardians are employed, and (2) minors under 12 may work on farms owned or operated by their parents or with parental or guardian consent on farms whose employees are exempt from section 6 by section 13 (a)(6)(A) of the Act.

(b) *Bona fide educational institution.* A *bona fide educational institution* is ordinarily an accredited institution. However, a school which is not accredited may be considered a *bona fide educational institution* in exceptional circumstances, such as when the school is too recently established to have received accreditation.

(c) *Retail or service establishment. Retail or service establishment* means a retail or service establishment as defined in section 13(a)(2) of the Fair Labor Standards Act. The statutory definition is interpreted in part 779 of this chapter.

(d) *Agriculture. Agriculture* means agriculture as defined in section 3(f) of the Fair Labor Standards Act. The statutory definition is interpreted in part 780 of this chapter.

(e) *Student hours of employment.* Student hours of employment means hours during which students are employed under full-time student certificates issued under this part and is distinguished from *hours of employment of students.*

(f) *Employer.* Section 519.4 permits an agricultural or retail or service establishment employer to employ not more than six full-time students at subminimum wages on forwarding an application but before certification. For this purpose, the term *employer* looks to the highest structure of ownership or control, and hence may be more than a single retail or service establishment or farm, *e.g.*, the controlling conglomerate or enterprise would be the *employer.* With respect to public employers who operate retail or service establishments (see 29 CFR part 779), the *employer* means the highest structure of control such as the State, municipality, county or other political subdivision.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977; 43 FR 29000, July 5, 1978]

### § 519.3 Application for a full-time student certificate.

(a) Whenever the employment of full-time students working outside of school hours in agriculture or in a retail or service establishment at wages lower than the minimum applicable under section 6 of the Fair Labor Standards Act is believed to be necessary to prevent curtailment of opportunities for employment and employment of them will not create a substantial probability of reducing the full-time employment opportunities of the other workers, an application for a certificate may be filed by their employer with the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers). Such application shall be signed by an authorized representative of the employer.

(b) The application must be filed in duplicate on official forms or exact copies thereof. The forms are available at the offices mentioned in paragraph (a) of this section. The application must contain the information as to the type of products sold or services rendered by the establishment, hours of employment during the preceding twelve-month period or data from previous certificates (or applications) as pertinent to the application, and other information for which request is made on the form.

(c) Separate application must be made for each farm or establishment in which authority to employ full-time students at subminimum wage rates is sought.

(d) Application for renewal of a certificate shall be made either on the same type of form as is used for a new application or on an alternate official form. No certificate in effect shall expire until action on such an application shall have been finally determined, provided that such application has

been properly executed, and is received by the office specified in paragraph (a) of this section not less than 15 nor more than 30 days prior to the expiration date. A properly executed application is one which fully and accurately contains the information required on the form, and the required certification by an authorized representative of the employer.

### §519.4 Procedure for action upon an application.

(a) Under certain conditions, an agricultural or retail or service establishment employer may obtain temporary authorization to employ full-time students at subminimum wages. These conditions are: (1) Attestation by the employer that he/she will employ no more than six full-time students at subminimum wages on any workday and that the employment of such students will not reduce the full-time employment opportunities of other persons, and (2) forwarding a properly completed application to the Wage and Hour Division not later than the start of such employment, and (3) posting a notice of such filing at the place(s) specified in paragraph (a) of §519.6 of this subpart, and (4) compliance during the temporary authorization period with the requirements set forth in paragraphs (b) and (j) through (o) of §519.6 of this subpart.

(b) Temporary authorization under the conditions set forth in paragraph (a) of this section is effective from the date the application is forwarded to the Wage and Hour Division in conformance with §519.3 of this subpart. This authorization shall continue in effect for one year from the date of forwarding of the application unless, within 30 days the Administrator or his/her authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the 30-day period of review.

(c) Upon receipt of an application for a certificate, the officer authorized to act upon such application shall issue a certificate if the terms and conditions specified in this subpart are satisfied. To the extent he/she deems appropriate, the authorized officer may provide an opportunity to other interested persons to present data, views, or argument on the application prior to granting or denying a certificate.

(d) Until April 30, 1976, if a certificate is issued, there shall be published in the FEDERAL REGISTER a general statement of the terms of such certificate together with a notice that, pursuant to §519.9, for 45 days following such publication any interested person may file a written request for reconsideration or review. Thereafter, applications and certificates will be available for examination in accordance with applicable regulations in Washington, DC, and in the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers) for establishments in its area. A period of 60 days will be provided after certificate issuance during which any interested person may file a written request for reconsideration or review.

(e) If a certificate is denied, notice of such denial shall be sent to the employer, stating the reason or reasons for the denial. Such denial shall be without prejudice to the filing of any subsequent application.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

### §519.5 Conditions governing issuance of full-time student certificates.

Certificates authorizing the employment of full-time students at subminimum wage rates shall not be issued unless the following conditions are met:

(a) Full-time students are available for employment at subminimum rates; the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) The employment of more than six full-time students by an employer will not create a substantial probability of reducing the full-time employment opportunities for persons other than those employed under such certificates.

(c) Abnormal labor conditions such as a strike or lockout do not exist at the farm or establishment for which a

full-time student certificate is requested.

(d) The data given on the application are accurate and based on available records.

(e) The farms or establishments on whose experience the applicant relies meet the requirements of paragraph (h) of § 519.6.

(f) There are no serious outstanding violations of the provisions of a full-time student certificate previously issued to the employer, nor have there been any serious violations of the Fair Labor Standards Act (including Child-Labor Regulation No. 3 and the Hazardous Occupations Orders published in part 570 of this chapter) which provide reasonable grounds to conclude that the terms of a certificate may not be compiled with, if issued.

(g) The subminimum wage rate(s) proposed to be paid full-time students under temporary authorization or under certificate is not less than 85 percent of the minimum wage applicable under section 6 of the Act.

(h) Certificates will not be issued where such issuance will result in a reduction of the wage rate paid to a current employee, including current student employees.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

### § 519.6 Terms and conditions of employment under full-time student certificates and under temporary authorization.

(a) A full-time student certificate will not be issued for a period longer than 1 year, nor will it be issued retroactively. It shall specify its effective and expiration dates. A copy of the certificate shall be posted during its effective period in a conspicuous place or places in the establishment or at the farm readily visable to all employees, for example, adjacent to the time clock or on the bulletin board used for notices to the employees. If temporary authorization is in effect under paragraph (a) of § 519.4 of this subpart, a notice thereof shall be similarly posted during the effective period of such authorization.

(b) Full-time students may not be employed under a certificate at less than 85 percent of the minimum wage applicable under section 6 of the Act.

(c) For retail or service establishment employers or agricultural employers, the allowable extent of full-time student employment under certificates varies depending on whether: (1) The employer proposes to employ no more than six full-time students at subminimum wages on any workday, (2) the applicant requests authority for not more than 10 percent of the total hours of all employees during any month, or (3) the applicant requests authority for more than 10 percent of the total hours during any month. (For agricultural employers, the month of full-time student certificated employment may vary somewhat from the month in a previous year on which the certificate is based, depending on seasonal factors.)

(d) *Retail or service establishment employers or agricultural employers requesting authorization to employ not more than six full-time students at subminimum wages on any workday*. An application from such an applicant provides temporary authorization for the employment of full-time students at subminimum wages: *Provided*, The conditions set forth in paragraph (a) of § 519.4 of this subpart are met. Upon review of the application by the Administration or his/her authorized representative, the extent of the temporary authority may be modified.

(e) *Applicants requesting authorization for not more than 10 percent of the total hours of all employees during any month*. For such an applicant, certificates may authorize the employment of full-time student at subminimum wages for up to 10 percent of the total hours of all employees during any month, regardless of past practice of employing students. (Note: An establishment which has not previously held a certificate may be authorized 10 percent of the total hours of all employees during any month. Applicants requesting authority under this paragraph need not refer to paragraphs (f), (g), or (h) of this section.)

(f) *Applicants requesting authorization for more than 10 percent of the total monthly hours of all employees during any month with records of hours of employment of students and coverage by the*

*Act prior to May 1974.* For such an applicant, certificates may not authorize full-time student employment at subminimum wages in excess of the highest ratio under any of these three formulas: (1) The proportion of student hours of employment (*i.e.,* of full-time students under certificates) to total hours of all employees for the corresponding month of the preceding twelve-month period; (2) the maximum proportion of student hours of employment to total hours of all employees (in any corresponding month), applicable to the issuance of full-time student certificates before May 1974; or (3) 10 percent of the total hours of all employees, during any month. (Note: An establishment which is entitled to monthly allowances ranging from 5 to 20 percent may be authorized 10 percent for those months which were less than 10 percent and retain the higher allowances for those months above 10 percent.)

(g) *Applicants requesting authorization for more than 10 percent of the total hours of all employees during any month with records of hours of employment of students and new coverage under the 1974 Amendments.* For such an applicant, the highest permissible allowance under a certificate during any month is the highest ratio under any of these three formulas: (1) The proportion of hours of employment of full-time students to total hours of all employees during the corresponding month from May 1973 through April 1974; (2) the proportion of student hours of employment (*i.e.,* of hours of full-time students under certificates) to total hours of all employees during the corresponding month of the preceding twelve-month period (an alternative which is not applicable to all months of the year until 12 months after May 1, 1974); or (3) 10 percent of the total hours of all employees, during any month. (See notes under paragraphs (e) and (f) of this section.)

(h) *Applicants requesting authorization for more than 10 percent of the total hours of all employees during any month without records of student hours worked.* For such an applicant, the permissible proportion under certificate of full-time student hours at subminimum wages to total hours of all employees is based on the ''practice'' during the preceding twelve-month period of: (1) Similar establishments of the same employer in the same general metropolitan areas in which such establishment is located: (2) similar establishments in the same or nearby communities if such establishment is not in a metropolitan area; or (3) other establishments of the same general character operating in the community or the nearest comparable community. (''Practice'' means either the certificate allowances or the proportion between the actual student hours of employment to the total hours of all employees.)

(i) An overestimate of total hours of employment of all employees for a current month resulting in the employment of the full-time students in excess of the hours authorized in paragraph (e), (f), (g), or (h) of this section may be corrected by compensating them for the difference between the subminimum wages actually paid and the applicable minimum under section 6 of the Act for the excess hours. Similarly, if an agricultural employer or a retail or service establishment employer has authorization to employ no more than six full-time students at subminimum wages on any workday but exceeds that number, the excess may be corrected by compensating the additional full-time students for the difference between the subminimum wages actually paid and the applicable minimum under section 6 of the Act. This additional compensation shall be paid on the regular payday next after the end of the period.

(j) Full-time students shall not be permitted to work at subminimum wages for more than 8 hours a day, nor for more than 40 hours a week when school is not in session, nor more than 20 hours a week when school is in session (apart from a full-time student's summer vacation), except that when a full-day school holiday occurs on a day when the establishment is open for business, the weekly limitation on the maximum number of hours which may be worked shall be increased by 8 hours for each such holiday but in no event shall the 40-hour limitation be exceeded. (Note: School is considered to be in session for a student attending summer school.) Whenever a full-time student is employed for more than 20 hours in

any workweek in conformance with this paragraph, the employer shall note in his/her payroll records that school was not in session during all or part of that workweek or the student was in his/her summer vacation.

(k) Neither oppressive child labor as defined in section 3(1) of the Act and regulations issued under the Act nor any other employment in violation of a Federal, State or local child labor law or ordinance shall come within the terms of any certificate issued under this subpart.

(l) Full-time students shall be employed at subminimum wages under this subpart only outside of their school hours, *i.e.*, only outside of the scheduled hours of instruction of the individual student, or, in the case of agriculture, only outside of school hours for the school district where the employee is living while so employed, if the employee is under 16 years of age.

(m) No full-time student shall be hired under a full-time student certificate while abnormal labor conditions, such as a strike or lockout, exist at the establishment or farm.

(n) No provision of any full-time student certificate shall excuse noncompliance with higher standards applicable to full-time students which may be established under the Walsh-Healey Public Contracts Act or any other Federal law, State law, local ordinance, or union or other agreement. Thus, certificates issued under this law have no application to employment under the Service Contract Act.

(o) No full-time student certificate shall apply to any employee to whom a certificate issued under section 14 (a) or (c) of the Act has application.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

### § 519.7 Records to be kept.

(a) The employer shall designate each worker employed as a full-time student under a full-time student certificate at subminimum wages, as provided under part 516 of this chapter.

(b)(1) In addition to the records required under part 516 of this chapter and this subpart, the employer shall keep the records specified in paragraph (b) (2) and (3) of this section specifically relating to full-time students employed at subminimum wages.

(2) The employer shall obtain at the time of hiring and keep in his records information from the school attended that the employee receives primarily daytime instruction at the physical location of the school in accordance with the school's accepted definition of a full-time student. During a period between attendance at different schools not longer than the usual summer vacation, a certificate from the school next to be attended that the student has been accepted as a full-time student will satisfy the requirements of this paragraph (b)(2).

(3) The employer operating any farm or retail or service establishment shall maintain records of the monthly hours of employment of full-time students at subminimum wages and of the total hours of employment during the month of all employees in the establishment except for those employed in agriculture who come within one of the other exemptions from the minimum wage provisions of the Act.

(c) The records required in this section, including a copy of any full-time student certificate issued, shall be kept for a period of 3 years at the place and made available for inspection, both as provided in part 516 of this chapter.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### § 519.8 Amendment or replacement of a full-time student certificate.

In the absence of an objection by the employer (which may be resolved in the manner provided in part 528 of this chapter), the authorized officer upon his/her own motion may amend the provisions of a certificate when it is necessary by reason of the amendment of these regulations, or may withdraw a certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificate.

### § 519.9 Reconsideration and review.

(a) Within 15 days after being informed of a denial of an application for a full-time student certificate or within 45 days after FEDERAL REGISTER publication of a statement of the terms of the certificate granted (subsequent to

April 30, 1976, within 60 days after a certificate is granted), any person aggrieved by the action of an authorized officer in denying or granting a certificate may: (1) File a written request for reconsideration thereof by the authorized officer who made the decision in the first instance, or (2) file with the Administrator a written request for review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsideration determination of an authorized officer may, within 15 days after such determination, file with the Administrator a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the authorized officer or the Administrator may, to the extent he/she deems it appropriate, afford other interested persons an opportunity to present data, views, or argument.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

## Subpart B—Institutions of Higher Education

### § 519.11 Applicability of the regulations in this subpart.

(a) *Statutory provisions.* Under section 14 of the Fair Labor Standards Act of 1938, as amended, and the authority and responsibility delegated to him/her by the Secretary of Labor (36 FR 8755) and by the Assistant Secretary for Employment Standards (39 FR 3384l), the Administrator of the Wage and Hour Division is authorized and directed, to the extent necessary in order to prevent curtailment of opportunities for employment, to provide by regulation or order for the employment, under certificates, of full-time students in institutions of higher education. That section contains provisions requiring a wage rate in such certificates of not less than 85 percent of the minimum wage applicable under section 6 of the Act, limiting weekly hours of employment, stipulating compliance with the applicable child-labor standards, and safeguarding against the reduction of the full-time employment opportunities of employees other than full-time students employed under certificates.

(b) *Source of limitations.* Some of the limitations expressed in this subpart are specifically required in section 14(b) of the Act. The other limitations implement the provisions relating to employment opportunities, *i.e.,* the ''extent necessary in order to prevent curtailment of opportunities for employment'' and the requirement that the regulations shall ''prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by'' section 14(b) of the Act is applicable.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### § 519.12 Definitions.

(a) *Full-time students.* A *full-time student* for the purpose of this subpart is defined as one who meets the accepted definition of a full-time student of the institution of higher education which employs him/her. A full-time student retains that status during the student's Christmas, summer and other vacations, even when a student is taking one or more courses during his/her summer or other vacation. The phrase in section 14(b) of the statute ''regardless of age but in compliance with applicable child labor laws'', among other things restricts the employment in an institution of higher education to full-time students who are at least 14 years of age because of the application of section 3(1) of the Act.

(b) *Institution of higher education.* An *institution of higher education* is an institution above the secondary level, such as a college or university, a junior college, or a professional school of engineering, law, library science, social work, etc. It is one that is recognized by a national accrediting agency or association as determined by the U.S. Commissioner of Education. Generally,

an institution of higher education: (1) Admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate; and (2) is legally authorized within a State to provide a program of education beyond high school; and (3) provides an educational program for which it normally awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles of knowledge.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### § 519.13 Application for a full-time student certificate.

(a) Whenever the employment of its full-time students working in an institution at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act is believed to be necessary to prevent curtailment of opportunities for employment and employment of them will not create a substantial probability of reducing the full-time employment opportunities of other workers, an application for a certificate may be filed by their employer with the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah and Wyoming; and the Caribbean Office for the area it covers). Such an application shall be signed by an authorized representative of the employer.

(b) The application provided for under § 519.14 must be filed in duplicate on official forms or exact copies thereof. The forms are available at the offices mentioned in paragraph (a) of this section. The application must contain the information on numbers of full-time students and full-time employees (other than full-time students), minimum full-time student wages, and other information for which request is made on the form.

(c) Separate application must be made for each campus of an institution of higher education for which authority to employ full-time students at subminimum wage rates is sought.

(d) Application for renewal of a certificate shall be made on the same type of form as is used for a new application. No certificate in effect shall expire until action on such an application shall have been finally determined, provided that such application has been properly executed, and is received by the office specified in paragraph (a) of this section not less than 15 nor more than 30 days prior to the expiration date. A properly executed application is one which fully and accurately contains the information required on the form, and the required certification by an authorized representative of the employer.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### § 519.14 Procedure for action upon an application.

(a) Under certain conditions, an institution of higher education has temporary authorization to employ full-time students at subminimum wages. These conditions are:

(1) Absence of an effective finding by the Secretary that the institution has been employing full-time students under certificates in violation of the requirements of section 14(b)(3) of the Act or of these regulations; and

(2) Forwarding of a properly completed application to the Wage and Hour Division not later than the start of employment of full-time students at subminimum wages; and

(3) Posting a notice of such filing at the place(s) specified in paragraph (a) of § 519.16 of this subpart; and

(4) Compliance during the temporary authorization period with the requirements set forth in paragraphs (b) and (e) through (j) of § 519.16 of this subpart.

(b) Temporary authorization under the conditions set forth in paragraph (a) of this section is effective from the date the application is forwarded to the Wage and Hour Division in conformance with § 519.13 of this subpart. This

authorization shall continue in effect for one year from the date of forwarding of the application unless, within 30 days, the Administrator or his/her authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the 30-day period of review.

(c) Upon receipt of an application for a certificate, the officer authorized to act upon such application shall issue a certificate if the terms and conditions specified in this subpart are satisfied. To the extent he/she deems appropriate, the authorized officer may provide an opportunity to other interested persons to present data, views, or argument on the application prior to granting or denying a certificate.

(d) Until April 30, 1976, if a certificate is issued there shall be published in the FEDERAL REGISTER a general statement of the terms of such certificate together with a notice that, pursuant to § 519.19, for 45 days following such publication any interested person may file a written request for reconsideration or review. Thereafter, applications and certificates will be available for examination in accordance with applicable regulations in Washington, DC, and in the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers) for institutions of higher education in its area. A period of 60 days will be provided after certificate issuance during which any interested person may file a written request for reconsideration or review.

(e) If a certificate is denied, notice of such denial shall be sent to the employer, stating the reason or reasons for the denial. Such denial shall be without prejudice to the filing of any subsequent application.

### § 519.15 Conditions governing issuance of full-time student certificates.

Certificates authorizing the employment of full-time students at subminimum wage rates shall not be issued unless the following conditions are met:

(a) Full-time students are available for employment at subminimum rates; the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) The employment of full-time students will not create a substantial probability of reducing the full-time employment opportunities for persons other than those employed under such certificates.

(c) Abnormal labor conditions such as a strike or lockout do not exist in the units of the campus for which a full-time student certificate is requested.

(d) The data given on the application are accurate and based on available records.

(e) There are no serious outstanding violations of the provisions of a full-time student certificate previously issued to the employer, nor have there been any serious violations of the Fair Labor Standards Act (including Child-Labor Regulation No. 3 and the Hazardous Occupations Orders published in part 570 of this chapter) which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

(f) The subminimum wage rate(s) proposed to be paid full-time students under temporary authorization or under certificate is not less than 85 percent of the minimum wage applicable under section 6 of the Act.

(g) Full-time students are not to be employed by an institution of higher education at subminimum wages under this subpart in unrelated trades or businesses as defined and applied under sections 511 through 515 of the Internal Revenue Code, such as apartment houses, stores, or other businesses not primarily catering to the students of the institution.

(h) Certificates will not be issued where such issuance will result in a reduction of the wage rate paid to a current employee, including current student employees.

### § 519.16 Terms and conditions of employment under full-time student certificates and under temporary authorization.

(a) A full-time student certificate will not be issued for a period longer

than 1 year, nor will it be issued retroactively. It shall specify its effective and expiration dates. A copy of the certificate shall be posted during its effective period in a conspicuous place or places in the institution of higher education readily visible to all employees, for example, adjacent to the time clock or on the bulletin board used for notices to the employees. If temporary authorization is in effect under paragraph (a) of § 519.14, a notice thereof shall be similarly posted during the effective period of such authorization.

(b) Full-time students may not be employed under a certificate at less than 85 percent of the minimum wage applicable under section 6 of the Act.

(c) An institution of higher education shall not employ full-time students at subminimum wages under this subpart in unrelated trades or businesses as defined and applied under sections 511 through 515 of the Internal Revenue Code, such as apartment houses, stores, or other businesses not primarily catering to the students of the institution.

(d) An institution of higher education subject to a finding by the Secretary that it is in violation of the requirements of section 14(b)(3) of the Act or of this subpart must be issued a full-time student certificate before it can employ full-time students at wages below those required by section 6 of the Act. The Administrator or his/her authorized representative will not issue a full-time student certificate to such an institution without adequate assurances and safeguards to insure that the violations found by the Secretary will not continue.

(e) Full-time students shall not be permitted to work at subminimum wages for more than 8 hours a day, nor for more than 40 hours a week when school is not in session, nor more than 20 hours a week when school is in session (apart from a full-time student's summer vacation), except that when a full-day school holiday occurs the weekly limitation on the maximum hours which may be worked shall be increased by 8 hours for each such holiday but in no event shall the 40-hour limitation be exceeded. (Note: School is considered to be in session for a student taking one or more courses during a summer or other vacation.) Whenever a full-time student is employed for more than 20 hours in any workweek in conformance with this paragraph, the employer shall note in his/her payroll that school was not in session during all or part of that workweek or the student was in his/her summer vacation.

(f) Neither oppressive child labor as defined in section 3(1) of the Act and regulations issued under the Act nor any other employment in violation of a Federal, State or local child labor law or ordinance shall come within the terms of any certificate issued under this subpart.

(g) Full-time students shall be employed at subminimum wages under this subpart only outside of their school hours, *i.e.*, only outside of the scheduled hours of instruction of the individual full-time student.

(h) No full-time student shall be hired under a full-time student certificate for work in a unit or units of the campus where abnormal labor conditions, such as a strike or lockout, exist.

(i) No provision of any full-time student certificate shall excuse noncompliance with higher standards applicable to full-time students which may be established under the Walsh-Healey Public Contracts Act or any other Federal law, State law, local ordinance, or union or other agreement. Thus, certificates issued under this subpart have no application to employment under the Service Contract Act.

(j) No full-time student certificate shall apply to any employee to whom a certificate issued under section 14(a) or (c) of the Act has application.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### § 519.17 Records to be kept.

(a) The employer shall designate each worker employed as a full-time student under a full-time student certificate at subminimum wages, as provided under part 516 of this chapter.

(b)(1) In addition to the records required under part 516 of this chapter and this subpart, the employer shall keep the records specified in paragraphs (b)(2) and (3) of this section specifically relating to full-time students employed at subminimum wages.

(2) The institution shall obtain at the time of hiring and keep in its records information that the employee is its full-time student at the physical location of the institution in accordance with its accepted definition of a full-time student. During a period between attendance at different schools not longer than the usual summer vacation, the acceptance by the institution of the full-time student for its next term will satisfy the requirements of (b)(2) of this section.

(3) An institution of higher education shall maintain records showing the total number of all full-time students of the type defined in §519.12(a) employed at the campus of the institution at less than the minimum wage otherwise applicable under the Act, and the total number of all employees at the campus to whom the minimum wage provision of the Act applies.

(c) The records required in this section, including a copy of any full-time student certificate issued, shall be kept for a period of 3 years at the place and made available for inspection, both as provided in part 516 of this chapter.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

### §519.18 Amendment or replacement of a full-time student certificate.

In the absence of an objection by the employer (which may be resolved in the manner provided in part 528 of this chapter) the authorized officer upon his/her own motion may amend the provisions of a certificate when it is necessary by reason of the amendment of these regulations, or may withdraw a certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificates.

### §519.19 Reconsideration and review.

(a) Within 15 days after being informed of a denial of an application for a full-time student certificate or within 45 days after FEDERAL REGISTER publication of a statement of the terms of the certificate granted, (subsequent to April 30, 1976, within 60 days after a certificate is granted), any person aggrieved by the action of an authorized officer in denying or granting a certificate may:

(1) File a written request for reconsideration thereof by the authorized officer who made the decision in the first instance, or

(2) File with the Administrator a written request for review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsideration of an authorized officer may, within 15 days after such determination, file with the Administrator a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the authorized officer or the Administrator may, to the extent he/she deems it appropriate, afford other interested persons an opportunity to present data, views, or argument.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

# PART 520—EMPLOYMENT UNDER SPECIAL CERTIFICATE OF MESSENGERS, LEARNERS (INCLUDING STUDENT-LEARNERS), AND APPRENTICES

## Subpart A [Reserved]

## Subpart B—What Are the General Provisions Governing the Employment of Messengers, Learners (Including Student-Learners), and Apprentices at Subminimum Wages?

Sec.

520.200 What is the legal authority for payment of wages lower than the minimum wage required by section 6(a) of the Fair Labor Standards Act?

520.201 How are those classifications of workers which may be paid subminimum wages under section 14(a) of the Fair Labor Standards Act defined?

520.202 How do persons who want to apply for a particular certificate find out what is needed?

520.203 What records does an employer have to keep when subminimum wage certificates are granted? How long do they have to be kept?
520.204 If someone does not agree with the Department of Labor's decision on a certificate, can the decision be appealed?
520.205 How do these rules affect other Federal, state and local laws and collective bargaining agreements?

### Subpart C—Definitions

520.300 Definitions.

### Subpart D—Messengers, Learners (Excluding Student-Learners), and Apprentices

520.400 Who are messengers, learners, and apprentices?
520.401 Are there any industries, occupations, etc. that do not qualify for a certificate to employ messengers, learners, or apprentices at subminimum wages?
520.402 How do I obtain authority to employ messengers, learners, or apprentices at subminimum wages?
520.403 What information is required when applying for authority to pay less than the minimum wage?
520.404 What must I demonstrate in my application for a messenger, learner, or apprentice certificate to receive a favorable review?
520.405 Must I notify my employees that I am applying for a certificate to employ messengers and/or learners at subminimum wages?
520.406 What happens once I have submitted my request for authorization to pay messengers, learners, or apprentices subminimum wages?
520.407 What is the subminimum wage for messengers and what must I do to comply with the terms of my certificate?
520.408 What is the subminimum wage for learners and what must I do to comply with the terms of my certificate?
520.409 When will authority to pay apprentices special minimum wages become effective and what is the special minimum wage rate?
520.410 How long does a messenger, learner, or apprentice certificate remain in effect?
520.411 Does a certificate authorizing payment of subminimum wages to messengers and/or learners remain in effect during the renewal process?
520.412 What records, in addition to those required by Part 516 of this chapter and section 520.203 of this part, must I keep relating to the employment of messengers, learners, or apprentices under special certificate?

### Subpart E—Student-Learners

520.500 Who is a student-learner?
520.501 How do I obtain authority to employ student-learners at subminimum wages?
520.502 What information must an application to employ student-learners at subminimum wages contain?
520.503 What must I demonstrate in my application for a student-learner certificate to receive a favorable review?
520.504 When will authority to pay student-learners subminimum wages become effective?
520.505 How will I be notified that my request to employ student-learners at subminimum wages has been denied and can I appeal the denial?
520.506 What is the subminimum wage for student-learners and what must I do to comply with the terms of my student-learner certificate?
520.507 How long does my certificate remain in effect?
520.508 What records, in addition to those required by Part 516 of this chapter and section 520.203 of this part, must I keep when student-learners are employed?

AUTHORITY: Sec. 14, 52 Stat. 1062, 1064 (29 U.S.C. 214); secs. 2–12, 60 Stat. 237–244; (5 U.S.C. 1001–1011); 52 Stat. 1068, as amended, 29 U.S.C. 214.

SOURCE: 62 FR 64959, Dec. 9, 1997, unless otherwise noted.

## Subpart A [Reserved]

## Subpart B—What are the General Provisions Governing the Employment of Messengers, Learners (Including Student-Learners), and Apprentices at Subminimum Wages?

### § 520.200 What is the legal authority for payment of wages lower than the minimum wage required by section 6(a) of the Fair Labor Standards Act?

Section 14(a) of the Fair Labor Standards Act provides, in order to prevent curtailment of employment opportunities, for the payment of special minimum wage rates to workers employed as messengers, learners (including student-learners), and apprentices under special certificates issued by the Department of Labor.

### § 520.201 How are those classifications of workers which may be paid subminimum wages under section 14(a) of the Fair Labor Standards Act defined?

(a) A messenger is a worker who is primarily engaged in delivering letters and messages for a firm whose principal business is the delivery of such letters and messages.

(b) A learner is a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed, produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a ''learner'' once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a ''learner'' may only be trained in two qualifying occupations.

(c) A student-learner is a student who is at least sixteen years of age, or at least eighteen years of age if employed in an occupation which the Secretary has declared to be particularly hazardous, who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a ''bona fide vocational training program'' as defined in subpart C of this part.

(d) An apprentice is a worker, at least sixteen years of age unless a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction. This term excludes pre-apprentices, trainees, learners, and student-learners. The terms learner and student-learner are defined in subpart C of this part. Standards governing the registration of apprenticeship programs are established and administered by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training (BAT) and are found in Regulations, 29 CFR Part 29.

(e) Additional terms used in this part are defined in subpart C of this part.

### § 520.202 How do persons who want to apply for a particular certificate find out what is needed?

The application process, terms, conditions and requirements of certificates and other matters are discussed in subparts D and E of this part. Messengers, learners (excluding student-learners), and apprentices are discussed in subpart D of this part and student-learners in subpart E of this part.

### § 520.203 What records does an employer have to keep when subminimum wage certificates are granted? How long do they have to be kept?

(a) In addition to other records required under the recordkeeping requirements (part 516 of this chapter), the employer is required to keep records specific to certification under section 14(a) of the Fair Labor Standards Act. All workers employed under a subminimum wage certificate shall be designated as such on the employer's payroll records. Further recordkeeping requirements are described in each applicable subpart of this part (see §§ 520.412 and 520.508 of this part).

(b) Employers must maintain and preserve all required records for at least three years from the last date of employment under a subminimum wage program. The employer's copy of the application and the certificate shall also be maintained for three years. Such records shall be kept secure and accessible at the place of employment or where payroll records are customarily maintained. All records must be available for inspection and copying by the Administrator.

### § 520.204 If someone does not agree with the Department of Labor's decision on a certificate, can the decision be appealed?

(a) Any person, applicant, trade union, association, etc. who does not agree with action granting or denying a certificate (pursuant to §§ 520.406 and 520.505) may, within 60 days of that action or such additional time as the Administrator may allow, file with the Administrator a petition for review.

The decision of the Administrator becomes final unless such a written request is timely filed.

(b) Such requests should contain a statement of the additional evidence which the person believes may materially affect the decision and establish that there were reasonable grounds for failure to present such evidence during the original certification process.

(c) If a request for reconsideration or review is granted, the Administrator, to the extent it is deemed appropriate, may afford other interested persons an opportunity to present data and views.

(d) The Administrator may conduct an investigation, which may include a hearing, prior to taking any action pursuant to this part.

### § 520.205 How do these rules affect other Federal, state and local laws and collective bargaining agreements?

No provision of this part, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or state law or municipal ordinance or collective bargaining agreement establishing higher standards.

## Subpart C—Definitions

### § 520.300 Definitions.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, or his/her authorized representative.

*Apparel industry* means the manufacturing of the following products as referred to in subpart D of this part:

(1) Rainwear means the manufacture of waterproofed garments and raincoats from oiled cloth or other materials, whether vulcanized, rubberized, cravenetted, or otherwise processed.

(2) Leather and sheep-lined clothing means the manufacture of leather, leather-trimmed and sheeplined garments for men, women or children.

(3) Women's apparel division of the apparel industry for the manufacture of women's, misses', and juniors' dresses means the production of women's, misses' and juniors' dresses; washable service garments; blouses from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear and negligees from woven fabrics; corsets and other body supporting garments from any material; infants' and children's outerwear; and other garments similar to them.

(4) Robes, means the manufacture of robes from any woven material or from purchased knitted materials, including, without limitation, men's, women's and children's bath, lounging and beach robes and dressing gowns.

*Apprentice* means a worker, at least sixteen years of age unless a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction. This term excludes pre-apprentices, trainees, learners, and student-learners. The terms learner and student-learner are defined in this subpart.

*Apprenticeship agreement* means a written agreement between an apprentice and either his/her employer, or an apprenticeship committee acting as agent for employer(s), which contains the terms and conditions of the employment and training of the apprentice.

*Apprenticeship committee* means those persons designated by the sponsor to act for it in the administration of the program. A committee may be ''joint'', i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate, or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be ''unilateral'' or ''non-joint'' and shall mean a program sponsor in which a bona fide collective bargaining agent is not a participant.

*Apprenticeship program* means a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirements for a written apprenticeship agreement.

*BAT* means the Bureau of Apprenticeship and Training, Employment and Training Administration, United States Department of Labor.

*Bona fide vocational training program* means a program authorized and approved by a state board of vocational education or other recognized educational body that provides for part-time employment training which may be scheduled for a part of the work day or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college, or university.

*Department* means the United States Department of Labor.

*Experienced worker* means a worker whose total experience in an authorized learner occupation in the industry, including vocational training, within the past three years is equal to or greater than 240 hours or such other period as authorized by a learner certificate issued pursuant to the regulations in this part.

*Experienced worker available for employment* means an experienced worker residing within the area from which the plant/business customarily draws its labor supply or within a reasonable commuting distance of such area, and who is willing and able to accept employment in the plant/business; or an experienced worker residing outside of the area from which the plant/business customarily draws its labor supply, who has in fact made himself or herself available for employment at the plant/business.

*FLSA* means the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 201 *et seq.*).

*Learner* means a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a ''learner'' once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a ''learner'' may only be trained in two qualifying occupations.

*Learning period* means a period of time measured in work hours and vocational training hours that is normally required to fully train an inexperienced worker in a particular occupation within an industry where the learner is employed. The learning period will not exceed 240 hours for any qualifying occupation except in extraordinary circumstances where the employer demonstrates that the occupation to be learned requires an extended period of specialized training.

*Men's and boys' clothing industry* means the industry which manufactures men's, youths', and boys' suits, coats, and overcoats.

*Messenger* means a worker who is primarily engaged in delivering letters and messages for a firm whose principal business is the delivery of such letters and messages.

*Minimum wage* means the wage rate required by section 6 of FLSA. For purposes of this part, subminimum wage rates are based exclusively on the applicable minimum wage provided by section 6(a) of FLSA.

*Recognized apprenticeship agency* means either a state apprenticeship agency recognized by the BAT, or if no such apprenticeship agency exists in the state, the BAT.

*Registered apprenticeship program or agreement* means a program or agreement which has been approved by a recognized apprenticeship agency as meeting the basic standards of apprenticeship adopted and published by BAT.

*Secretary or Secretary of Labor* means the Secretary of Labor, United States Department of Labor or his/her authorized representative.

*Shoe manufacturing industry* means the manufacture or partial manufacture of footwear from any material and by any process except knitting, vulcanizing of the entire article or vulcanizing (as distinct from cementing) of the sole to the upper, including the manufacturing of the following: athletic shoes; boots; boot tops; burial shoes; custom-made boots or shoes;

moccasins; puttees, except spiral puttees; sandals; shoes completely rebuilt in a shoe factory; slippers. This term also includes the manufacture from leather or from any shoe-upper material of all cut stock and findings for footwear, including bows, ornaments, and trimmings. It also includes the manufacture of cutsoles; midsoles; insoles; taps; lifts; rands; toplifts; bases; shanks; boxtoes; counters; stays; stripping; sock linings; and heel pads. Shoe manufacturing also includes the manufacture of heels from any material except molded rubber, but not including the manufacture of woodheel blocks; the manufacture of cut upper parts for footwear, including linings, vamps and quarters; and the manufacture of pasted shoe stock; as well as the manufacture of boot and shoe patterns. However, the manufacture of cut stock and findings is included within this definition only when performed by companies engaged in the production of shoes who incorporate most of the cut stock and findings in the manufacture of their product(s).

*Skilled trade* means an apprenticeable occupation which possesses all of the following characteristics:

(1) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(2) It is clearly identified and commonly recognized throughout an industry.

(3) It involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

(4) It requires related instruction to supplement the on-the-job training.

(5) It is not merely a part of an apprenticeable occupation and does not fall into any of the following categories: marketing; sales administration; administrative support; executive and managerial; professional and semi-professional occupations (this category covers occupations for which entrance requirements customarily include education of college level).

*Standards of apprenticeship* means the apprenticeship program is an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, which meets the requirements established by BAT, and is subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

*State* means any state of the United States or the District of Columbia or any territory or possession of the United States.

*Student-learner* means a student who is at least sixteen years of age, or at least eighteen years of age if employed in an occupation which the Secretary has declared to be particularly hazardous, who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training program.

*Subminimum wage* means the rates which may be paid under temporary authorization or under certificate as provided by section 14(a) of FLSA and this part.

*Vocational Training Program.* See ''Bona fide vocational training program''.

*Wage and Hour Division* means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

## Subpart D—Messengers, Learners (Excluding Student-Learners), and Apprentices

### § 520.400 Who are messengers, learners, and apprentices?

The terms messenger, learner, and apprentice are defined in subpart C of this part.

### § 520.401 Are there any industries, occupations, etc. that do not qualify for a certificate to employ messengers, learners, or apprentices at subminimum wages?

(a) Certificates to employ messengers at subminimum wages are available to only those establishments engaged in the business of providing messenger service, i.e., the delivery of letters and messages. Requests for such certificates are uniformly denied to applicants whose principal business purpose is not the delivery of messages and letters.

(b) All applications for special certificates authorizing the employment of learners at subminimum wage rates in the manufacture of products in the following industries shall be denied (definitions for all listed activities can be found in subpart C of this part):

(1) In the apparel industry:

(i) Rainwear

(ii) Leather and sheep-lined clothing

(iii) Women's apparel division of the apparel industry for the manufacture of women's misses', and juniors' dresses;

(iv) Robes

(2) Shoe manufacturing industry

(3) Men's and boys' clothing industry.

(c) No certificates will be granted authorizing the employment of learners at subminimum wage rates as homeworkers; in maintenance occupations such as guard, porter, or custodian; in office and clerical occupations in any industry; or in operations of a temporary or sporadic nature.

(d) Authorization to employ apprentices at subminimum wages will only be granted if permitted by the BAT regulations (29 CFR Part 29).

### § 520.402 How do I obtain authority to employ messengers, learners, or apprentices at subminimum wages?

(a) Employers wishing to employ messengers, learners, or apprentices as defined in subpart C of this part at subminimum wages must apply for authority to do so from the Administrator at the Wage and Hour Division's Regional Office having administrative jurisdiction over the geographic area in which the employment is to take place. To obtain the address of the Regional Office which services your geographic area, please contact your local Wage and Hour Office (under ''Department of Labor'' in the blue pages of your local telephone book).

(b) In the case of messengers, such application may be filed by an employer or group of employers. Preferential consideration will be given to applications filed by groups or organizations which are deemed to be representative of the interests of a whole industry or branch thereof.

### § 520.403 What information is required when applying for authority to pay less than the minimum wage?

(a) A separate application must be made for each plant or establishment requesting authorization for employment of messengers and/or learners at subminimum wages, on the official form furnished by the Wage and Hour Division, containing all information required by the form including:

(1) Information concerning efforts made by the applicant to obtain experienced workers in occupation(s) for which learners are requested;

(2) The occupations/industry in which the messenger(s) and/or learner(s) are to be employed;

(3) A statement explaining why employment of messenger(s) and/or learners(s) at subminimum wages is needed to prevent curtailment of employment opportunities;

(4) The number of messengers and/or learners the applicant anticipates employing at subminimum wages under special certificate;

(5) If requesting authorization for the employment of learners at subminimum wages for a learning period greater than 240 hours, information pertinent to the extraordinary circumstances necessitating such a request. While each such request will be considered on its own merit, it is anticipated that such authorizations would be limited to occupations requiring an extended period of specialized training;

(6) The number of messengers and/or learners hired at subminimum wages during the twelve-month period prior to making application;

(7) Total number of nonsupervisory workers in the particular plant or establishment for which a certificate is requested;

(8) The number of experienced workers in the learner occupations and their straight-time average hourly earnings during the last payroll period and the corresponding payroll period in the prior year; and

(9) The type of equipment to be used by learners.

(b) For apprentices, the employer or apprenticeship committee must submit a copy of the registered apprenticeship program.

(c) Any applicant may also submit such additional information as may be pertinent. Applications which fail to provide the information required by the form may be returned to the applicant with a notation of deficiencies and without prejudice against submission of a new or revised application.

(The information collection requirements contained in paragraphs (a), (b) and (c) were approved by the Office of Management and Budget under control number 1215–0192.)

### § 520.404 What must I demonstrate in my application for a messenger, learner, or apprentice certificate to receive a favorable review?

(a) The application must demonstrate that a certificate is necessary in order to prevent the curtailment of opportunities for employment.

(b) The issuance of a messenger and/or learner certificate must not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage rates or working standards of experienced workers performing work of a like or comparable character in the industry.

(c) Abnormal labor conditions such as a strike, lock-out, or other similar condition, must not exist at the plant or establishment for which a messenger and/or learner certificate is requested.

(d) It must be shown that an adequate supply of qualified experienced workers is not available for employment in those occupations for which authorization to pay subminimum wages to learners has been requested; that the experienced workers presently employed in the plant or establishment in occupations in which learners are requested are afforded an opportunity, to the fullest extent possible, for full-time employment upon completion of the learning period; and that learners are available for employment.

(e) Reasonable efforts must have been made to recruit workers paid at least the minimum wage in those occupations in which certificates to employ learners at subminimum wages have been requested. This includes the placement of an order with the local State or Territorial Public Employment Service Office (except in possessions where there is no such office) not more than fifteen days prior to the date of application. Written evidence from such office that the order has been placed shall be submitted by the employer with the application.

(f) The occupation or occupations in which learners are to receive training must involve a sufficient degree of skill to necessitate an appreciable learning period.

(g) An apprenticeship program must conform with or substantially conform with the standards of apprenticeship as defined in subpart C of this part.

(h) There must be no serious outstanding violations involving the employee(s) for whom a certificate is being requested nor any serious outstanding violations of a certificate previously issued, nor any serious violations of the FLSA which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

### § 520.405 Must I notify my employees that I am applying for a certificate to employ messengers and/or learners at subminimum wages?

Upon making application for a messenger and/or learner certificate or for renewal thereof, an employer shall post a copy of the first page of the completed application form in a conspicuous place in each department of the plant or establishment where he/she proposes to employ messengers and/or learners at subminimum wage rates. Such notice shall remain posted until the application is acted upon by the Administrator.

(The information collection requirements contained in paragraphs (a), (b) and (c) were approved by the Office of Management and Budget under control number 1215–0192.)

### § 520.406 What happens once I have submitted my request for authorization to pay messengers, learners, or apprentices subminimum wages?

(a) All applications submitted for authorization to pay wages lower than those required by section 6(a) of the FLSA will be considered and acted upon (issued or denied) subject to the conditions specified in §§ 520.403 and 520.404 of this part.

(b) If, in the case of messengers and/or learners, available information indicates that the requirements of this part are satisfied, the Administrator

shall issue a special certificate which will be mailed to the employer. If a special certificate is denied, the employer shall be given written notice of the denial. If a messenger and/or learner certificate is denied, notice of such denial shall be without prejudice to the filing of any subsequent application.

(c) If, in the case of apprentices, the apprenticeship agreement and other available information indicate that the requirements of this part are satisfied, the Administrator shall issue a special certificate. The special certificate, if issued, shall be mailed to the employer or the apprenticeship committee and a copy shall be mailed to the apprentice. If a special certificate is denied, the employer or the apprenticeship committee, the apprentice and the recognized apprenticeship agency shall be given written notice of the denial. The employer shall pay the apprentice the minimum wage applicable under section 6(a) of the FLSA from the date of receipt of notice of such denial.

### § 520.407 What is the subminimum wage for messengers and what must I do to comply with the terms of my certificate?

(a) A messenger certificate, if issued, shall specify:

(1) The subminimum wage rate of not less than 95 percent of the applicable minimum wage required by section 6(a) of the FLSA; and

(2) The effective and expiration dates of the certificate.

(b) The employer shall post a copy of the messenger certificate during its effective period in a conspicuous place where it can be readily seen by employees.

(c) No messenger shall be hired under a messenger certificate while abnormal labor conditions such as a strike, lockout, or other similar condition, exist.

### § 520.408 What is the subminimum wage for learners and what must I do to comply with the terms of my certificate?

(a) All learner certificates shall specify:

(1) The subminimum wage rate of not less than 95 percent of the applicable minimum wage required by section 6(a) of the FLSA;

(2) The number or proportion of learners authorized to be employed on any one day;

(3) The occupations in which learners may be employed;

(4) The authorized learning period of not more than 240 hours, except in extraordinary situations as discussed in § 520.403; and

(5) The effective and expiration dates of the certificate.

(b) Learners properly hired prior to the date on which a learner certificate expires may be continued in employment at subminimum wage rates for the duration of their authorized learning period under the terms of the certificate, even though the certificate may expire before the learning period is completed.

(c) The employer shall post a copy of the learner certificate during its effective period and thereafter until all authorized learners have completed their learning period(s). The certificate shall be posted in a conspicuous place in each department of the plant where learners are to be employed.

(d) No learners shall be hired under a learner certificate if, at the time the employment begins, experienced workers capable of equaling the performance of a worker of minimum acceptable skill are available for employment. Before hiring learners during the effective period of the certificate, the employer shall place an order for experienced workers with the local State or Territorial Public Employment Service Office (except in possessions where there is no such office) or have such an active order on file. Written evidence that an order has been placed or is on active file shall be maintained in the employer's records.

(e) No learner shall be hired under a learner certificate while abnormal labor conditions such as a strike, lockout, or other similar condition exist in the plant or establishment.

(f) For each individual learner, the number of hours of previous employment and hours of vocational or similar facility(ies) training must be deducted from the authorized learning period if within the past three years the learner has been employed or received vocational training in a given occupation and industry.

(g) If experienced workers are paid on a piece rate basis, learners shall be paid at least the same piece rates as experienced workers employed on similar work in the plant and shall receive earnings based on such piece rates whenever such earnings exceed the subminimum wage rates permitted in the certificate.

### § 520.409 When will authority to pay apprentices special minimum wages become effective and what is the special minimum wage rate?

(a) An apprenticeship program which has been registered with a recognized apprenticeship agency shall constitute a temporary special certificate authorizing the employment of an apprentice at the wages and under the conditions specified in such program until a special certificate is issued or denied. This temporary authorization is, however, conditioned on the requirement that within 90 days from the beginning date of employment of the apprentice, the employer or the apprenticeship committee shall send one copy of each apprenticeship agreement, with evidence of registration, to the appropriate Regional Office of the Wage and Hour Division.

(b) The wage rate specified by the apprenticeship program becomes the special minimum wage rate that must be paid unless the Administrator issues a certificate modifying the terms and conditions of employment of apprentices at special minimum wages.

### § 520.410 How long does a messenger, learner, or apprentice certificate remain in effect?

(a) Messenger and/or learner certificates may be issued for a period of not longer than one year.

(b) Each special apprentice certificate shall specify the conditions and limitations under which it is granted, including the periods of time during which subminimum wage rates may be paid pursuant to a registered apprenticeship program.

(c) No certificate may be issued retroactively.

(d) The Administrator may amend the provisions of a certificate when necessary to correct omissions or defects in the original certificate or reflect changes in this part.

### § 520.411 Does a certificate authorizing payment of subminimum wages to messengers and/or learners remain in effect during the renewal process?

(a) Application for renewal of a messenger and/or learner certificate shall be made on the same form as described in this section and employees shall be advised of such renewal application in the same manner as explained in § 520.405. No effective messenger and/or learner certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in accordance with the requirements, and filed with and received by the Administrator not less than fifteen nor more than thirty days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a messenger and/or learner certificate, or withdrawal of the application. A ''properly executed application'' is one which contains the complete information required on the form, and the required certification by the applicant.

(b) A renewal certificate will not be issued unless there is a clear showing that the conditions set forth in section 520.404 of this part still prevail.

### § 520.412 What records, in addition to those required by Part 516 of this chapter and section 520.203 of this part, must I keep relating to the employment of messengers, learners, or apprentices under special certificate?

(a) Each worker employed as a messenger, learner, or apprentice under a certificate shall be designated as such on the employer's payroll records. All such messengers, learners, or apprentices shall be listed together as a separate group on the payroll records, with each messenger's, learner's, or apprentice's occupation being shown.

(b) At the time learners are hired, the employer shall also obtain and keep in his/her records a statement signed by each employee showing all applicable experience which the learner had in the employer's industry, including vocational training, during the preceding three years. The statement shall contain the dates of such previous

employment, names and addresses of employers, the occupation or occupations in which the learner was engaged and the types of products upon which the learner worked. The statement shall also contain information concerning pertinent training in vocational training schools or similar training facilities, including the dates of such training and the identity of the vocational school or training facility. If the learner has had no applicable experience or pertinent training, a statement to that effect signed by the learner shall likewise be kept in the employer's records.

(c) The employer shall maintain a file of all evidence and records, including any correspondence, pertaining to the filing or cancellation of job orders placed with the local State or Territorial Public Employment Service Office pertaining to job orders for occupations to be performed by learners.

(d) Every employer who employs apprentices under temporary or special certificates shall preserve for three years from the last effective date of the certificate copies of the apprenticeship program, apprenticeship agreement and special certificate under which such an apprentice is employed.

(e) Every apprenticeship committee which holds a certificate under this part shall keep the following records for each apprentice under its control and supervision:

(1) The apprenticeship program, apprenticeship agreement and special certificate under which the apprentice is employed by an employer;

(2) The cumulative amount of work experience gained by the apprentice, in order to establish the proper wage at the time of his/her assignment to an employer; and

(3) A list of the employers to whom the apprentice was assigned and the period of time he/she worked for each employer.

(f) The records required in this section, including a copy of the application(s) submitted and any special certificate(s) issued, shall be kept and made available for inspection for at least three years from the expiration date of the certificate(s).

## Subpart E—Student-Learners

### § 520.500 Who is a student-learner?

The term student-learner is defined in subpart C.

### § 520.501 How do I obtain authority to employ student-learners at subminimum wages?

(a) Employers wishing to employ student-learners at subminimum wages must apply for authority to do so from the Administrator at the Wage and Hour Division's Regional Office having administrative jurisdiction over the geographic area in which the employment is to take place. To obtain the address of the Regional Office which services your geographic area, please contact your local Wage and Hour Office (under ''Department of Labor'' in the blue pages of your local telephone book).

(b) Application must be made on the official form furnished by the Wage and Hour Division and must be signed by the employer, the appropriate school official and the student-learner. A separate application must be filed by the employer for each student-learner the employer proposes to employ at subminimum wages.

(The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0192.)

### § 520.502 What information must an application to employ student-learners at subminimum wages contain?

Student-learner applications must contain:

(a) A statement clearly outlining the vocational training program and showing, particularly, the processes in which the student-learner will be engaged when in training on the job;

(b) A statement clearly outlining the school instruction directly related to the job;

(c) The total number of workers employed in the establishment;

(d) The number and hourly wage rates of experienced workers employed in the occupation in which the student-learner is to be trained;

(e) The hourly wage rate or progressive wage schedule which the employer proposes to pay the student-learner;

(f) The age of the student-learner;

(g) The period of employment training at subminimum wages;

(h) The number of hours of employment training a week and the number of hours of school instruction a week;

(i) A certification by the appropriate school official that the student named on the application form will be receiving instruction in an accredited school, college, or university and will be employed pursuant to a bona fide vocational training program, as defined in subpart C of this part. The certification by the school official must satisfy the following conditions:

(1) The application must be properly executed in conformance with § 520.501 of this subpart;

(2) The employment training must conform with the provisions of § 520.503 (a), (c), (d), and (g) and paragraphs (a) and (c) of § 520.506;

(3) The occupation must not be one for which a student-learner application was previously submitted by the employer and a special certificate was denied by the Administrator.

(The information collection requirements contained in paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) were approved by the Office of Management and Budget under control number 1215–0192.)

### § 520.503 What must I demonstrate in my application for a student-learner certificate to receive a favorable review?

Each student-learner application must demonstrate that:

(a) The training program under which the student-learner will be employed is a bona fide vocational training program as defined in subpart C of this part;

(b) The employment of the student-learner at subminimum wages authorized by the special certificate must be necessary to prevent curtailment of opportunities for employment;

(c) The student-learner is at least sixteen years of age, or at least eighteen years of age if employed in any occupation which the Secretary has declared to be particularly hazardous (see part 570, subpart E, of this chapter, but note the specific exemptions for student-learners in several of the orders);

(d) The occupation for which the student-learner is receiving preparatory training requires a sufficient degree of skill to necessitate a substantial learning period;

(e) The training is not for the purpose of acquiring manual dexterity and high production speed in repetitive operations;

(f) The employment of a student-learner will not have the effect of displacing a worker employed in the establishment;

(g) The employment of the student-learners at subminimum wages must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable character;

(h) The occupational needs of the community or industry warrant the training of student-learners;

(i) There are no serious outstanding violations of the provisions of a student-learner certificate previously issued to the employer, or serious violations of any other provisions of the FLSA by the employer which provide reasonable grounds to conclude that the terms of the certificate would not be complied with, if issued;

(j) The issuance of such a certificate would not tend to prevent the development of apprenticeship programs in accordance with the regulations applicable thereto (subpart D of this part) or would not impair established apprenticeship standards in the occupation or industry involved; and

(k) The number of student-learners to be employed in one establishment is not more than a small proportion of its work force.

### § 520.504 When will authority to pay student-learners subminimum wages become effective?

(a) Certification by the appropriate school official on an application for a special student-learner certificate shall constitute a temporary authorization. This temporary authorization is effective from the date such application is forwarded to the Wage and Hour Division in conformance with § 520.501.

(b) At the end of 30 days, this application shall become the permanent special student-learner certificate unless, after review, the Administrator denies the application, issues a certificate with modified terms and conditions, or expressly extends the period of review.

### § 520.505 How will I be notified that my request to employ student-learners at subminimum wages has been denied and can I appeal the denial?

(a) If, after review, an application is denied, notification of denial will be made to the appropriate school official, the employer and the student. This notification will occur within 30 days following the date such application was forwarded to the Wage and Hour Division, unless additional time for review is considered necessary or appropriate.

(b) If additional time for review is considered necessary or appropriate, the proper school official, the employer, and the student shall be so notified. To the extent feasible, the Administrator may provide an opportunity to other interested persons to present data and views on the application before denying a special student-learner certificate.

(c) Whenever a notification of denial is mailed to the employer, such denial shall be without prejudice to any subsequent application, except under the circumstances referred to in § 520.502(i)(3).

(d) Section 520.204 of this part describes the procedures for requesting reconsideration of a decision to grant or deny a certificate.

### § 520.506 What is the subminimum wage for student-learners and what must I do to comply with the terms of my student-learner certificate?

(a) The special minimum wage rate paid to student-learners shall be not less than 75 percent of the applicable minimum under section 6(a) of the FLSA.

(b) Compliance with items listed for favorable review of a student-learner application (§ 540.503) must be demonstrated.

(c)(1) The number of hours of employment training each week at subminimum wages pursuant to a certificate, when added to the hours of school instruction, shall not exceed 40 hours, except that authorization may be granted by the Administrator for a greater number of hours if found to be justified by extraordinary circumstances.

(2) When school is not in session on any school day, the student-learner may work a number of hours in addition to the weekly hours of employment training authorized by the certificate; provided,

(i) The total hours worked shall not exceed 8 hours on any such day, and

(ii) A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked on such day.

(3) During the school term, when school is not in session for the entire week, the student-learner may work at his/her employment training a number of hours in the week in addition to those authorized by the certificate; provided,

(i) The total hours shall not exceed 40 hours in any such week, and

(ii) A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked in such week.

(d) A special student-learner certificate shall not constitute authorization to pay a subminimum wage rate to a student-learner in any week in which he/she is employed for a number of hours in addition to the number authorized in the certificate, except as provided in paragraphs (c)(1), (2), and (3) of this section.

### § 520.507 How long does my certificate remain in effect?

(a) A special student-learner certificate shall be effective for a period not to exceed the length of one school year unless a longer period is found to be justified by extraordinary circumstances. These circumstances must be explained in detail at the time of application. While each such request will be considered on its own merit, it is anticipated that such authorizations would be limited to occupations requiring an extended period of specialized training;

(b) No certificate shall authorize employment training beyond the date of graduation.

(c) No special student-learner certificate may be issued retroactively.

### § 520.508 What records, in addition to those required by Part 516 of this chapter and section 520.203 of this part, must I keep when student-learners are employed?

Any worker employed as a student-learner shall be identified as such on the payroll records, with each student-learner's occupation and rate of pay being shown. Notations should be made in the employer's records when additional hours are worked by reason of school not being in session.

## PARTS 521–523 [RESERVED]

## PART 525—EMPLOYMENT OF WORKERS WITH DISABILITIES UNDER SPECIAL CERTIFICATES

Sec.

525.1 Introduction.
525.2 Purpose and scope.
525.3 Definitions.
525.4 Patient workers.
525.5 Wage payments.
525.6 Compensable time.
525.7 Application for certificates.
525.8 Special provisions for temporary authority.
525.9 Criteria for employment of workers with disabilities under certificates at special minimum wage rates.
525.10 Prevailing wage rates.
525.11 Issuance of certificates.
525.12 Terms and conditions of special minimum wage certificates.
525.13 Renewal of special minimum wage certificates.
525.14 Posting of notices.
525.15 Industrial homework.
525.16 Records to be kept by employers.
525.17 Revocation of certificates.
525.18 Review.
525.19 Investigations and hearings.
525.20 Relation to other laws.
525.21 Lowering of wage rates.
525.22 Employee's right to petition.
525.23 Work activities centers.
525.24 Advisory Committee on Special Minimum Wages.

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### § 525.1 Introduction.

The Fair Labor Standards Amendments of 1986 (Pub. L. 99–486, 100 Stat. 1229) substantially revised those provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201) (FLSA) permitting the employment of individuals disabled for the work to be performed (workers with disabilities) at special minimum wage rates below the rate that would otherwise be required by statute. These provisions are codified at section 14(c) of the FLSA and:

(a) Provide for the employment under certificates of individuals with disabilities at special minimum wage rates which are commensurate with those paid to workers not disabled for the work to be performed employed in the vicinity for essentially the same type, quality, and quantity of work;

(b) Require employers to provide written assurances that wage rates of individuals paid on an hourly rate basis be reviewed at least once every six months and that the wages of all employees be reviewed at least annually to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the locality for essentially the same type of work;

(c) Prohibit employers from reducing the wage rates prescribed by certificate in effect on June 1, 1986, for two years;

(d) Permit the continuance or establishment of work activities centers; and

(e) Provide that any employee receiving a special minimum wage rate pursuant to section 14(c), or the parent or guardian of such an employee, may petition for a review of that wage rate by an administrative law judge.

### § 525.2 Purpose and scope.

The regulations in this part govern the issuance of all certificates authorizing the employment of workers with disabilities at special minimum wages pursuant to section 14(c) of FLSA.

### § 525.3 Definitions.

(a) *FLSA* means the Fair Labor Standards Act of 1938, as amended.

(b) *Secretary* means the Secretary of Labor or the Secretary of Labor's authorized representative.

(c) *Administrator* means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(d) *Worker with a disability* for the purpose of this part means an individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed. Disabilities which may affect earning or productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction. The following, taken by themselves, are not considered disabilities for the purposes of this part: Vocational, social, cultural, or educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and, correctional parole or probation. Further, a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another.

(e) *Patient worker* means a worker with a disability, as defined above, employed by a hospital or institution providing residential care where such worker receives treatment or care without regard to whether such worker is a resident of the establishment.

(f) *Hospital or institution,* hereafter referred to as *institution,* is a public or private, nonprofit or for-profit facility primarily engaged in (*i.e.*, more than 50 percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or retarded, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed.

(g) *Employ* is defined in FLSA as *to suffer or permit to work*. An employment relationship arises whenever an individual, including an individual with a disability, is suffered or permitted to work. The determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit. However, an individual does not become an employee if engaged in such activities as making craft products where the individual voluntarily participates in such activities and the products become the property of the individual making them, or all of the funds resulting from the sale of the products are divided among the participants in the activity or are used in purchasing additional materials to make craft products.

(h) *Special minimum wage* is a wage authorized under a certificate issued to an employer under this part that is less than the statutory minimum wage.

(i) *Commensurate* wage is a special minimum wage paid to a worker with a disability which is based on the worker's individual productivity in proportion to the wage and productivity of experienced nondisabled workers performing essentially the same type, quality, and quantity of work in the vicinity in which the individual under certificate is employed. For example, the commensurate wage of a worker with a disability who is 75% as productive as the average experienced nondisabled worker, taking into consideration the type, quality, and quantity of work of the disabled worker, would be set at 75% of the wage paid to the nondisabled worker. For purposes of these regulations, a commensurate wage is always a special minimum wage, *i.e.*, a wage below the statutory minimum.

(j) *Vicinity* or *locality* means the geographic area from which the labor force of the community is drawn.

(k) *Experienced worker* means a worker who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period.

### § 525.4 Patient workers.

With respect to patient workers, as defined in § 525.3(e), a major factor in determining if an employment relationship exists is whether the work performed is of any consequential economic benefit to the institution. Generally, work shall be considered to be of consequential economic benefit if it

is of the type that workers without disabilities normally perform, in whole or in part in the institution or elsewhere. However, a patient does not become an employee if he or she merely performs personal housekeeping chores, such as maintaining his or her own quarters, or receives a token remuneration in connection with such services. It may also be possible for patients in family-like settings such as group homes to rotate or share household tasks or chores without becoming employees.

### § 525.5 Wage payments.

(a) An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage. An individual whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the applicable minimum wage may be paid a commensurate wage, but only after the employer has obtained a certificate authorizing payment of special minimum wages from the appropriate office of the Wage and Hour Division of the Department of Labor.

(b) With respect to patient workers employed in institutions, no deductions can be made from such individuals' commensurate wages to cover the cost of room, board, or other services provided by the facility. Such an individual must receive his or her wages free and clear, except for amounts deducted for taxes assessed against the employee and any voluntary wage assignments directed by the employee. (See part 531 of this title.) However, it is not the intention of these regulations to preclude the institution thereafter from assessing or collecting charges for room, board, and other services actually provided to an individual to the extent permitted by applicable Federal or State law and on the same basis as it assesses and collects from nonworking patients.

### § 525.6 Compensable time.

Individuals employed subject to this part must be compensated for all hours worked. Compensable time includes not only those hours during which the individual is actually performing productive work but also includes those hours when no work is performed but the individual is required by the employer to remain available for the next assignment. However, where the individual is completely relieved from duty and is not required to remain available for the next assignment, such time will not be considered compensable time. For example, an individual employed by a rehabilitation facility would not be engaged in a compensable activity where such individual is completely relieved from duty but is provided therapy or the opportunity to participate in an alternative program or activity in the facility not involving work and not directly related to the worker's job (*e.g.,* self-help skills training, recreation, job seeking skills training, independent living skills, or adult basic education). The burden of establishing that such hours are not compensable rests with the facility and such hours must be clearly distinguishable from compensable hours. (For further information on compensable time in general under FLSA, see part 785 of this title.)

### § 525.7 Application for certificates.

(a) Application for a certificate may be filed by any employer with the Regional Office of the Wage and Hour Division having administrative jurisdiction over the geographic area in which the employment is to take place.

(b) The employer shall provide answers to all of the applicable questions contained on the application form provided by the Regional Office.

(c) The application shall be signed by the employer or the employer's authorized representative.

### § 525.8 Special provisions for temporary authority.

(a) Temporary authority may be granted to an employer permitting the employment of workers with disabilities pursuant to a vocational rehabilitation program of the Veterans Administration for veterans with a service-incurred disability or a vocational rehabilitation program administered by a State agency.

(b) Temporary authority is effective for 90 days from the date the appropriate section of the application form is signed and completed by the duly

designated representative of the State agency or the Veterans Administration. Such authority may not be renewed or extended by the issuing agency.

(c) The signed application constitutes the temporary authority to employ workers with disabilities at special minimum wage rates. A copy of the application must be forwarded within 10 days to the appropriate Regional Office of the Wage and Hour Division. Upon receipt, the application will be reviewed and, where appropriate, a certificate will be issued by the Regional Office. Where additional information is required or certification is denied, the applicant will receive notification from the Regional Office.

### § 525.9 Criteria for employment of workers with disabilities under certificates at special minimum wage rates.

(a) In order to determine that special minimum wage rates are necessary in order to prevent the curtailment of opportunities for employment, the following criteria will be considered:

(1) The nature and extent of the disabilities of the individuals employed as these disabilities relate to the individuals' productivity;

(2) The prevailing wages of experienced employees not disabled for the job who are employed in the vicinity in industry engaged in work comparable to that performed at the special minimum wage rate;

(3) The productivity of the workers with disabilities compared to the norm established for nondisabled workers through the use of a verifiable work measurement method (see § 525.12(h)) or the productivity of experienced nondisabled workers employed in the vicinity on comparable work; and,

(4) The wage rates to be paid to the workers with disabilities for work comparable to that performed by experienced nondisabled workers.

(b) In order to be granted a certificate authorizing the employment of workers with disabilities at special minimum wage rates, the employer must provide the following written assurances concerning such employment:

(1) In the case of individuals paid hourly rates, the special minimum wage rates will be reviewed by the employer at periodic intervals at a minimum of once every six months; and,

(2) Wages for all employees will be adjusted by the employer at periodic intervals at a minimum of once each year to reflect changes in the prevailing wages paid to experienced nondisabled individuals employed in the locality for essentially the same type of work.

### § 525.10 Prevailing wage rates.

(a) A prevailing wage rate is a wage rate that is paid to an experienced worker not disabled for the work to be performed. The Department recognizes that there may be more than one wage rate for a specific type of work in a given area. An employer must be able to demonstrate that the rate being used as prevailing for determining a commensurate wage was objectively determined according to the guidelines contained in this section.

(b) An employer whose work force primarily consists of nondisabled workers or who employs more than a token number of nondisabled workers doing similar work may use as the prevailing wage the wage rate paid to that employer's experienced nondisabled employees performing similar work. Where an agency places a worker or workers with disabilities on the premises of an employer described above, the wage paid to the employer's experienced workers may be used as prevailing.

(c) An employer whose work force primarily consists of workers disabled for the work to be performed may determine the prevailing wage by ascertaining the wage rates paid to the experienced nondisabled workers of other employers in the vicinity. Such data may be obtained by surveying comparable firms in the area that employ primarily nondisabled workers doing similar work. The firms surveyed must be representative of comparable firms in terms of wages paid to experienced workers doing similar work. The appropriate size of such a sample will depend on the number of firms doing similar work but should include no less than three firms unless there are fewer firms doing such work in the area. A comparable firm is one which is of

similar size in terms of employees or which competes for or bids on contracts of a similar size or nature. Employers may contact other sources such as the Bureau of Labor Statistics or private or State employment services where surveys are not practical. If similar work cannot be found in the area defined by the geographic labor market, the closest comparable community may be used.

(d) The prevailing wage rate must be based upon the wage rate paid to experienced nondisabled workers as defined elsewhere in these regulations. Employment services which only provide entry level wage data are not acceptable as sources for prevailing wage information as required in these regulations.

(e) There is no prescribed method for tabulating the results of a prevailing wage survey. For example, either a weighted or unweighted average would be acceptable provided the employer is consistent in the methodology used.

(f) The prevailing wage must be based upon work utilizing similar methods and equipment. Where the employer is unable to obtain the prevailing wage for a specific job to be performed on the premises, such as collating documents, it would be acceptable to use as the prevailing wage the wage paid to experienced individuals employed in similar jobs such as file clerk or general office clerk, requiring the same general skill levels.

(g) The following information should be recorded in documenting the determination of prevailing wage rates:

(1) Date of contact with firm or other source;

(2) Name, address, and phone number of firm or other source contacted;

(3) Individual contacted within firm or source;

(4) Title of individual contacted;

(5) Wage rate information provided;

(6) Brief description of work for which wage information is provided;

(7) Basis for the conclusion that wage rate is not based upon an entry level position. (See also § 525.10(c).)

(h) A prevailing wage may not be less than the minimum wage specified in section 6(a) of FLSA.

### § 525.11 Issuance of certificates.

(a) Upon consideration of the criteria cited in these regulations, a special certificate may be issued.

(b) If a special minimum wage certificate is issued, a copy shall be sent to the employer. If denied, the employer will be notified in writing and told the reasons for the denial, as well as the right to petition under § 525.18.

### § 525.12 Terms and conditions of special minimum wage certificates.

(a) A special minimum wage certificate shall specify the terms and conditions under which it is granted.

(b) A special minimum wage certificate shall apply to all workers employed by the employer to which the special certificate is granted provided such workers are in fact disabled for the work they are to perform.

(c) A special minimum wage certificate shall be effective for a period to be designated by the Administrator. Workers with disabilities may be paid wages lower than the statutory minimum wage rate set forth in section 6 of FLSA only during the effective period of the certificate.

(d) Workers paid under special minimum wage certificates shall be paid wages commensurate with those paid experienced nondisabled workers employed in the vicinity in which they are employed for essentially the same type, quality, and quantity of work.

(e) Workers with disabilities shall be paid not less than one and one-half times their regular rates of pay for all hours worked in excess of the maximum workweek applicable under section 7 of FLSA.

(f) The wages of all workers paid a special minimum wage under this part shall be adjusted by the employer at periodic intervals at a minimum of once a year to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the vicinity for essentially the same type of work.

(g) Each worker with a disability and, where appropriate, a parent or guardian of the worker, shall be informed, orally and in writing, of the terms of the certificate under which

such worker is employed. This requirement may be satisfied by making copies of the certificate available. Where a worker with disabilities displays an understanding of the terms of a certificate and requests that other parties not be informed, it is not necessary to inform a parent or guardian.

(h) In establishing piece rates for workers with disabilities, the following criteria shall be used:

(1) Industrial work measurement methods such as stop watch time studies, predetermined time systems, standard data, or other measurement methods (hereinafter referred to as ''work measurement methods'') shall be used by the employer to establish standard production rates of workers not disabled for the work to be performed. The Department will accept the use of whatever method an employer chooses to use. However, the employer has the responsibility of demonstrating that a particular method is generally accepted by industrial engineers and has been properly executed. No specific training or certification will be required. Where work measurement methods have already been applied by another employer or source, and documentation exists to show that the methods used are the same, it is not necessary to repeat these methods to establish production standards.

(i) The piece rates shall be based on the standard production rates (number of units an experienced worker not disabled for the work is expected to produce per hour) and the prevailing industry wage rate paid experienced nondisabled workers in the vicinity for essentially the same type and quality of work or for work requiring similar skill. (Prevailing industry wage rate divided by the standard number of units per hour equals the piece rate.).

(ii) Piece rates shall not be less than the prevailing piece rates paid experienced workers not disabled for the work doing the same or similar work in the vicinity when such piece rates exist and can be compared with the actual employment situations of the workers with disabilities.

(2) Any work measurement method used to establish piece rates shall be verifiable through the use of established industrial work measurement techniques.

(i) If stop watch time studies are made, they shall be made with a person or persons whose productivity represents normal or near normal performance. If their productivity does not represent normal or near normal performance, adjustments of performance shall be made. Such adjustments, sometimes called ''performance rating'' or ''leveling'' shall be made only by a person knowledgeable in this technique, as evidenced by successful completion of training in this area. The persons observed should be given time to practice the work to be performed in order to provide them with an opportunity to overcome the initial learning curve. The persons observed shall be trained to use the specific work method and tools which are available to workers with disabilities employed under special minimum wage certificates.

(ii) Appropriate time shall be allowed for personal time, fatigue, and unavoidable delays. Generally, not less than 15% allowances (9–10 minutes per hour) shall be used in conducting time studies.

(iii) Work measurements shall be conducted using the same work method that will be utilized by the workers with disabilities. When modifications such as jigs or fixtures are made to production methods to accommodate special needs of individual workers with disabilities, additional work measurements need not be conducted where the modifications enable the workers with disabilities to perform the work or increase productivity but would impede a worker without disabilities. Where workers with disabilities do not have a method available to them, as for example where an adequate number of machines are not available, a second work measurement should be conducted.

(i) Each worker with a disability employed on a piece rate basis should be paid full earnings. Employers may ''pool'' earnings only where piece rates cannot be established for each individual worker. An example of this situation is a team production operation

where each worker's individual contribution to the finished product cannot be determined separately. However, in such situations, the employer should make every effort to objectively divide the earnings according to the productivity level of each individual worker.

(j) The following terms shall be met for workers with disabilities employed at hourly rates:

(1) Hourly rates shall be based upon the prevailing hourly wage rates paid to experienced workers not disabled for the job doing essentially the same type of work and using similar methods or equipment in the vicinity. (See also § 525.10.)

(2) An initial evaluation of a worker's productivity shall be made within the first month after employment begins in order to determine the worker's commensurate wage rate. The results of the evaluation shall be recorded and the worker's wages shall be adjusted accordingly no later than the first complete pay period following the initial evaluation. Each worker is entitled to commensurate wages for all hours worked. Where the wages paid to the worker during pay periods prior to the initial evaluation were less than the commensurate wage indicated by the evaluation, the employer must compensate the worker for any such difference unless it can be demonstrated that the initial payments reflected the commensurate wage due at that time.

(3) Upon completion of not more than six months of employment, a review shall be made with respect to the quantity and quality of work of each hourly-rated worker with a disability as compared to that of nondisabled workers engaged in similar work or work requiring similar skills and the findings shall be recorded. The worker's productivity shall then be reviewed and the findings recorded at least every 6 months thereafter. A review and recording of productivity shall also be made after a worker changes jobs and at least every 6 months thereafter. The worker's wages shall be adjusted accordingly no later than the first complete pay period following each review. Conducting reviews at six-month intervals should be viewed as a minimum requirement since workers with disabilities are entitled to commensurate wages for all hours worked. Reviews must be conducted in a manner and frequency to insure payment of commensurate wages. For example, evaluations should not be conducted before a worker has had an opportunity to become familiar with the job or at a time when the worker is fatigued or subject to conditions that result in less than normal productivity.

(4) Each review should contain, as a minimum and in addition to the data cited above, the following: name of the individual being reviewed; date and time of the review; and, name and position of the individual doing the review.

### § 525.13 Renewal of special minimum wage certificates.

(a) Applications may be filed for renewal of special minimum wage certificates.

(b) If an application for renewal has been properly and timely filed, an existing special minimum wage certificate shall remain in effect until the application for renewal has been granted or denied.

(c) Workers with disabilities may not continue to be paid special minimum wages after notice that an application for renewal has been denied.

(d) Except in cases of willfulness or those in which the public interest requires otherwise, before an application for renewal is denied facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

### § 525.14 Posting of notices.

Every employer having workers who are employed under special minimum wage certificates shall at all times display and make available to employees a poster as prescribed and supplied by the Administrator. The Administrator will make available, upon request, posters in other formats such as Braille or recorded tapes. Such a poster will explain, in general terms, the conditions under which special minimum wages may be paid and shall be posted in a conspicuous place on the employer's premises where it may be readily

observed by the workers with disabilities, the parents and guardians of such workers, and other workers. Where an employer finds it inappropriate to post such a notice, this requirement may be satisfied by providing the poster directly to all employees subject to its terms.

### § 525.15 Industrial homework.

(a) Where the employer is an organization or institution carrying out a recognized program of rehabilitation for workers with disabilities and holds a special certificate issued pursuant to this part, certification under regulations governing the employment of industrial homeworkers (29 CFR part 530) is not required.

(b) For all other types of employers, special rules apply to the employment of homeworkers in the following industries: Jewelry manufacturing, knitted outerwear, gloves and mittens, buttons and buckles, handkerchief manufacturing, embroideries, and women's apparel. (See 29 CFR part 530.)

### § 525.16 Records to be kept by employers.

Every employer, or where appropriate (in the case of records verifying the workers' disabilities) the referring agency or facility, of workers employed under special minimum wage certificates shall maintain and have available for inspection records indicating:

(a) Verification of the workers' disabilities;

(b) Evidence of the productivity of each worker with a disability gathered on a continuing basis or at periodic intervals (not to exceed six months in the case of employees paid hourly wage rates);

(c) The prevailing wages paid workers not disabled for the job performed who are employed in industry in the vicinity for essentially the same type of work using similar methods and equipment as that used by each worker with disabilities employed under a special minimum wage certificate (see also § 525.10(b) and (d));

(d) The production standards and supporting documentation for nondisabled workers for each job being performed by workers with disabilities employed under special certificates; and

(e) The records required under all of the applicable provisions of part 516 of this title, except that any provision pertaining to homeworker handbooks shall not be applicable to workers with disabilities who are employed by a recognized nonprofit rehabilitation facility and working in or about a home, apartment, tenement, or room in a residential establishment. (See § 525.15) Records required by this section shall be maintained and preserved for the periods specified in part 516 of this title.

(Approved by the Office of Management and Budget under control number 1215–0017)

### § 525.17 Revocation of certificates.

(a) A special minimum wage certificate may be revoked for cause at any time. A certificate may be revoked:

(1) As of the date of issuance, if it is found that misrepresentations or false statements have been made in obtaining the certificate or in permitting a worker with a disability to be employed thereunder;

(2) As of the date of violation, if it is found that any of the provisions of FLSA or of the terms of the certificate have been violated; or

(3) As of the date of notice of revocation, if it is found that the certificate is no longer necessary in order to prevent curtailment of opportunities for employment, or that the requirements of these regulations other than those referred to in paragraph (a)(2) of this section have not been complied with.

(b) Except in cases of willfulness or those in which the public interest requires otherwise, before any certificate shall be revoked, facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

### § 525.18 Review.

Any person aggrieved by any action of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if

granted, shall be made by the Administrator. Other interested persons, to the extent it is deemed appropriate, may be afforded an opportunity to present data and views.

### § 525.19 Investigations and hearings.

The Administrator may conduct an investigation, which may include a hearing, prior to taking any action pursuant to these regulations. To the extent it is deemed appropriate, the Administrator may provide an opportunity to other interested persons to present data and views. Proceedings initiated pursuant to this section are separate from those taken pursuant to FLSA section 14(c)(5) and § 525.22.

### § 525.20 Relation to other laws.

No provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.

### § 525.21 Lowering of wage rates.

(a) No employer may reduce the minimum hourly wage rate, guaranteed by a special minimum wage certificate in effect on June 1, 1986, of any worker with disabilities from June 1, 1986 until May 31, 1988, without prior authorization of the Secretary.

(b) This provision applies to those workers with disabilities who were:

(1) Employed during the pay period which included June 1, 1986, even if no work was performed during that pay period; and

(2) Employed under a group or individual special minimum wage certificate which specified a minimum guaranteed rate, i.e., a special certificate issued under former section 14(c) (1) or (2)(b) of FLSA.

(c) In order to obtain authority to lower the wage rate of a worker with a disability to whom this provision applies to a rate below the certificate rate, the employer must submit information as prescribed under this section to the appropriate Regional Office. The burden of establishing the necessity of lowering the wage of a worker with a disability rests with the employer.

(d) In reviewing a request to lower a wage rate of a worker with a disability, documented evidence of the following will be considered:

(1) Any change in the worker's disabling condition which has a substantially negative impact on productive capacity;

(2) Any change in the type of work being performed in the facility which would affect the productivity of the worker with a disability or which would result in the application of a lower prevailing wage rate;

(3) Any change in general economic conditions in the locality in which the work is performed which results in lower prevailing wage rates.

(e) A wage rate may not be lowered until authorization is obtained.

### § 525.22 Employee's right to petition.

(a) Any employee receiving a special minimum wage at a rate specified pursuant to subsection 14(c) of FLSA or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. No particular form of petition is required, except that a petition must be signed by the individual, or the parent or guardian of the individual, and should contain the name and address of the employee and the name and address of the employee's employer. A petition may be filed in person or by mail with the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S3502, 200 Constitution Avenue NW., Washington, DC 20210. The petitioner may be represented by counsel in any stage of such proceedings. Upon receipt, the petition shall be forwarded immediately to the Chief Administrative Law Judge.

(b) Upon receipt of a petition, the Chief Administrative Law Judge shall, within 10 days of the receipt of the petition by the Secretary, appoint an Administrative Law Judge (ALJ) to hear the case. Upon receipt, the ALJ shall notify the employer named in the petition. The ALJ shall also notify the employee, the employer, the Administrator, and the Associate Solicitor for Fair Labor Standards of the time and place of the hearing. The date of the hearing shall be not more than 30 days after the assignment of the case to the

ALJ. All the parties shall be given at least eight days' notice of such hearing. Because of the time constraints imposed by the statute, requests for postponement shall be granted only sparingly and for compelling reasons.

(c) Hearings held under this subpart shall be conducted, consistent with statutory time limitations, under the Department's rules of practice and procedure for administrative hearings found in 29 CFR part 18. There shall be a minimum of formality in the proceeding consistent with orderly procedure. Any employer who intends to participate in the proceeding shall provide to the ALJ, and shall serve on the petitioner and the Associate Solicitor for Fair Labor Standards no later than 15 days prior to the commencement of the hearing, or as soon as practical depending on when the notice of a hearing as required under paragraph (b) of this section was received, that documentary evidence pertaining to the employee or employees identified in the petition which is contained in the records required by § 525.16 (a), (b), (c) and (d). The Administrator shall be permitted to participate by counsel in the proceeding upon application.

(d) In determining whether any special minimum wage rate is justified, the ALJ shall consider, to the extent evidence is available, the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured, and the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity and the conditions under which much productivity was mesured. In these proceedings, the burden of proof on all matters relating to the propriety of a wage at issue shall rest with the employer.

(e) The ALJ shall issue a decision within 30 days after the termination of the hearing and shall serve the decision on the Administrator and all interested parties by Express Mail or other similar system guaranteeing one-day delivery. The decision shall contain appropriate findings and conclusions and an order. If the ALJ finds that the special minimum wage being paid or which has been paid is not justified, the order shall specify the lawful rate and the period of employment to which the rate is applicable. In the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid.

(f) Within 15 days after the date of the decision of the ALJ, the petitioner, the Administrator, or the employer who seeks review thereof may request review by the Secretary. No particular form of request is required, except that a request must be in writing and must attach a copy of the ALJ's decision. Requests for review shall be filed with the Secretary of Labor, 200 Constitution Ave. NW., Washington, DC 20210. Any other interested party may file a reply thereto with the Secretary and the Administrator within 5 working days of receipt of such request for review. The request for review and reply thereto shall be transmitted by the Administrator to all interested parties by Express Mail or other similar system guaranteeing one-day delivery.

(g) The decision of the ALJ shall be deemed to be final agency action 30 days after issuance thereof, unless within 30 days of the date of the decision the Secretary grants a request to review the decision. Where such request for review is granted, within 30 days after receipt of such request the Secretary shall review the record and shall either adopt the decision of the ALJ or issue exceptions. The decision of the ALJ, together with any exceptions issued by the Secretary, shall be deemed to be a final agency action.

(h) Within 30 days of issuance of the final action of the Secretary reviewing the decision of the ALJ or declining to grant such review, any person adversely affected or aggrieved by such action may seek judicial review pursuant to chapter 7 of title 5, United States Code. The record of the case, including the record of proceedings before the ALJ, shall be transmitted by the Secretary to the appropriate court pursuant to the rules of such court.

### § 525.23 Work activities centers.

Nothing in these regulations shall be interpreted to prevent an employer from maintaining or establishing work

activities centers to provide therapeutic activities for workers with disabilities as long as the employer complies with the requirement of these regulations. Work activities centers shall include centers planned and designed to provide therapeutic activities for workers with severe disabilities affecting their productive capacity. Any establishment whose workers with disabilities are employed at special minimum wages must comply with the requirements of this part, regardless of the designation of such establishment.

### § 525.24 Advisory Committee on Special Minimum Wages.

The Advisory Committee on Special Minimum Wages, the members of which are appointed by the Secretary, shall advise and make recommendations to the Administrator concerning the administration and enforcement of these regulations and the need for amendments thereof and shall serve such other functions as may be desired by the Administrator.

## PART 527 [RESERVED]

## PART 528—ANNULMENT OR WITHDRAWAL OF CERTIFICATES FOR THE EMPLOYMENT OF STUDENT-LEARNERS, APPRENTICES, LEARNERS, MESSENGERS, HANDICAPPED PERSONS, STUDENT-WORKERS, AND FULL-TIME STUDENTS IN AGRICULTURE OR IN RETAIL OR SERVICE ESTABLISHMENTS AT SPECIAL MINIMUM WAGE RATES

Sec.

528.1 Applicability of the regulations in this part.
528.2 Definition of terms.
528.3 Withdrawal and annulment of certificates.
528.4 According opportunity to demonstrate or achieve compliance.
528.5 Proceedings for withdrawal or annulment.
528.6 Review.
528.7 Effect of order of annulment or withdrawal.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214, unless otherwise noted.

### § 528.1 Applicability of the regulations in this part.

The regulations in this part shall govern the annulment or withdrawal of any certificate except a temporary certificate issued pending final action on an application, issued pursuant to parts 519, 520, 521, 522, 523, 524, and 527 of this chapter, and having effect under section 14 of the Fair Labor Standards Act of 1938.

[27 FR 3994, Apr. 26, 1962]

### § 528.2 Definition of terms.

As used in the regulations contained in this part, the term:

(a) *Withdrawal* shall mean termination of validity of a certificate with prospective effect from the time of the action of withdrawal.

(b) *Annulment* shall mean withdrawal of a certificate with retroactive effect to the date of issuance.

(c) *Authorized representative* shall mean: (1) The Assistant Regional Administrators for the Wage and Hour Division (who are authorized to redelegate this authority) within their respective regions, and (2) the Caribbean Director of the Wage and Hour Division for the area covered by the Caribbean office.

(d) *Area director* shall include any area director of the Wage and Hour Division.

(Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913). Employment Standards Order No. 76–2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

### § 528.3 Withdrawal and annulment of certificates.

(a) An authorized representative may withdraw a certificate from any employer within that representative's region who, acting under color of any certificate or application for the employment of learners, handicapped workers, student workers, student learners, apprentices, messengers, or full-time students in agriculture, retail, or service establishments, or in institutions of higher education at subminimum wages under section 14 of the act, fails to comply with the limitations in such certificate or otherwise violates the act.

(b) An authorized representative may annul a certificate affected by mistake in its issuance if the employer knowingly induced or knowingly took advantage of the mistake. Where the employer did not knowingly induce the mistake but knowingly took advantage of it, a new certificate shall be issued by the authorized representative if, and on such terms as, such certificate would have been issued had there been no mistake limited in its term from the date of issuance to the date of annulment of the annulled certificate.

(c) A certificate may be withdrawn in the public interest by a representative authorized to issue such type of certificate whenever any part of the exemption it provides is no longer necessary to prevent curtailment of opportunities for employment. If appropriate, a more limited replacement certificate may be issued by the authorized representative.

(Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76–2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

### § 528.4 According opportunity to demonstrate or achieve compliance.

Prior to instituting proceedings for withdrawal of a certificate under paragraph (a) of § 528.3, except in cases of willfullness, an area director shall mail a letter to the employer setting forth alleged facts or conduct which may warrant withdrawal of the certificate, and fixing a time and a place for a conference at which the employer shall be accorded an opportunity to show that no cause for withdrawal under § 528.3(a) exists or that compliance has been achieved by paying wages improperly withheld and by taking steps adequate to insure that new cause for annulment or withdrawal will not occur. By written report to the appropriate authorized representative, a copy of which shall be mailed to the employer, the area director shall concisely summarize the conference and shall include conclusions as to whether the employer demonstrated or achieved compliance. If the authorized representative is satisfied that the employer either demonstrated or achieved such compliance, no proceedings shall be instituted under § 528.3(a) for the withdrawal of the certificate.

(Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913), Employment Standards Order 76–2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

### § 528.5 Proceedings for withdrawal or annulment.

The representative authorized to withdraw or annul a certificate under § 528.3 shall institute proceedings by a letter mailed to the employer and, where appropriate, to the apprenticeship agency (in the case of apprentice certificates) or the responsible school official (in the case of student-learner certificates), setting forth alleged facts which may warrant such annulment or withdrawal and advising the employer that such an annulment or withdrawal of the scope provided in § 528.7 will take effect at a time specified unless facts are presented which convince the authorized representative that such action should not be taken. The letter shall advise such person, agency, or official of the right to respond by mail or to appear by or with counsel or by other duly qualified representative at a specified time and place. If there is no timely objection to the withdrawal or annulment thus proposed, it shall be deemed effective according to the terms of the letter instituting the annulment or withdrawal proceeding without the necessity of any further action. If objection to the annulment or withdrawal as proposed is made within the specified time the further proceedings shall be as informal as practicable commensurate with orderly dispatch and fairness. Department of Labor investigation files or reports or portions thereof may be considered in such proceedings to the extent they are made available for examination during the proceedings. If objection to the proposed annulment or withdrawal is made by such specified time, the authorized representative shall, after considering all pertinent matters presented, mail a letter to the employer and, where appropriate, to the apprenticeship agency or the responsible school official, setting out that representative's findings of specific pertinent facts and conclusions and that representative's order concerning the

proposed annulment or withdrawal. In proceedings instituted for annulment, the order may provide for withdrawal instead of annulment if the proof warrants such withdrawal but fails to support adequately the annulment. Such an order shall be deemed issued and effective according to its terms when mailed.

(Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76–2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

### § 528.6 Review.

Any employer and, when appropriate, any apprenticeship agency or responsible school official, who expressed timely objection to the proposed action prior to issuance of an order of annulment or withdrawal may obtain review, limited to the question of whether the findings of fact support the order under the regulations in this part. Application for such review shall be in writing addressed to the Administrator and mailed within 15 days after the order is issued. The Administrator may affirm, modify, or reverse the order, or may remand it for further proceedings. The order under review shall not be stayed in effect pending such review. Any aggrieved person may obtain such review of an order entered in proceedings instituted under paragraph (c) of § 528.3.

[21 FR 5316, July 17, 1956, as amended at 22 FR 5683, July 18, 1957]

### § 528.7 Effect of order of annulment or withdrawal.

Except as otherwise expressly provided in such order, any order of annulment or withdrawal under paragraph (a) or (b) of § 528.3 shall be effective to terminate all certifications to which the regulations in this part apply in effect at the establishment where the cause for withdrawal arose or where the annulled certificate had effect. After such annulment or withdrawal, such employer shall be ineligible to obtain or exercise the privileges granted in such a certificate until he satisfies the issuing officer that he will not again give cause for annulment or withdrawal if a certificate is issued.

(Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No 76–2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

## PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

### Subpart A—General

Sec.
530.1 Definitions.
530.2 Restriction of homework.
530.3 Application forms for individual homeworker certificates.
530.4 Terms and conditions for the issuance of individual homeworker certificates.
530.5 Investigation.
530.6 Termination of individual homeworker certificates.
530.7 Revocation and cancellation of individual homeworker certificates.
530.8 Preservation of individual homeworker certificates.
530.9 Records and reports.
530.10 Delegation of authority to grant, deny, or cancel an individual homeworker certificate.
530.11 Petition for review.
530.12 Special provisions.

### Subpart B—Homeworker Employer Certificates

530.101 General.
530.102 Requests for employer certificates.
530.103 Employer assurances.
530.104 Bonding or security payments.
530.105 Investigations.

### Subpart C—Denial/Revocation of Homeworker Employer Certificates

530.201 Conflict with State law.
530.202 Piece rates—work measurement.
530.203 Outstanding violations and open investigations.
530.204 Discretionary denial or revocation.
530.205 Mandatory denial or revocation.
530.206 Special circumstances.

### Subpart D—Civil Money Penalties

530.301 General.
530.302 Amounts of civil money penalties.
530.303 Considerations in determining amounts.
530.304 Procedures for assessment.

### Subpart E—Administrative Procedures

530.401 Applicability of procedures and rules.
530.402 Notice of determination.
530.403 Request for hearing.
530.404 Referral to Administrative Law Judge.
530.405 General.
530.406 Decision and order of Administrative Law Judge.
530.407 Procedures for initiating and undertaking review.
530.408 Notice of the Secretary to review decision.
530.409 Final decision of the Secretary.
530.410 Special procedures.
530.411 Emergency certificate revocation procedures.
530.412 Alternative summary proceedings.
530.413 Certification of the record.
530.414 Equal Access to Justice Act.

AUTHORITY: Sec. 11, 52 Stat. 1066 (29 U.S.C. 211) as amended by sec. 9, 63 Stat. 910 (29 U.S.C. 211(d)); Secretary's Order No. 6–84, 49 FR 32473, August 14, 1984; and Employment Standards Order No. 85–01, June 5, 1985.

SOURCE: 24 FR 729, Feb. 3, 1959, unless otherwise noted.

## Subpart A—General

### § 530.1 Definitions.

(a) The meaning of the terms person, employ, employer, employee, goods, and production, as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) *Administrator* as used in this part means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or an authorized representative of the Administrator.

(c) *Industrial homeworker* and *homeworker*, as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(d) *Industrial homework*, as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(e) The women's apparel industry is defined as follows: The production of women's, misses' and juniors' dresses, washable service garments, blouses, and neckwear from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear, and negligees from woven fabrics; corsets and other body supporting garments from any material; other garments similar to the foregoing; and infants; and children's outerwear.

(f) The jewelry manufacturing industry is defined as follows:

(1)(i) The manufacturing, processing, or assembling, wholly or partially from any material, of jewelry, commonly or commercially so known. Jewelry as used herein includes without limitation, religious, school, college, and fraternal insignia; articles of ornament or adornment designed to be worn on apparel or carried on or about the person, including, without limitation, cigar and cigarette cases, holders, and lighters; watch cases; metal mesh bags and metal watch bracelets; and chain, mesh, and parts for use in the manufacture of any of the articles included in this definition. Jewelry as used in this part does not include pocket knives, cigar cutters, badges, emblems, military and naval insignia, belt buckles, and handbag and pocketbook frames and clasps, or commercial compacts and vanity cases, except when made from or embellished with precious metals or precious, semiprecious, synthetic or imitation stones, or the assaying, refining, and smelting of base or precious metals.

(ii) The term *parts* as used in paragraph (e)(1)(i) of this section does not include parts which are used predominantly for products other than jewelry, such as springs, blades, and nail files. The term *commercial compacts and vanity cases* as used means compacts and vanity cases which bear the trade name or mark of a cosmetic manufacturer and are made for the purpose of distributing or advertising said cosmetics.

(2) The manufacturing, cutting, polishing, encrusting, engraving, and setting of precious, semiprecious, synthetic, and imitation stones.

(3) The manufacturing, drilling, and stringing of pearls, imitation pearls, and beads designed for use in the manufacture of jewelry.

(4) The term *hand-fashioned jewelry* as used in § 530.12(b) means articles of jewelry commonly known as genuine Navajo, Pueblo, Hopi, or Zuni handmade jewelry which in all elements of design, fashioning and ornamentation are handmade by methods and with the help of only such devices as permit the maker to determine the shape and design of each individual product: *Provided*, That silver used in the making of such jewelry shall be of at least nine hundred fineness, and that turquoise and other stones used shall be genuine stones, uncolored and untreated by artificial means: *And provided further*, That power machinery is permitted in the production of findings, in the cutting and polishing of stones, in the buffing and polishing of completed products, and in incidental functions. Equipment specifically prohibited shall include hand presses, foot presses, drop hammers, and similar equipment: *And provided further*, That solder may be of less silver content than nine hundred; *And provided further*, That findings may be mechanically made of any metal by Indians or others: *And provided further*, That turquoise and other stones may be cut and polished by Indians or others without restrictions as to methods or equipment used.

(g) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided*, That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulled suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

(7) Fleece-lined garments made from knitted fabric containing cotton only or containing any mixture of cotton and not more than 25 percent, by weight, of wool or animal fiber other than silk.

(8) Knitted shirts of cotton or any synthetic fiber or any mixture of such fibers which have been knit on machinery of 10-cut or fine: *Provided*, That this exception shall not be construed to exclude from the knitted outerwear industry and the manufacturing, dyeing, or other finishing of knitted shirts made in the same establishment as that where the knitting process is performed, if such shirts are made wholly or in part of fibers other than those specified in this clause, or if such shirts of any fiber are knit on machinery coarser than 10-cut.

(h) The gloves and mittens industry is defined as follows: The production of gloves and mittens from any material or combination of materials, except athletic gloves and mittens.

(i) The button and buckle manufacturing industry is defined as follows: The manufacture of buttons, buckles, and slides, and the manufacture of blanks and parts for such articles from any material except metal, for use on apparel.

(j) The handkerchief manufacturing industry is defined as follows: The manufacture of men's, women's and children's handkerchiefs, plain or ornamented, from any materials.

(k) The embroideries industry is defined as follows: The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including but not by way of limitation, tucking shirring, smocking, hemstitching, hand rolling, fagoting, Bonnez embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schifli embroidery and laces, burnt-out laces and velvets, Swiss handmachine embroidery, thread splitting, embroidery thread cutting, scallop cutting,

lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided,* That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.

(l) As used throughout this part the terms ''Secretary'' or ''Secretary of Labor'' shall mean the Secretary of Labor, U.S. Department of Labor, or his or her designee.

[24 FR 729, Feb. 3, 1959, as amended at 46 FR 50349, Oct. 9, 1981; 49 FR 22036, May 24, 1984; 53 FR 45722, Nov. 10, 1988; 61 FR 19986, May 3, 1996]

### § 530.2 Restriction of homework.

Except as provided in subpart B of this part, no work in the industries defined in paragraphs (e) through (k) of § 530.1 shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.2 of this chapter.

[53 FR 45722, Nov. 10, 1988]

### § 530.3 Application forms for individual homeworker certificates.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefore on forms provided by the Wage and Hour Division. Such forms shall be signed by both the homeworker and the employer.

(Approved by the Office of Management and Budget under control number 1215–0005)

[24 FR 729, Feb. 3, 1959, as amended at 49 FR 18294, Apr. 30, 1984]

### § 530.4 Terms and conditions for the issuance of individual homeworker certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour Division, certificates may be issued to the applicant employer authorizing the employment of a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1)(i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because the worker's presence is required to care for an invalid in the home; and

(2)(i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (*a*) April 4, 1942, in the button and buckle manufacturing industry; (*b*) November 2, 1942, in the embroideries industry; (*c*) April 1, 1941, in the gloves and mittens industry; (*d*) October 7, 1942, in the handkerchief manufacturing industry; (*e*) July 1, 1941, in the jewelry manufacturing industry; or (*f*) March 5, 1942, in the women's apparel industry, except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homeworker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

(Information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1215–0005)

[24 FR 729, Feb. 3, 1959, as amended at 43 FR 28470, June 30, 1978; 46 FR 50349, Oct. 9, 1981; 49 FR 44270, Nov. 5, 1984; 53 FR 45722, Nov. 10, 1988]

### § 530.5 Investigation.

An investigation may be ordered in any case to obtain additional data or facts. A medical examination of the worker or invalid may be ordered or a

certification of facts concerning eligibility for the certificate by designated officers of the State or Federal Government may be required.

### § 530.6 Termination of individual homeworker certificates.

(a) A certificate shall be valid under the terms set forth in the certificate for a period to be designated by the Administrator or his authorized representative. Application for renewal of any certificate shall be filed in the same manner as an original application under this part.

(b) No effective certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in accordance with the requirements, and filed not less than 15 nor more than 30 days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a certificate, or withdrawal of the application. A ''properly executed'' application is one which contains the complete information required on the form.

[24 FR 729, Feb. 3, 1959, as amended at 27 FR 7020, July 25, 1962]

### § 530.7 Revocation and cancellation of individual homeworker certificates.

Any certificate may be revoked for cause at any time. Violation of any provision of the Fair Labor Standards Act shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certificates shall be issued to the offending employer for a period of up to one year. Before any certificate is cancelled, however, interested parties shall be notified in writing of the facts warranting such cancellation and afforded an opportunity to demonstrate or achieve compliance. In appropriate circumstances, the Administrator shall afford an opportunity for a hearing to resolve the disputed matter.

[49 FR 44271, Nov. 5, 1984]

### § 530.8 Preservation of individual homeworker certificates.

A copy of all certificates provided to the employer under this part shall be maintained for a period of at least three years after the last employment under the certificate.

[49 FR 44271, Nov. 5, 1984]

### § 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

### § 530.10 Delegation of authority to grant, deny, or cancel an individual homeworker certificate.

The Administrator may from time to time designate and appoint members of the Administrator's staff or State Agencies as his authorized representatives with full power and authority to grant, deny, or cancel homework certificates.

[43 FR 28470, June 30, 1978]

### § 530.11 Petition for review.

Any person aggrieved by the action of an authorized representative of the Administrator in granting or denying a certificate may, within 15 days thereafter or within such additional time as the Administrator for cause shown may allow, file with the Administrator a petition for review of the action of such representative praying for such relief as is desired. Such petition for review, if duly filed, will be acted upon by the Administrator or an authorized representative of the Administrator who took no part in the proceeding being reviewed. All interested parties will be afforded an opportunity to present their views in support of or in opposition to the matters prayed for in the petition.

### § 530.12 Special provisions.

(a) *Gloves and mittens industry.* Any certificate issued to an industrial homeworker by the New York State Department of Labor under paragraph II of Home Work Order No. 4 Restricting Industrial Homework in the Glove Industry, dated June 28, 1941, will be given effect by the Administrator as a certificate permitting the employment

of the homeworker under the terms of § 530.4 for the period during which such certificate shall continue in force.

(b) *Jewelry manufacturing industry.* Nothing contained in the regulations in this part shall be construed to prohibit the employment, as homeworkers, of American Indians residing on the Navajo, Pueblo, and Hopi Indian Reservations, who are engaged in producing genuine hand-fashioned jewelry on the Indian reservations mentioned, provided the employment of such homeworker is in conformity with the following conditions:

(1) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall submit in duplicate to the regional office of the Wage and Hour Division for the region in which the employer's place of business is located, on April 1, August 1, and December 1 of each year, the name and address of such employee engaged during the preceding 4-month period in making hand-fashioned jewelry on Indian reservations;

(2) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall file copies of the piece rates in duplicate with the regional office of the Wage and Hour Division for the region in which the employer's place of business is located on April 1, August 1, and December 1 of each year, and

(3) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall keep, maintain, and have available for inspection by the Administrator or the Administrator's authorized representative at any time, records and reports showing with respect to each of the homeworkers engaged in making hand-fashioned jewelry on these Indian reservations, the following information:

(i) Name of the homeworker.

(ii) Address of the homeworker.

(iii) Date of birth of the homeworker, if under 19 years of age.

(iv) Description of work performed.

(v) Amount of cash wage payments made to the homeworker for each pay period.

(vi) Date of such payment.

(vii) Schedule of piece rates paid.

These records shall be kept by each employer for each of the employer's homeworkers engaged in making hand-fashioned jewelry on Indian reservations, as provided in this section, in lieu of the records required under §§ 516.2 and 516.31 of this chapter: *Provided, however,* That nothing in this section shall relieve an employer from maintaining all other records required by part 516 of this chapter.

[24 FR 729, Feb. 3, 1959, as amended at 43 FR 28470, June 30, 1978]

## Subpart B—Homeworker Employer Certificates

SOURCE: 53 FR 45722, Nov. 10, 1988, unless otherwise noted.

### § 530.101 General.

(a) Except as provided in subpart C, a certificate may be issued to an employer authorizing the employment of homeworkers in

(1) The knitted outerwear, gloves and mittens, and embroideries industries as defined in paragraphs (g), (h), and (k), respectively, at § 530.1, effective January 9, 1989;

(2) In the button and buckle and handkerchief manufacturing industries as defined in paragraphs (i) and (j), respectively, of § 530.1, effective July 9, 1989; and

(3) In the jewelry industry as defined in paragraph (f) of § 530.1, effective July 9, 1989, but only where the employer's homeworkers are engaged exclusively in the stringing of beads and other jewelry and the carding and packaging of jewelry. The terms ''carding and packaging of jewelry'' include the attaching of jewelry to cards, boxing and wrapping, and the use of common household glues available to the general public, but do not include potentially hazardous operations such as the use of industrial glues, epoxies, soldering irons, or heating elements.

(b) This certificate may be issued irrespective of whether individual homeworkers meet the conditions set forth in paragraph (a) of § 530.4 of Subpart A. Unless suspended or revoked, such certificates are valid for two-year periods. Applications for renewals must

be submitted no later than thirty (30) days prior to the expiration date of the current certificate. Except as provided in subpart A, in the absence of a certificate, the employment of homeworkers in these industries is prohibited, and an employer violating this prohibition is subject to all the sanctions provided in the Fair Labor Standards Act and in this part, including an injunction restraining the employment of homeworkers.

(c) Certificates authorizing such employment may be issued on the following terms and conditions upon written application to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

### § 530.102 Requests for employer certificates.

The initial request for certification or renewal application shall be signed by the employer and shall contain the name of the firm, its mailing address, the physical location of the firm's principal place of business and a description of the business operations and items produced. In addition, the initial or renewal application shall contain the names, addresses, and languages (if other than English) spoken by the homeworkers that are currently employed (if any) or expected to be employed. The employer shall also provide the Administrator, within thirty (30) days, a notice of each change of address of the principal place of business. The notification shall be in writing and addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

### § 530.103 Employer assurances.

In order to be granted a certificate authorizing the employment of industrial homeworkers, the employer must provide written assurances concerning the employment of homeworkers subject to section 11(d) of the Fair Labor Standards Act to the effect that:

(a) All homeworkers shall be paid in accordance with the monetary provisions of the Act.

(b) All homeworkers shall be employed in compliance with the child labor provisions contained in section 12 of the Act and regulations and orders issued pursuant to section 12. All homeworkers will be instructed not to permit minors to work in violation of such provisions.

(c) Records of hours worked and wages paid shall be maintained in accordance with section 11 of the Act and part 516 of this chapter.

(d) All homeworkers shall complete homeworker handbooks in accordance with § 516.31 of part 516.

(e) All homeworkers will be instructed to accurately record all hours worked, piece work information, and business-related expenses in the handbooks.

(f) All records shall be made available for inspection and transcription by the Administrator or a duly authorized and designated representative, or transcription by the employer upon written request.

(g) Piece rates paid to homeworkers shall be established using stop watch time studies or other work measurement methods.

(h) All homeworkers shall be encouraged to cooperate with the Department in any investigation that may be made.

(i) With respect to jewelry manufacturing, no operations other than the stringing of beads and other jewelry and the carding and packaging of jewelry will be performed by homeworkers.

### § 530.104 Bonding or security payments.

(a) Where in the Administrator's judgment there is not sufficient reason to believe that the Act will be complied with or that money will be available if violations of the Act occur, the Administrator may condition issuance or renewal of a certificate to an employer upon the furnishing of a bond with a surety or sureties satisfactory to the Administrator.

(b) The Administrator shall condition issuance or reinstatement of a certificate to any employer whose application for a certificate had previously been denied, or whose certificate had been revoked, upon the furnishing of a bond.

(c) Any bond required by the Administrator under paragraph (a) or (b) of

this section shall be in an amount determined by the Administrator, up to $2500 for each homeworker to be employed by such employer under the certificate. In lieu of a bond, the employer may furnish a cash payment of equal amount, to be held in a special deposit account by the Administrator for the period during which the certificate is in effect. Such bond, or cash payment, shall be subject to payment or forfeiture, in whole or in part, upon a final determination that the employer has failed to pay minimum wages or overtime compensation to homeworkers in accordance with the Act. Any sums thus paid or forfeited to the Administrator shall be disbursed to affected homeworkers in accordance with section 16(c) of the Act.

(d) At the Administrator's discretion, the obligation of a bond may be relieved, and any cash payment held as security in lieu thereof may be refunded (together with any interest accrued thereon), upon a subsequent determination that the employer is in compliance with the Act and that sufficient funds will be available to meet back wage payment obligations in the event of violations of the Act.

### § 530.105 Investigations.

Any employer in a restricted industry who requests certification to employ homeworkers will be investigated promptly after the issuance of the certificate by the Wage and Hour Division. Where such an employer is found to be in violation of the FLSA, and the violations are corrected and future compliance is promised, the firm will be reinvestigated to assure that full FLSA compliance has, in fact, been achieved.

## Subpart C—Denial/Revocation of Homeworker Employer Certificates

SOURCE: 53 FR 45723, Nov. 10, 1988, unless otherwise noted.

### § 530.201 Conflict with State law.

No certificate will be issued pursuant to § 530.101 of subpart B above authorizing the employment of homeworkers in an industry in a State where the Governor (or authorized representative) has advised the Administrator of the Wage and Hour Division in writing that the employment of homeworkers in such industry, as defined in paragraphs (f) through (k) of § 530.1, is illegal by virtue of a State labor standards or health and safety law.

### § 530.202 Piece rates—work measurement.

(a) No certificate will be issued pursuant to § 530.101 of subpart B to an employer who pays homeworkers based on piece rates unless the employer establishes the piece rates for the different types of items produced using stop watch time studies or other work measurement methods. Documentation of the work measurements used to establish the piece rates, and the circumstances under which such measurements were conducted shall be retained for three years and made available on request to the Wage and Hour Division.

(b) The fact that an employer bases piece rates on work measurements which indicate that the homeworkers would receive at least the minimum wage at such piece rate(s) does not relieve the employer from the Act's requirement that *each* homeworker actually receive not less than the minimum wage for all hours worked.

### § 530.203 Outstanding violations and open investigations.

A homework certificate will not be issued or renewed by the Administrator if, within the previous three years, the Administrator has found and notified the applicant of a monetary violation of the Fair Labor Standards Act in an amount certain, or the Administrator has assessed a civil money penalty pursuant to subpart D of these regulations or part 579 of this chapter (child labor), and such amounts are unpaid, or if the applicant is the subject of a revocation proceeding at the time of the application for renewal, or the applicant is the subject of an open investigation.

### § 530.204 Discretionary denial or revocation.

Where the Administrator finds that the employment of homeworkers under a certificate is likely to result in violations of the Fair Labor Standards Act, the regulations issued thereunder, or

the assurances required by this part, the Administrator may deny or revoke the certificate.

### § 530.205 Mandatory denial or revocation.

The Administrator shall deny or revoke a certificate in accordance with the following standards and for the period specified in the standards:

(a) *Serious wage violations.* Upon a finding by the Administrator of a serious wage violation, a certificate shall be denied (including refusal to renew) or revoked for one year. A serious wage violation is defined as minimum wage or overtime pay violations of the Act totalling $10,000 or more with respect to homeworkers; or minimum wage violations where 10 percent or more of a certificate holder's homeworkers (but in all cases at least two homeworkers) failed to receive at least 80 percent of the minimum wage for all hours worked for 6 or more weeks in any 3 month period; or minimum wage or overtime pay violations affecting more than half of the homeworkers of the certificate holder for 6 or more weeks in any 3 month period. All other wage violations are deemed non-serious wage violations for purposes of this section.

(b) *Repeated wage violations.* For repeated wage violations found by the Administrator, a certificate shall be denied or revoked for one to three years, depending on the seriousness and frequency of the violations.

(c) *Child labor violations.* Upon a finding by the Administrator of a violation of the child labor provisions of section 12 of the Fair Labor Standards Act and the regulations at part 570 of this title, a certificate shall be denied or revoked for one year. Upon a second finding by the Administrator of such a violation, the certificate shall be denied or revoked for three years.

(d) *Failure to pay back wages or civil money penalties judged owing.* Upon the failure of a certificate holder to pay within 60 days back wages or civil money penalties finally judged by a court, administrative law judge or other appropriate authority, as the case may be, to be owed by the certificate holder, or agreed to be paid by the certificate holder, or within such longer period as may be specified in the final order or agreement, a certificate shall be denied or revoked for up to one year or for such period as such obligation shall remain unpaid if longer than one year.

(e) *Failure to cooperate in an investigation.* Where the Administrator finds obstruction of or other failure to cooperate in a Wage and Hour investigation by a certificate holder which impedes the investigation, the certificate shall be denied or revoked for a period of one to three years, depending on the circumstances. For purposes of this regulation, cooperation includes providing records upon request to Wage and Hour compliance officers, identifying homeworkers of the certificate holder, and encouraging homeworkers to make themselves available in connection with an investigation.

(f) *Serious recordkeeping violations.* Upon a finding by the Administrator that a certificate holder has engaged in a serious recordkeeping violation, the certificate may be revoked for up to one year. Upon a second finding by the Administrator of a serious recordkeeping violation, a certificate shall be denied or revoked for one to three years. A serious recordkeeping violation is defined as one where, either through errors in or omissions of required information, the name and current address of homeworkers and the data which is necessary for the accurate determination of hours worked by or wages paid to homeworkers or data necessary for the computation of wages owed to homeworkers is unavailable with respect to 10 percent or more of the homeworkers.

(g) *Deliberate misstatement in an application for a certificate or in other documents.* Upon a finding by the Administrator of a deliberate misstatement of a material fact in an application for a certificate, in payroll records, or in any other information submitted to the Wage and Hour Division or maintained by the employer pursuant to these regulations, the certificate shall be denied or revoked for one to three years.

(h) *Discrimination against a homeworker.* Upon a finding by the Administrator that a certificate holder

has discharged or otherwise discriminated against a homeworker with respect to the homeworker's compensation or terms, conditions, or privileges of employment because the homeworker engaged in protected activity, the certificate shall be denied or revoked for three years. Protected activity is defined as: (1) Any complaint of a violation of the Act to the employer, the Department or other appropriate authority, or (2) any action which furthers the enforcement of or compliance with the Act, such as giving information to a Wage and Hour compliance officer.

### § 530.206 Special circumstances.

At the discretion of the Administrator, a certificate need not be denied or revoked pursuant to §§ 530.204 or 530.205 of this subpart if the Administrator finds all of the following:

(a) The certificate holder, despite the exercise of due care, did not know and did not have reason to know of the violations;

(b) All back wages and civil money penalties found by the Administrator to be owing by the certificate holder have been paid; and

(c) The certificate holder has taken appropriate steps to prevent recurrence of the violations.

## Subpart D—Civil Money Penalties

SOURCE: 53 FR 45724, Nov. 10, 1988, unless otherwise noted.

### § 530.301 General.

A system of civil money penalties is established to provide a remedy for any violation of the FLSA related to homework (except child labor violations, which are subject to civil money penalties pursuant to part 579 of this chapter), or for any violation of the homeworker regulations or employers' assurances pursuant to this part, which are not so serious as to warrant denial or revocation of a certificate. Accordingly, no civil money penalty will be assessed for conduct which serves as the basis of proposed denial or revocation of a certificate. (See subpart C of this part.) Civil money penalties will be assessed only against employers who are operating under a certificate or who are seeking certification.

### § 530.302 Amounts of civil money penalties.

(a) A civil money penalty, not to exceed $500 per affected homeworker for any one violation, may be assessed for any violation of the Act or of this part or of the assurances given in connection with the issuance of a certificate.

(b) The amount of civil money penalties shall be determined per affected homeworker within the limits set forth in the following schedule, except that no penalty shall be assessed in the case of violations which are deemed to be *de minimis* in nature:

| Nature of violation | Penalty per affected homeworker | | |
|---|---|---|---|
| | Minor | Substantial | Repeated, intentional or knowing |
| Recordkeeping | $10–100 | $100–200 | $200–500 |
| Monetary violations | 10–100 | 100–200 | ..... |
| Employment of homeworkers without a certificate | ..... | 100–200 | 200–500 |
| Other violations of statutes, regulations or employer assurances | 10–100 | 100–200 | 200–500 |

### § 530.303 Considerations in determining amounts.

(a) In determining the amount of a penalty within any range, the Administrator shall take into account the presence or absence of circumstances such as the following:

(1) Good faith attempts to comply with the Act or regulations;

(2) Extent to which the violation is under the employer's control;

(3) Non-culpable ignorance of the requirements of the Act or regulations;

(4) False documents or representations; and

(5) Exercise of due care.

(b) An employer's financial inability to meet obligations under the Act shall not constitute a mitigating or extenuating circumstance.

(c) No civil money penalty shall be assessed against an employer, who applies for a certificate, solely for employing homeworkers, provided the employer is not currently under investigation by the Wage and Hour Division.

### § 530.304 Procedures for assessment.

Assessment of penalties pursuant to this section, including administrative proceedings, shall be in accordance with the procedures set out in subpart E of this part.

## Subpart E—Administrative Procedures

SOURCE: 53 FR 45725, Nov. 10, 1988, unless otherwise noted.

### § 530.401 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process which will be applied with respect to a determination to deny (including refusal to renew) or revoke a certificate and to a determination to assess civil money penalties. Special rules and procedures for the emergency revocation of certificates are prescribed in § 530.412 of this subpart.

### § 530.402 Notice of determination.

Whenever the Administrator determines to deny or revoke a certificate or determines to assess a civil money penalty, the person affected by such determination shall be notified of the determination in writing, by certified mail to the last known address. The notice required shall:

(a) Set forth the determination of the Administrator, including the specific statutory or regulatory provision or assurance violated, the reasons for denying or revoking a certificate, or the amount of any civil money penalty assessment and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 530.403 of this subpart.

(d) Inform any affected person or persons that in lieu of formal proceedings there is available an alternative summary proceeding under § 530.412 of this subpart.

(e) Inform any affected persons that in the absence of a timely request for a hearing the determination of the Administrator shall become final and unappealable.

### § 530.403 Request for hearing.

(a) Except in the case of an emergency revocation under § 530.411 of this subpart, a request for an administrative hearing on a determination referred to in § 530.402 of this subpart shall be made in writing to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington DC 20210, and must be received no later than thirty (30) days after issuance of the notice referred to in § 530.402 of this subpart.

(b) No particular form is prescribed for any request for a hearing permitted by this part. However, any such request shall be typewritten or legibly written; specify the issue or issues stated in the notice of determination giving rise to such request; state the specific reason or reasons why the person requesting the hearing believes such determination is in error; be signed by the person making the request or by an authorized representative of such person; and include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) In the case of an emergency revocation, a request for an administrative hearing shall be made in writing to the Chief Administrative Law Judge, U.S. Department of Labor, 1111 20th Street, NW., suite 700, Washington, DC 20036, and must be received no later than 20 days after the issuance of the notice referred to in § 530.402 of this subpart.

### § 530.404 Referral to Administrative Law Judge.

Upon receipt of a timely request for a hearing, the request and a copy of the notice of administrative determination complained of, shall, by Order of Reference, be referred to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall, respectively, be given the effect of a complaint and answer

thereto for purposes of the administrative proceedings, subject to any amendment that may be permitted under 29 CFR part 18.

### § 530.405 General.

Except as specifically provided in these regulations, the ''Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this subpart.

### § 530.406 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. If the Administrative Law Judge finds that the Administrator has established by a preponderance of the evidence the factual basis for the determination to deny or revoke a certificate or to assess a civil money penalty, that determination shall be affirmed. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Secretary in person or by certified mail. The decision when served by the Administrative Law Judge shall constitute the final order of the Department of Labor unless the Secretary, as provided for in § 530.407 of this subpart, determines to review the decision.

### § 530.407 Procedures for initiating and undertaking review.

Any party desiring review of the decision of the Administrative Law Judge may petition the Secretary to review the decision. To be effective, such petition must be received by the Secretary within 30 days of the date of the decision of the Administrative Law Judge. Copies of the petition shall be served on all parties and on the Chief Administrative Law Judge. If the Secretary does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the Administrative Law Judge shall be deemed the final agency action.

### § 530.408 Notice of the Secretary to review decision.

Whenever the Secretary determines to review the decision and order of an Administrative Law Judge, the Secretary shall notify each party of the issue or issues raised; the form in which submission shall be made (*i.e.*, briefs, oral argument, etc.); and, the time within which such presentation shall be submitted.

### § 530.409 Final decision of the Secretary.

The Secretary's final decision shall be served upon all parties and the Administrative Law Judge, in person or by certified mail.

### § 530.410 Special procedures.

In a revocation proceeding pursuant to § 530.205(d) of subpart C of this part arising as a result of a certificate holder's failure to pay back wages or civil money penalties judged owing, the Administrator may file a motion for expedited decision, attaching to the notice, by affidavit or other means, evidence that a final order has been entered or agreement signed requiring respondent to pay back wages or civil money penalties and that the back wages or civil money penalties have not been paid. The respondent in the proceeding shall have 20 days in which to file a countering affidavit or other evidence. If no evidence countering the material assertions of the Administrator has been submitted within 20 days, the Administrative Law Judge shall, within 30 days thereafter, affirm the revocation or denial of the certificate. If the respondent does timely file such evidence, the Administrative Law Judge shall schedule a hearing pursuant to § 530.411(c) of

this subpart and the case shall be subject to the expeditious procedures following therein.

### § 530.411 Emergency certificate revocation procedures.

(a) When the Administrator determines that immediate revocation of a homework certificate is necessary to safeguard the payment of minimum wages to homeworkers, a notice of proposed emergency revocation of a certificate shall be sent to the certificate holder pursuant to § 530.402 of this subpart setting forth reasons requiring emergency revocation of the certificate.

(b) If no request for a hearing pursuant to § 530.403 of this subpart is received within 20 days of the date of receipt of the notice by the certificate holder, the proposed revocation of the certificate shall become final.

(c) The Office of Administrative Law Judges shall notify the parties at their last known address, of the date, time and place for the hearing, which shall be no more than 60 days from the date of receipt of the request for the hearing. All parties shall be given at least 5 days notice of such hearing. No requests for postponement shall be granted except for compelling reasons.

(d) The Administrative Law Judge shall issue a decision pursuant to § 530.406 of this subpart within 30 days after the termination of a proceeding at which evidence was submitted. The decision shall be served on all parties and the Secretary by certified mail and shall constitute the final order of the Department of Labor unless the Secretary determines to review the decision.

(e) Any party desiring review of the decision of the Administrative Law Judge may petition the Secretary to review the decision of the Administrative Law Judge. To be effective, such petition must be received by the Secretary within 30 days of the date of the decision of the Administrative Law Judge. If the Secretary does not issue a notice accepting a petition for review within 15 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition is filed, the decision of the Administrative Law Judge shall be deemed the final agency action.

(f) The Secretary's decision shall be issued within 60 days of the notice by the Secretary accepting the submission, and shall be served upon all parties and the Administrative Law Judge, in person or by certified mail.

### § 530.412 Alternative summary proceedings.

In lieu of an administrative hearing before an Administrative Law Judge under the above procedures, an applicant or certificate holder who does not dispute the factual findings of the Administrator may, within 30 days of the date of issuance of the notice of denial, revocation, or assessment (or within 20 days in the case of a notice of emergency revocation) petition the Administrator instead to reconsider the denial or revocation of the certificate or the assessment of civil money penalties. An applicant or certificate holder electing this informal procedure may appear before the Administrator in person, make a written submission to the Administrator, or both. Such reconsideration by the Administrator shall be available only upon waiver by the applicant or certificate holder of the formal hearing procedures provided by the above regulations.

### § 530.413 Certification of the record.

Upon receipt of a complaint seeking review of a final decision issued pursuant to this part filed in a United States District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge shall promptly index, certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

### § 530.414 Equal Access to Justice Act.

Proceedings under this part are not subject to the provisions of the Equal Access to Justice Act. In any hearing conducted pursuant to these regulations, Administrative Law Judges shall have no power or authority to award attorney fees or other litigation expenses pursuant to the Equal Access to Justice Act.

# PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

## Subpart A—Preliminary Matters

Sec.
531.1 Definitions.
531.2 Purpose and scope.

## Subpart B—Determinations of ''Reasonable Cost'' and ''Fair Value''; Effects of Collective Bargaining Agreements

531.3 General determinations of ''reasonable cost''.
531.4 Making determinations of ''reasonable cost''.
531.5 Making determinations of ''fair value''.
531.6 Effects of collective bargaining agreements.
531.7 Request for review of tip credit.

## Subpart C—Interpretations

531.25 Introductory statement.
531.26 Relation to other laws.

HOW PAYMENTS MAY BE MADE

531.27 Payment in cash or its equivalent required.
531.28 Restrictions applicable where payment is not in cash or its equivalent.
531.29 Board, lodging, or other facilities.
531.30 ''Furnished'' to the employee.
531.31 ''Customarily'' furnished.
531.32 ''Other facilities.''
531.33 ''Reasonable cost''; ''fair value''.
531.34 Payment in scrip or similar medium not authorized.
531.35 ''Free and clear'' payment; ''kickbacks''.

PAYMENT WHERE ADDITIONS OR DEDUCTIONS ARE INVOLVED

531.36 Nonovertime workweeks.
531.37 Overtime workweeks.

PAYMENTS MADE TO PERSONS OTHER THAN EMPLOYEES

531.38 Amounts deducted for taxes.
531.39 Payments to third persons pursuant to court order.
531.40 Payments to employee's assignee.

PAYMENT OF WAGES TO TIPPED EMPLOYEES

531.50 Statutory provisions with respect to tipped employees.
531.51 Conditions for taking tip credits in making wage payments.
531.52 General characteristics of ''tips.''
531.53 Payments which constitute tips.
531.54 Tip pooling.
531.55 Examples of amounts not received as tips.
531.56 ''More than $20 a month in tips.''
531.57 Receiving the minimum amount ''customarily and regularly.''
531.58 Initial and terminal months.
531.59 The tip wage credit.
531.60 Overtime payments.

AUTHORITY: Sec. 3(m), 52 Stat. 1060; sec. 2, 75 Stat. 65; sec. 101, 80 Stat. 830; 29 U.S.C. 203 (m) and (t).

SOURCE: 32 FR 13575, Sept. 28, 1967, unless otherwise noted.

## Subpart A—Preliminary Matters

### §531.1 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

### §531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term ''wage'' to include the ''reasonable cost'', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the ''fair value.'' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of ''fair value.'' Whenever so determined and when applicable and pertinent, the ''fair value'' of the facilities involved shall be includable as part of ''wages'' instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of ''wages'' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the ''reasonable

cost'' and ''fair value'' of board, lodging, or other facilities having general application, and describes the procedure whereby determinations having general or particular application may be made. The part also interprets generally the provisions of section 3(m) of the Act, including the term ''tipped employee'' as defined in section 3(t).

## Subpart B—Determinations of ''Reasonable Cost'' and ''Fair Value''; Effects of Collective Bargaining Agreements

### § 531.3 General determinations of ''reasonable cost.''

(a) The term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) *Reasonable cost* does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under § 531.4 is applicable, the ''reasonable cost'' to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided,* That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term ''good accounting practices'' does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term ''depreciation'' includes obsolescence.

(d)(1) The cost of furnishing ''facilities'' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

### § 531.4 Making determinations of ''reasonable cost.''

(a) *Procedure.* Upon his own motion or upon the petition of any interested person, the Administrator may determine generally or particularly the ''reasonable cost'' to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. Notice of proposed determination shall be published in the FEDERAL REGISTER, and interested persons shall be afforded an opportunity to participate through submission of written data, views, or arguments. Such notice shall indicate whether or not an opportunity will be afforded to make oral presentations. Whenever the latter opportunity is afforded, the notice shall specify the time and place of any hearing and the rules governing such proceedings. Consideration shall be given to all relevant matter presented in the adoption of any rule.

(b) *Contents of petitions submitted by interested persons.* Any petition by an employee or an authorized representative of employees, an employer or group of employers, or other interested persons for a determination of ''reasonable cost'' shall include the following information:

(1) The name and location of the employer's or employers' place or places of business;

(2) A detailed description of the board, lodging, or other facilities furnished by the employer or employers, whether or not these facilities are customarily furnished by the employer or

employers, and whether or not they are alleged to constitute ''wages'';

(3) The charges or deductions made for the facility or facilities by the employer or employers;

(4) When the actual cost of the facility or facilities is known an itemized statement of such cost to the employer or employers of the furnished facility or facilities;

(5) The cash wages paid;

(6) The reason or reasons for which the determination is requested, including any reason or reasons why the determinations in § 531.3 should not apply; and

(7) Whether an opportunity to make an oral presentation is requested; and if it is requested, the inclusion of a summary of any expected presentation.

### § 531.5 Making determinations of "fair value."

(a) *Procedure.* The procedures governing the making of determinations of the ''fair value'' of board, lodging, or other facilities for defined classes of employees and in defined areas under section 3(m) of the Act shall be the same as that prescribed in § 531.4 with respect to determinations of ''reasonable cost.''

(b) *Petitions of interested persons.* Any petition by an employee or an authorized representative of employees, an employer or group of employers, or other interested persons for a determination of ''fair value'' under section 3(m) of the Act shall contain the information required under paragraph (b) of § 531.4, and in addition, to the extent possible, the following:

(1) A proposed definition of the class or classes of employees involved;

(2) A proposed definition of the area to which any requested determination would apply;

(3) Any measure of ''fair value'' of the furnished facilities which may be appropriate in addition to the cost of such facilities.

### § 531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when it is made with a labor organization which has been certified pursuant to the provision of section 7(b)(1) or 7(b)(2) of the Act by the National Labor Relations Board, or which is the certified representative of the employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended.

(c) Collective bargaining agreements made with representatives who have not been so certified will be ruled on individually upon submission to the Administrator.

### § 531.7 Request for review of tip credit.

(a) Any employee (either himself or acting through his representative) may request the Administrator to determine whether the actual amount of tips received by him is less than the amount determined by the employer as a wage credit. If it is shown to the satisfaction of the Administrator that the actual amount of tips is the lesser of these amounts, the amount paid the employee by the employer shall be deemed to have been increased by such lesser amount.

(b) Requests for review and determination may be made either orally or in writing to any investigator or any regional, district, or field office of the Wage and Hour Division or to the Administrator in Washington, DC 20210. Requests should be accompanied by a statement of tips received each week or each month over a representative period as reported by the employee to the employer for purposes of Internal Revenue Service reports. Such a request should also be accompanied by a statement showing the tip credit taken by the employer and any other information deemed pertinent by the petitioner. In any instance in which it appears that the tip credit claimed by the employer exceeds the amount of tips actually received by the tipped employee, the employer shall be apprised of the facts made available to the Wage and Hour Division and be afforded the opportunity to submit any evidence he may care to present in support of his

claim for tip credit before a determination is made. Such determination shall be made by the official representative of the Wage and Hour Division assigned to make an investigation of the employing establishment.

## Subpart C—Interpretations

### § 531.25 Introductory statement.

(a) 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 subpart 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. Order 45A, May 24, 1950, 15 FR 3290). 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.)

(b) The interpretations of the law contained in this subpart are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The interpretations indicate, with respect to the methods of paying the compensation required by sections 6 and 7 and the application thereto of the provisions of section 3(m) of the Act, 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 administrative duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. Reliance may be placed upon the interpretations as provided in section 10 of the Portal-to-Portal Act (29 U.S.C. 259) so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. For discussion of section 10 of the Portal-to-Portal Act, see part 790 of this chapter.

### § 531.26 Relation to other laws.

Various Federal, State, and local legislation requires the payment of wages in cash; prohibits or regulates the issuance of scrip, tokens, credit cards, ''dope checks'' or coupons; prevents or restricts payment of wages in services or facilities; controls company stores and commissaries; outlaws ''kickbacks''; restrains assignment and garnishment of wages; and generally governs the calculation of wages and the frequency and manner of paying them. Where such legislation is applicable and does not contravene the requirements of the Act, nothing in the Act, the regulations, or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws.

HOW PAYMENTS MAY BE MADE

### § 531.27 Payment in cash or its equivalent required.

(a) Standing alone, sections 6 and 7 of the Act require payments of the prescribed wages, including overtime compensation, in cash or negotiable instrument payable at par. Section 3(m) provides, however, for the inclusion in the ''wage'' paid to any employee, under the conditions which it prescribes of the ''reasonable cost,'' or ''fair value'' as determined by the Secretary, of furnishing such employee with board, lodging, or other facilities. In addition,

section 3(m) provides that a tipped employee's wages may consist in part of tips. It is section 3(m) which permits and governs the payment of wages in other than cash.

(b) It should not be assumed that because the term ''wage'' does not appear in section 7, all overtime compensation must be paid in cash and may not be paid in board, lodging, or other facilities. There appears to be no evidence in either the statute or its legislative history which demonstrates the intention to provide one rule for the payment of the minimum wage and another rule for the payment of overtime compensation. The principles stated in paragraph (a) of this section are considered equally applicable to payment of the minimum hourly wage required by section 6 or of the wages required by the equal pay provisions of section 6(d), and to payment, when overtime is worked, of the compensation required by section 7. Thus, in determining whether he has met the minimum wage and overtime requirements of the Act, the employer may credit himself with the reasonable cost to himself of board, lodging, or other facilities customarily furnished by him to his employees when the cost of such board, lodging, or other facilities is not excluded from wages paid to such employees under the term of a bona fide collective bargaining agreement applicable to the employees. Unless the context clearly indicates otherwise, the term ''wage'' is used in this part to designate the amount due under either section 6 or section 7 without distinction. It should be remembered, however, that the wage paid for a job, within the meaning of the equal pay provisions of section 6(d), may include remuneration for employment which is not included in the employee's regular rate of pay under section 7(e) of the act or is not allocable to compensation for hours of work required by the minimum wage provisions of section 6. Reference should be made to parts 778 and 800 of this chapter for a more detailed discussion of the applicable principles.

(c) Tips may be credited or offset against the wages payable under the Act in certain circumstances, as discussed later in this subpart. See also the recordkeeping requirements contained in part 516 of this chapter.

### § 531.28 Restrictions applicable where payment is not in cash or its equivalent.

It appears to have been the clear intention of Congress to protect the basic minimum wage and overtime compensation required to be paid to the employee by sections 6 and 7 of the Act from profiteering or manipulation by the employer in dealings with the employee. Section 3(m) of the Act and subpart B of this part accordingly prescribe certain limitations and safeguards which control the payment of wages in other than cash or its equivalent. (Special recordkeeping requirements must also be met. These are contained in part 516 of this chapter.) These provisions, it should be emphasized, do not prohibit payment of wages in facilities furnished either as additions to a stipulated wage or as items for which deductions from the stipulated wage will be made; they prohibit only the use of such a medium of payment to avoid the obligation imposed by sections 6 and 7.

### § 531.29 Board, lodging, or other facilities.

Section 3(m) applies to both of the following situations: (a) Where board, lodging, or other facilities are furnished in addition to a stipulated wage; and (b) where charges for board, lodging, or other facilities are deducted from a stipulated wage. The use of the word ''furnishing'' and the legislative history of section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

### § 531.30 "Furnished" to the employee.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily ''furnished'' to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance

of the facility be voluntary and uncoerced. See *Williams* v. *Atlantic Coast Line Railroad Co.* (E.D.N.C.). 1 W.H. Cases 289.

### § 531.31 "Customarily" furnished.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where ''customarily'' furnished to the employee. Where such facilities are ''furnished'' to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities. See *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C.A. 9), cert. denied, 327 U.S. 803; *Southern Pacific Co.* v. *Joint Council* (C.A. 9) 7 W.H. Cases 536. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities ''customarily'' furnished.

### § 531.32 "Other facilities."

(a) ''Other facilities,'' as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.

(b) Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not appear to be ''facilities'' within the meaning of the section.

(c) It should also be noted that under § 531.3(d)(1), the cost of furnishing ''facilities'' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in § 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered ''facilities'' within the meaning of section 3(m) include: Safety caps, explosives, and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; ''dues'' to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as ''supper money,'' ''travel expenses,'' etc., see § 778.217 of this chapter.

### § 531.33 "Reasonable cost"; "fair value."

(a) Section 3(m) directs the Administrator to determine ''the reasonable cost * * * to the employer of furnishing * * * facilities'' to the employee, and in addition it authorizes him to determine ''the fair value'' of such facilities for defined classes of employees and in defined areas, which may be used in

lieu of the actual measure of the cost of such facilities in ascertaining the ''wages'' paid to any employee. Subpart B contains three methods whereby an employer may ascertain whether any furnished facilities are a part of ''wages'' within the meaning of section 3(m): (1) An employer may calculate the ''reasonable cost'' of facilities in accordance with the requirements set forth in § 531.3; (2) an employer may request that a determination of ''reasonable cost'' be made, including a determination having particular application; and (3) an employer may request that a determination of ''fair value'' of the furnished facilities be made to be used in lieu of the actual measure of the cost of the furnished facilities in assessing the ''wages'' paid to an employee.

(b) ''Reasonable cost,'' as determined in § 531.3 ''does not include a profit to the employer or to any affiliated person.'' Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities they will normally be deemed ''affiliated persons'' within the meaning of the regulations: (1) A spouse, child, parent, or other close relative of the employer; (2) a partner, officer, or employee in the employer company or firm; (3) a parent, subsidiary, or otherwise closely connected corporation; and (4) an agent of the employer.

### § 531.34 Payment in scrip or similar medium not authorized.

Scrip, tokens, credit cards, ''dope checks,'' coupons, and similar devices are not proper mediums of payment under the Act. They are neither cash nor ''other facilities'' within the meaning of section 3(m). However, the use of such devices for the purpose of conveniently and accurately measuring wages earned or facilities furnished during a single pay period is not prohibited. Piecework earnings, for example, may be calculated by issuing tokens (representing a fixed amount of work performed) to the employee, which are redeemed at the end of the pay period for cash. The tokens do not discharge the obligation of the employer to pay wages, but they may enable him to determine the amount of cash which is due to the employee. Similarly, board, lodging, or other facilities may be furnished during the pay period in exchange for scrip or coupons issued prior to the end of the pay period. The reasonable cost of furnishing such facilities may be included as part of the wage, since payment is being made not in scrip but in facilities furnished under the requirements of section 3(m). But the employer may not credit himself with ''unused scrip'' or ''coupons outstanding'' on the pay day in determining whether he has met the requirements of the Act because such scrip or coupons have not been redeemed for cash or facilities within the pay period. Similarly, the employee cannot be charged with the loss or destruction of scrip or tokens.

### § 531.35 "Free and clear" payment; "kickbacks."

Whether in cash or in facilities, ''wages'' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or ''free and clear.'' The wage requirements of the Act will not be met where the employee ''kicks-back'' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the ''kick-back'' is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

## PAYMENT WHERE ADDITIONS OR DEDUCTIONS ARE INVOLVED

### § 531.36 Nonovertime workweeks.

(a) When no overtime is worked by the employees, section 3(m) and this part apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works 40

hours a week at a cash wage rate of $1.60 an hour in a situation when that rate is the applicable minimum wage and is paid $64 in cash free and clear at the end of the workweek, and in addition is furnished facilities valued at $4, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and this part, since the employee has received in cash the applicable minimum wage of $1.60 an hour for all hours worked. Similarly, where an employee is employed at a rate of $1.80 an hour and during a particular workweek works 40 hours for which he is paid $64 in cash, the employer having deducted $8 from his wages for facilities furnished, whether such deduction meets the requirement of section 3(m) and subpart B of this part need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of $1.60 an hour. Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum, provided the prices charged do not exceed the ''reasonable cost'' of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage (which includes the ''reasonable cost'' of the facilities) below the required minimum. Accordingly, in a situation when $1.60 an hour is the applicable minimum wage, if an employee employed at a rate of $1.65 an hour works 40 hours in a workweek and is paid only $54 in cash, $12 having been deducted for facilities furnished to him, such facilities must be measured by the requirements of section 3(m) and this part to determine if the employee has received the minimum of $64 (40 hours × $1.60) in cash or in facilities which may be legitimately included in ''wages'' payable under the Act. The same would be true where an employee is furnished the facilities in addition to a cash wage of $54 for 40 hours of work. In either case, if the ''reasonable cost'' to the employer of legitimate facilities equals at least $10 the requirements of the Act are met. Cf. *Southern Pacific Co.* v. *Joint Council Dining Car Employees*, 165 F. (2d) 26 (C.A. 9).

(b) Deductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute ''board, lodging, or other facilities'' may likewise be made in nonovertime workweeks if the employee nevertheless received the required minimum wage in cash free and clear; but to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act, they are illegal.

### § 531.37 Overtime workweeks.

(a) Section 7 requires that the employee receive compensation for overtime hours at ''a rate of not less than one and one-half times the regular rate at which he is employed.'' When overtime is worked by an employee who receives the whole or part of his wage in facilities and it becomes necessary to determine the portion of his wages represented by facilities, all such facilities must be measured by the requirements of section 3(m) and subpart B of this part. It is the Administrator's opinion that deductions may be made, however, on the same basis in an overtime workweek as in nonovertime workweeks (see § 531.36), if their purpose and effect are not to evade the overtime requirements of the Act or other law, providing the amount deducted does not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. For example, in a situation where $1.60 an hour is the applicable minimum wage, if an employee is employed at a rate of $1.65 an hour (5 cents in excess of the minimum wage) the maximum amount which may be deducted from his wages in a 40-hour workweek for items such as tools, dynamite caps, miners' lamps, or other articles which are not ''facilities'' within the meaning of the Act, is 40 times 5 cents or $2 (see § 531.36). Deductions in excess of this amount for such articles are illegal in overtime workweeks as well as in nonovertime workweeks. There is no limit on the amount which may be deducted for ''board, lodging, or other facilities'' in overtime workweeks (as in workweeks

when no overtime is worked), provided that these deductions are made only for the ''reasonable cost'' of the items furnished. When such items are furnished at a profit, the amount of the profit (plus the full amount of any deductions for articles which are not facilities) may not exceed $2 in the example heretofore used in this paragraph. These principles assume a situation where bona fide deductions are made for particular items in accordance with the agreement or understanding of the parties. If the situation is solely one of refusal or failure to pay the full amount of wages required by section 7, these principles have no application. Deductions made only in overtime workweeks, or increases in the prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade the overtime requirements of the Act.

(b) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay. See *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C.A. 9), cert. denied, 327 U.S. 803. Thus, suppose an employee employed at a cash rate of $2 an hour, whose maximum nonovertime workweek under section 7(a) of the Act is 40 hours, works 44 hours during a particular workweek. If, in addition, he is furnished board, lodging, or other facilities valued at $16, but whose ''reasonable cost'' is $11, the $11 must be added to his cash straight-time pay of $88 ($2 × 44 hours) in determining the regular rate of pay on which his overtime compensation is to be calculated. The regular rate then becomes $2.25 an hour (($88+$11=$99)÷(44 hours)=$2.25 an hour). The employee is thus entitled to receive a total of $103.50 for the week ((40 hours × $2.25=$90)+(4 hours × $3.37 ½ =$13.50)). In addition to the straight-time pay of $88 in cash and $11 in facilities, extra compensation of $4.50 in cash for the 4 overtime hours must, therefore, be paid by the employer, to meet the requirements of the Act.

PAYMENTS MADE TO PERSONS OTHER THAN EMPLOYEES

### § 531.38 Amounts deducted for taxes.

Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as ''wages'' although they do not technically constitute ''board, lodging, or other facilities'' within the meaning of section 3(m). This principle is applicable to the employee's share of social security and State unemployment insurance taxes, as well as other Federal, State, or local taxes, levies, and assessments. No deduction may be made for any tax or share of a tax which the law requires to be borne by the employer.

### § 531.39 Payments to third persons pursuant to court order.

(a) Where an employer is legally obliged, as by order of a court of competent and appropriate jurisdiction, to pay a sum for the benefit or credit of the employee to a creditor of the employee, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceeding, deduction from wages of the actual sum so paid is not prohibited: *Provided,* That neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for the purposes of the Act, to payment to the employee.

(b) The amount of any individual's earnings withheld by means of any legal or equitable procedure for the payment of any debt may not exceed the restriction imposed by section 303(a), title III, Restriction on Garnishment, of the Consumer Credit Protection Act (82 Stat. 163, 164; 15 U.S.C. 1671 *et seq.*). The application of title III is discussed in part 870 of this chapter. When the payment to a third person of moneys withheld pursuant to a court order under which the withholdings exceeds that permitted by the CCPA, the

excess will not be considered equivalent to payment of wages to the employee for purpose of the Fair Labor Standards Act.

[35 FR 10757, July 2, 1970]

### § 531.40 Payments to employee's assignee.

(a) Where an employer is directed by a voluntary assignment or order of his employee to pay a sum for the benefit of the employee to a creditor, donee, or other third party, deduction from wages of the actual sum so paid is not prohibited: *Provided*, That neither the employer nor any person acting in his behalf or interest, directly or indirectly, derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for purposes of the Act, to payment to the employee.

(b) No payment by the employer to a third party will be recognized as a valid payment of compensation required under the Act where it appears that such payment was part of a plan or arrangement to evade or circumvent the requirements of section 3(m) or subpart B of this part. For the protection of both employer and employee it is suggested that full and adequate record of all assignments and orders be kept and preserved and that provisions of the applicable State law with respect to signing, sealing, witnessing, and delivery be observed.

(c) Under the principles stated in paragraphs (a) and (b) of this section, employers have been permitted to treat as payments to employees for purposes of the Act sums paid at the employees' direction to third persons for the following purposes: Sums paid, as authorized by the employee, for the purchase in his behalf of U.S. savings stamps or U.S. savings bonds; union dues paid pursuant to a collective bargaining agreement with bona fide representatives of the employees and as permitted by law; employees' store accounts with merchants wholly independent of the employer; insurance premiums (paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it); voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit directly or indirectly.

## PAYMENT OF WAGES TO TIPPED EMPLOYEES

### § 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m) provides:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

(b) ''Tipped employee'' is defined in section 3(t) of the Act as follows:

> *Tipped employee* means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

### § 531.51 Conditions for taking tip credits in making wage payments.

The wage credit permitted on account of tips under section 3(m) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of ''tipped employees'' as defined in section 3(t). Under section 3(t), the occupation of the employee must be one ''in which he customarily and regularly receives more than $20 a month in tips.'' To determine whether a tip credit may be taken in paying wages to a particular employee it is necessary to know what payments constitute ''tips,'' whether the employee receives ''more than $20 a month'' in such payments in the occupation in which he is engaged, and whether in

such occupation he receives these payments in such amount ''customarily and regularly.'' The principles applicable to a resolution of these questions are discussed in the following sections.

### § 531.52 General characteristics of "tips."

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a ''tipped employee'' within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

### § 531.53 Payments which constitute tips.

In addition to cash sums presented by customers which an employee keeps as his own, tips received by an employee include, within the meaning of the Act, amounts paid by bank check or other negotiable instrument payble at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money or its equivalent as above described such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of the Act.

### § 531.54 Tip pooling.

Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act.

### § 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips within the meaning of section 3(m) and 3(t). The amounts received from customers are the employer's property, not his, and do not constitute tip income to the employee.

(b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. However, where such sums are distributed by the employer to his employees, they may be used in their entirety to satisfy the monetary requirements of the Act. Also, if pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the

monetary requirements of the Act. In such instances, there is no applicability of the 50-percent limitation on tip credits provided by section 3(m).

### § 531.56 "More than $20 a month in tips."

(a) *In general.* An employee who receives tips, within the meaning of the Act, is a ''tipped employee'' under the definition in section 3(t) when, in the occupation in which he is engaged, the amounts he receives as tips customarily and regularly total ''more than $20 a month.'' An employee employed in an occupation in which the tips he receives meet this minimum standard is a ''tipped employee'' for whom the wage credit provided by section 3(m) may be taken in computing the compensation due him under the Act for employment in such occupation, whether he is employed in it full time or part time. An employee employed full time or part time in an occupation in which he does not receive more than $20 a month in tips customarily and regularly is not a ''tipped employee'' within the meaning of the Act and must receive the full compensation required by its provisions in cash or allowable facilities without any deduction for tips received under the provisions of section 3(m).

(b) *Month.* The definition of tipped employee does not require that the calendar month be used in determining whether more than $20 a month is customarily and regularly received as tips. Any appropriate recurring monthly period beginning on the same day of the calendar month may be used.

(c) *Individual tip receipts are controlling.* An employee must himself customarily and regularly receive more than $20 a month in tips in order to qualify as a tipped employee. The fact that he is part of a group which has a record of receiving more than $20 a month in tips will not qualify him. For example, a waitress who is newly hired will not be considered a tipped employee merely because the other waitresses in the establishment receive tips in the requisite amount. For the method of applying the test in initial and terminal months of employment, see § 531.58.

(d) *Significance of minimum monthly tip receipts.* More than $20 a month in tips customarily and regularly received by the employee is a minimum standard that must be met before any wage credit for tips is determined under section 3(m). It does not govern or limit the determination by the employer or the Secretary of Labor of the appropriate amount (up to 50 percent of the minimum wage) of wage credit under section 3(m) that may be taken for tips.

(e) *Dual jobs.* In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $20 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

### § 531.57 Receiving the minimum amount "customarily and regularly."

The employee must receive more than $20 a month in tips ''customarily and regularly'' in the occupation in which he is engaged in order to qualify as a tipped employee under section 3(t). If it is known that he always receives more than the stipulated amount each month, as may be the case with many employees in occupations such as those of waiters, bellhops, taxicab drivers, barbers, or beauty operators, the employee will qualify and the tip credit provisions of section 3(m) may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than $20 a month, such as at Christmas or New

Years when customers may be more generous than usual, will not be deemed a tipped employee. The phrase ''customarily and regularly'' signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he normally and recurrently receives more than $20 a month in tips, he will be considered a tipped employee even though occasionally because of sickness, vacation, seasonal fluctuations or the like, he fails to receive more than $20 in tips in a particular month.

**§ 531.58 Initial and terminal months.**

An exception to the requirement that an employee, whether full-time, part-time, permanent or temporary, will qualify as a tipped employee only if he customarily and regularly receives more than $20 a month in tips is made in the case of initial and terminal months of employment. In such months the purpose of the provision for tipped employees would seem fulfilled if qualification as a tipped employee is based on his receipt of tips in the particular week or weeks of such month at a rate in excess of $20 a month, where the employee has worked less than a month because he started or terminated employment during the month.

**§ 531.59 The tip wage credit.**

In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m) the amount paid to a tipped employee by an employer is deemed to be increased on account of tips by an amount which cannot exceed 50 percent of the minimum wage applicable to such employee in the workweek for which the wage payment is made. This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m). The credit allowed on account of tips may be less than 50 percent of the applicable minimum wage; it cannot be more. The actual amount is left by the statute to determination by the employer on the basis of his information concerning the tipping practices and receipts in his establishment. However, section 3(m) provides that an employee who can show to the satisfaction of the Secretary of Labor that the actual amount of tips received by him was less than the amount determined by the employer as a tip credit shall receive an appropriate wage adjustment. See § 531.50(a). As stated in Senate Report No. 1487 (89th Cong. 2d sess.), it is presumed that in the application of this special provision the employee will be receiving at least the maximum tip credit in actual tips: ''If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips.'' Provision is made in § 531.7 for employee requests for review of tip credit determinations made by employers, in the event that the employee considers that the tip credit taken exceeds his actual tips. As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which he qualifies as a ''tipped employee.'' Under employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income. See also § 531.54.

**§ 531.60 Overtime payments.**

(a) When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, his regular rate of pay is determined by dividing hs total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. (See part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of 50 percent of the applicable minimum wage), the reasonable cost or fair value of any facilities furnished him by the employer, as authorized under section 3(m) and this part 531, and the cash

wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

# PART 536—AREA OF PRODUCTION

Sec.
536.1–536.2 [Reserved]
536.3 ''Area of production'' as used in section 13(b)(14) of the Fair Labor Standards Act.

AUTHORITY: Sec. 13(a)(17), 52 Stat. 1067, as amended, sec. 9, 75 Stat. 71, as amended, sec. 204(b), 80 Stat. 835; 29 U.S.C. 213(b)(14).

SOURCE: 27 FR 400, Jan. 13, 1962, unless otherwise noted.

## §§ 536.1–536.2 [Reserved]

## § 536.3 "Area of production" as used in section 13(b)(14) of the Fair Labor Standards Act.

(a) An employee employed by an establishment commonly recognized as a country elevator and having not more than five employees (including such an establishment which sells products and services used in the operation of a farm) shall be regarded as employed within the ''area of production,'' within the meaning of section 13(b)(14) of the Fair Labor Standards Act, if the establishment by which he is employed is located in the open country or in a rural community and 95 percent of the agricultural commodities received by the establishment for storage or for market come from normal rural sources of supply within the following air-line distances from the establishment:

(1) With respect to grain and soybeans—50 miles;

(2) With respect to any other agricultural commodities—20 miles.

(b) For the purpose of this section:

(1) ''Open country or rural community'' shall not include any city, town, or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of the city, town, or urban place with a population of 2,500 up to by not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater, according to the latest available United States Census.

(2) The commodities shall be considered to come from ''normal rural sources of supply'' within the specified distances from the establishment if they are received: (i) From farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

(Sec. 13(a) (17), 52 Stat. 1067, as amended, sec. 9, 75 Stat. 71; 29 U.S.C. 213 (a) (17))

[27 FR 400, Jan. 13, 1962, as amended at 71 FR 16666, Apr. 3, 2006]

# PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

## Subpart A—General Regulations

Sec.
541.0 Introductory statement.

541.1 Terms used in regulations.
541.2 Job titles insufficient.
541.3 Scope of the section 13(a)(1) exemptions.
541.4 Other laws and collective bargaining agreements.

Subpart B—Executive Employees

541.100 General rule for executive employees.
541.101 Business owner.
541.102 Management.
541.103 Department or subdivision.
541.104 Two or more other employees.
541.105 Particular weight.
541.106 Concurrent duties.

Subpart C—Administrative Employees

541.200 General rule for administrative employees.
541.201 Directly related to management or general business operations.
541.202 Discretion and independent judgment.
541.203 Administrative exemption examples.
541.204 Educational establishments.

Subpart D—Professional Employees

541.300 General rule for professional employees.
541.301 Learned professionals.
541.302 Creative professionals.
541.303 Teachers.
541.304 Practice of law or medicine.

Subpart E—Computer Employees

541.400 General rule for computer employees.
541.401 Computer manufacture and repair.
541.402 Executive and administrative computer employees.

Subpart F—Outside Sales Employees

541.500 General rule for outside sales employees.
541.501 Making sales or obtaining orders.
541.502 Away from employer's place of business.
541.503 Promotion work.
541.504 Drivers who sell.

Subpart G—Salary Requirements

541.600 Amount of salary required.
541.601 Highly compensated employees.
541.602 Salary basis.
541.603 Effect of improper deductions from salary.
541.604 Minimum guarantee plus extras.
541.605 Fee basis.
541.606 Board, lodging or other facilities.

Subpart H—Definitions And Miscellaneous Provisions

541.700 Primary duty.
541.701 Customarily and regularly.
541.702 Exempt and nonexempt work.
541.703 Directly and closely related.
541.704 Use of manuals.
541.705 Trainees.
541.706 Emergencies.
541.707 Occasional tasks.
541.708 Combination exemptions.
541.709 Motion picture producing industry.
541.710 Employees of public agencies.

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## Subpart A—General Regulations

### § 541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee, as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act. Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees.

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated

employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

(c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee under section 13(a)(1) of the Act. The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the United States Equal Employment Opportunity Commission.

### § 541.1 Terms used in regulations.

*Act* means the Fair Labor Standards Act of 1938, as amended.

*Administrator* means the Administrator of the Wage and Hour Division, United States Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in the Secretary under sections 13(a)(1) and 13(a)(17) of the Fair Labor Standards Act.

### § 541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

### § 541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other ''blue collar'' workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt ''blue collar'' employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

### § 541.4 Other laws and collective bargaining agreements.

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

## Subpart B—Executive Employees

### § 541.100 General rule for executive employees.

(a) The term ''employee employed in a bona fide executive capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase ''salary basis'' is defined at § 541.602; ''board, lodging or other facilities'' is defined at § 541.606; ''primary duty'' is defined at § 541.700; and ''customarily and regularly'' is defined at § 541.701.

### § 541.101 Business owner.

The term ''employee employed in a bona fide executive capacity'' in section 13(a)(1) of the Act also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management. The term ''management'' is defined in § 541.102. The requirements of Subpart G (salary requirements) of this part do not apply to the business owners described in this section.

### § 541.102 Management.

Generally, ''management'' includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their

rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

**§ 541.103 Department or subdivision.**

(a) The phrase ''a customarily recognized department or subdivision'' is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.

(c) A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

**§ 541.104 Two or more other employees.**

(a) To qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase ''two or more other employees'' means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

**§ 541.105 Particular weight.**

To determine whether an employee's suggestions and recommendations are given ''particular weight,'' factors to

be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a coworker. An employee's suggestions and recommendations may still be deemed to have ''particular weight'' even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

**§ 541.106 Concurrent duties.**

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

## Subpart C—Administrative Employees

**§ 541.200 General rule for administrative employees.**

(a) The term ''employee employed in a bona fide administrative capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

**§ 541.201 Directly related to management or general business operations.**

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase ''directly related to the management or general business operations'' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

**§ 541.202 Discretion and independent judgment.**

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ''matters of significance'' refers to the level of importance or consequence of the work performed.

(b) The phrase ''discretion and independent judgment'' must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the

term ''discretion and independent judgment'' does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a ''statistician.''

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

### § 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and

implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who ''screen'' applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the

use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

**§ 541.204 Educational establishments.**

(a) The term ''employee employed in a bona fide administrative capacity'' in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term ''educational establishment'' means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term ''other educational establishment'' includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase ''performing administrative functions directly related to academic instruction or training'' means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

## Subpart D—Professional Employees

### § 541.300 General rule for professional employees.

(a) The term ''employee employed in a bona fide professional capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

### § 541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase ''work requiring advanced knowledge'' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase ''field of science or learning'' includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase ''customarily acquired by a prolonged course of specialized intellectual instruction'' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word ''customarily'' means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience

rather than by advanced specialized intellectual instruction.

(e)(1) *Registered or certified medical technologists.* Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(2) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) *Dental hygienists.* Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

(5) *Accountants.* Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) *Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) *Athletic trainers.* Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) *Funeral directors or embalmers.* Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties

requirements for the learned professional exemption.

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

**§ 541.302 Creative professionals.**

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be ''in a recognized field of artistic or creative endeavor.'' This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of ''invention, imagination, originality or talent'' distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an ''animator'' of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

**§ 541.303 Teachers.**

(a) The term ''employee employed in a bona fide professional capacity'' in

section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term ''educational establishment'' is defined in § 541.204(b).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (*e.g.*, permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of § 541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

### § 541.304 Practice of law or medicine.

(a) The term ''employee employed in a bona fide professional capacity'' in section 13(a)(1) of the Act also shall mean:

(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term ''physicians'' includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section.

## Subpart E—Computer Employees

### § 541.400 General rule for computer employees.

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the

computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, and the section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

### § 541.401 Computer manufacture and repair.

The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in § 541.400(b), are also not exempt computer professionals.

### § 541.402 Executive and administrative computer employees.

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

## Subpart F—Outside Sales Employees

### § 541.500 General rule for outside sales employees.

(a) The term ''employee employed in the capacity of outside salesman'' in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term ''primary duty'' is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's

own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

### § 541.501 Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that ''sale'' or ''sell'' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also ''obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.'' Obtaining orders for ''the use of facilities'' includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word ''services'' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

### § 541.502 Away from employer's place of business.

An outside sales employee must be customarily and regularly engaged ''away from the employer's place or places of business.'' The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's place of business.

### § 541.503 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty

is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

**§ 541.504 Drivers who sell.**

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited, who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.

(4) A driver who calls on established customers along the route and persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

## Subpart G—Salary Requirements

### § 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.204(a)(1).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

### § 541.601 Highly compensated employees.

(a) An employee with total annual compensation of at least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b)(1) ''Total annual compensation'' must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may

still qualify as exempt under subparts B, C or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

**§ 541.602 Salary basis.**

(a) *General rule.* An employee will be considered to be paid on a ''salary basis'' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness

or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

### § 541.603 Effect of improper deductions from salary.

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to

pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

(e) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

### § 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

**§ 541.605 Fee basis.**

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a ''fee basis'' within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a ''fee'' is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. Thus, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $500 if 40 hours were worked.

**§ 541.606 Board, lodging or other facilities.**

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in § 541.600, ''exclusive of board, lodging or other facilities.'' The phrase ''exclusive of board, lodging or other facilities'' means ''free and clear'' or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) Regulations defining what constitutes ''board, lodging, or other facilities'' are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term ''other facilities'' refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished

for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.

## Subpart H—Definitions and Miscellaneous Provisions

### § 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's ''primary duty'' must be the performance of exempt work. The term ''primary duty'' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

### § 541.701 Customarily and regularly.

The phrase ''customarily and regularly'' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ''customarily and regularly'' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

### § 541.702 Exempt and nonexempt work.

The term ''exempt work'' means all work described in §§ 541.100, 541.101, 541.200, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities directly and closely related to such work. All other work is considered ''nonexempt.''

### § 541.703 Directly and closely related.

(a) Work that is ''directly and closely related'' to the performance of exempt work is also considered exempt work. The phrase ''directly and closely related'' means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, ''directly and closely related'' work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work ''directly and closely related'' to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not ''directly and closely related'' if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is

not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in

the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

### § 541.704 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

### § 541.705 Trainees.

The executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.

### § 541.706 Emergencies.

(a) An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An ''emergency'' does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a bona fide executive.

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

### § 541.707 Occasional tasks.

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice

for the exempt employee to perform the task.

### § 541.708 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

### § 541.709 Motion picture producing industry.

The requirement that the employee be paid ''on a salary basis'' does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $695 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C or D of this part, and who is employed at a base rate of at least $695 a week is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(a) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least $695 if 6 days were worked; or

(b) The employee is in a job category having a weekly base rate of at least $695 and the daily base rate is at least one-sixth of such weekly base rate.

### § 541.710 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

## PART 547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN''

Sec.
547.0 Scope and effect of part.
547.1 Essential requirements for qualifications.
547.2 Disqualifying provisions.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

SOURCE: 19 FR 4864, Aug. 3, 1954, unless otherwise noted.

### § 547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the Act). In determining the total remuneration for employment which section 7(e) of the Act requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements

set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, or with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations. Part 549, or the tests set forth in Interpretative Bulletin, part 778 of this chapter, §§ 778.214 and 778.215, as the case may be.

### § 547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the Act is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § 547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees' *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: *Provided, however,* That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a ''bona fide thrift or savings plan'' within the meaning of section 7(e)(3)(b) of the Act if:

(1) The plan meets all the other standards of this section;

(2) The plan contains none of the disqualifying factors enumerated in § 547.2;

(3) The employer's contribution is based to a substantial degree upon retention of savings; and

(4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

(Approved by the Office of Management and Budget under control number 1215–0119)

[19 FR 4864, Aug. 3, 1954, as amended at 47 FR 145, Jan. 5, 1982; 71 FR 16666, Apr. 3, 2006]

### § 547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced

by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

# PART 548—AUTHORIZATION OF ESTABLISHED BASIC RATES FOR COMPUTING OVERTIME PAY

## Subpart A—General Regulations

Sec.
548.1 Scope and effect of regulations.
548.2 General conditions.
548.3 Authorized basic rates.
548.4 Application for authorization of a ''basic rate.''

## Subpart B—Interpretations

INTRODUCTION

548.100 Introductory statement.

REQUIREMENTS FOR A BASIC RATE

548.200 Requirements.

AUTHORIZED BASIC RATES

548.300 Introductory statement.
548.301 Salaried employees.
548.302 Average earnings for period other than a workweek.
548.303 Average earnings for each type of work.
548.304 Excluding value of lunches furnished.
548.305 Excluding certain additions to wages.
548.306 Average earnings for year or quarter year preceding the current quarter.

RATES AUTHORIZED ON APPLICATION

548.400 Procedures.
548.401 Agreement or understanding.
548.402 Applicable overtime provisions.
548.403 Description of method of calculation.
548.404 Kinds of jobs or employees.
548.405 Representative period.

COMPUTATION OF OVERTIME PAY

548.500 Methods of computation.
548.501 Overtime hours based on nonstatutory standards.
548.502 Other payments.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207, unless otherwise noted.

## Subpart A—General Regulations

SOURCE: 20 FR 5679, Aug. 6, 1955, unless otherwise noted.

### § 548.1 Scope and effect of regulations.

The regulations in this part set forth the requirements for authorization of established basic rates to be used in the computation of overtime pay in accordance with section 7(g)(3) of the Fair Labor Standards Act of 1938, as amended. Payment of overtime compensation in accordance with other subsections of section 7 of the Act is explained in part 778 of this title (Interpretative Bulletin on Overtime Compensation).

### § 548.2 General conditions.

The requirements of section 7 of the Act with respect to the payment of overtime compensation to an employee for a workweek longer than the applicable number of hours established in section 7(a) of the Act, will be met under the provisions of section 7(g)(3) of the Act by payments which satisfy all the following standards:

(a) Overtime compensation computed in accordance with this part and section 7(g)(3) of the Act is paid pursuant to an agreement or understanding arrived at between the employer and the employee or as a result of collective bargaining before performance of the work;

(b) A rate is established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder;

(c) The established basic rate is a specified rate or a rate which can be derived from the application of a specified method of calculation;

(d) The established basic rate is a bona fide rate and is not less than the minimum hourly rate required by applicable law;

(e) The basic rate so established is authorized by § 548.3 or is authorized by the Administrator under § 548.4 as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

(f) Overtime hours are compensated at a rate of not less than one and one-half times such established basic rate;

(g) The hours for which the employee is paid not less than one and one-half times such established basic rate qualify as overtime hours under section 7(e)(5), (6), or (7) of the Act;

(h) The number of hours for which the employee is paid not less than one and one-half times such established basic rate equals or exceeds the number of hours worked by him in any workweek in excess of the maximum workweek applicable to such employees under subsection 7(a) of the Act;

(i) The employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the Act are not less than the minimum hourly rate required by this Act or other applicable law;

(j) Extra overtime compensation is properly computed and paid on other forms of additional pay which have not been considered in arriving at the basic rate but which are required to be included in computing the regular rate.

[20 FR 5679, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

### § 548.3 Authorized basic rates.

A rate which meets all of the conditions of § 548.2 and which in addition satisfies all the conditions set forth in one of the following paragraphs will be regarded as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time and may be used in computing overtime compensation for purposes of section 7(g)(3) of the Act, and § 548.2:

(a) A rate per hour which is obtained by dividing a monthly or semi-monthly salary by the number of regular working days in each monthly or semi-monthly period and then by the number or hours in the normal or regular workday. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the monthly or semi-monthly period for which the salary is paid.

(b) A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the Act, of the employee for all work performed during the workday or any other longer period not exceeding sixteen calendar days for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the particular period for which the earnings average is computed.

(c) A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the Act, of the employee for each type of work performed during each workweek, or any other longer period not exceeding sixteen calendar days, for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation, during the particular period for which such average is computed, for all the overtime hours worked by the employee at the type of work for which the rate is obtained.

(d) The rate or rates which may be used under the Act to compute overtime compensation of the employee but excluding the cost of meals where the employer customarily furnishes not more than a single meal per day.

(e) The rate or rates (not less than the rates required by section 6 (a) and (b) of the Act) which may be used under the Act to compute overtime compensation of the employee but excluding additional payments in cash or in kind which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the Act) in the period for which such additional payments are made.

(f)(1) A rate per hour for each workweek equal to the average hourly remuneration of the employee for employment during the annual period or the quarterly period immediately preceding the calendar or fiscal quarter year in which such workweek ends, provided: (i) It is a fact, confirmed by proper records of the employer, that

the terms, conditions, and circumstances of employment during such prior period, including weekly hours of work, work assignments and duties, and the basis of remuneration for employment, were not significantly different from the terms, conditions, and circumstances of employment which affect the employee's regular rates of pay during the current quarter year, or differ only because of some change in basic salary or similar nonfluctuating factor for which suitable adjustments have been made in the calculations to accurately reflect such change and (ii) such average hourly remuneration during the prior period is computed by the method or methods authorized in the following paragraphs.

(2) The average hourly remuneration on which the rate authorized in paragraph (f)(1) of this section is based shall be computed: (i) By totaling all remuneration for employment during the workweeks ending in the prior period (including all earnings at hourly or piece rates, bonuses, commission or other incentive payments, and other forms of remuneration paid to or on behalf of the employee) except overtime premiums and other payments excluded from the regular rate pursuant to provisions of section 7(e) of the Act, and (ii) by dividing the amount thus obtained by the number of hours worked in such prior period for which such compensation was paid.

(3) Where it is not practicable for an employer to compute the total remuneration of an employee for employment in the prior period in time to determine obligations under the Act for the current quarter year (as where computation of bonus, commission, or incentive payments cannot be made immediately at the end of the period), a one month grace period may be used. If this one month grace period is used, it will be deemed in compliance with paragraph (f)(1) of this section to use the basic rate authorized therein for the quarter commencing one month after the next preceding four-quarter or quarter-year period (whichever length period is adopted as the base period for the rate determination). Once the grace period method of computation is adopted it must be used for each successive quarter.

(52 Stat. 1060, as amended; 29 U.S.C. 201)

[20 FR 5679, Aug. 6, 1955, as amended at 28 FR 11266, Oct. 22, 1963; 31 FR 6769, May 6, 1966]

### § 548.4 Application for authorization of a "basic rate."

(a) Application may be made by any employer or group of employers, for authorization of a basic rate or rates, other than those approved under § 548.3. Application must be made jointly with any collective bargaining representative of employees covered by the application. Application must be made to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(b) Each application shall contain the following:

(1) A statement of the agreement or understanding arrived at between the employer and employee, including the proposed effective date, the term of the agreement or understanding, and a statement of the applicable overtime provisions, and

(2) A description of the basic rate of the method or formula to be used in computing the basic rate for the type of work or position to which it will be applicable, and

(3) A statement of the kinds of jobs or employees covered by the agreement, and

(4) The facts and reasons relied upon to show that the basic rate so established is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time. For such showing, a basic rate shall be deemed ''substantially equivalent'' to the average hourly earnings of the employee if, during a representative period, the employee's total overtime earnings calculated at the basic rate in accordance with the applicable overtime provisions are substantially equivalent to the amount of such earnings when computed in accordance with section 7(a) of the Act on the basis of the employee's average hourly earnings for each workweek, and

(5) Such additional information as the Administrator may require.

(c) The Administrator shall require that notice of the application be given to affected employees in such manner as he deems appropriate. The Administrator shall notify the applicants in writing of his decision as to each application.

(d) In authorizing a basic rate pursuant to this part, the Administrator shall include such conditions as are necessary to insure that the basic rate will be used only so long as it is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time, and such other conditions as are necessary or appropriate to insure compliance with the provisions of the Act.

(e) The Administrator may at any time, upon his own motion or upon written request of any interested party setting forth reasonable grounds therefor, and after a hearing or other opportunity to interested persons to present their views, amend or revoke any authorization granted under this part.

## Subpart B—Interpretations

INTRODUCTION

### § 548.100 Introductory statement.

(a) This subpart contains material explaining and illustrating the terms used in subpart A of this part which were issued under section 7(g)(3) of the Fair Labor Standards Act. The purpose of section 7(g)(3) of the Act, and subpart A of this part, is to provide an exception from the requirements of computing overtime pay at the regular rate,[1] and to allow, under specific conditions, the use of an established ''basic'' rate[2] instead. Basic rates are alternatives to the regular rate of pay under section 7(a), and their use is optional. The use of basic rates is principally intended to simplify bookkeeping and computation of overtime pay.

(b) Section 7(g) of the Fair Labor Standards Act provides that an employer will comply with the overtime requirements of the Act if:

* * * pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection [7](a):

* * * * *

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

[20 FR 5680, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

REQUIREMENTS FOR A BASIC RATE

### § 548.200 Requirements.

The following conditions must be satisfied if a ''basic'' rate is to be considered proper under section 7(g)(3) and subpart A of this part.

[1] The regular rate is the average hourly earnings of an employee for a workweek. See §§ 778.107 to 778.122 of this chapter on overtime compensation. Sections 7(g)(1) and 7(g)(2) of the Act permit overtime compensation to be computed, under specified conditions, at time and one-half the bona fide hourly or piece rate applicable to the work performed during the overtime hours. See §§ 778.415 to 778.421 of this chapter.

[2] The term ''basic'' rate as used in this part means the rate authorized under section 7(g)(3) of the Fair Labor Standards Act. Such a rate may be used to compute overtime compensation under the Walsh-Healey Public Contracts Act. (See Rulings and Interpretations No. 3. section 42(e)(1)). However, the term ''basic'' rate in this part should not be confused with the more general use of the term in the Public Contracts Act to describe all rates which may be used to compute overtime compensation or the use of the term in any other statute.

(a) *Agreement or understanding.* There must be an agreement or understanding establishing a basic rate or rates. This agreement must be arrived at before performance of the work to which it is intended to apply. It may be arrived at directly with the employee or through his representative. The ''basic'' rate method of computing overtime may be used for as many of the employees in an establishment as the employer chooses, provided he has reached an agreement or understanding with these employees prior to the performance of the work.[3]

(b) *The rate.* The established basic rate may be a specified rate or a rate which can be derived from the application of a specified method of calculation. For instance, under certain conditions the Regulations permit the use of the daily average hourly earnings of the employee as a basis for computing daily overtime.[4] Thus, a method rather than a specific rate is authorized. Also, under certain conditions, the cost of a single meal a day furnished to employees may be excluded from the computation of overtime pay.[5] It is the exclusion of the cost of the meals that is authorized and each employee's rate of pay, whatever it may be—an hourly rate, a piece rate or a salary—is his basic rate.

(c) *Minimum wage.* The employee's average hourly earnings for the workweek (exclusive of overtime pay and other pay which may be excluded from the regular rate)[6] and the established basic rate used to compute overtime pay may not be less than the legal minimum.[7]

[20 FR 5680, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

[3] The records which an employer is required to maintain and preserve for an employee compensated for overtime hours on the basis of a basic rate are described in §§ 516.5(b)(5) and 516.21 of this subchapter.

[4] See § 548.302.

[5] See § 548.304.

[6] See §§ 778.200 through 778.225 of this chapter for further discussion of what payments may be excluded.

[7] The legal minimum is the highest rate required by the Fair Labor Standards Act or other Federal, State or local law.

AUTHORIZED BASIC RATES

### § 548.300 Introductory statement.

Section 548.3 contains a description of a number of basic rates any one of which, when established by agreement or understanding, is authorized for use without prior specific approval of the Administrator. These basic rates have been found in use in industry and the Administrator has determined that they are substantially equivalent to the straight-time average hourly earnings of the employee over a representative period of time. The authorized basic rates are described below.

[20 FR 5681, Aug. 6, 1955]

### § 548.301 Salaried employees.

(a) Section 548.3(a) authorizes as an established basic rate: ''A rate per hour which is obtained by dividing a monthly or semi-monthly salary by the number of regular working days in each monthly or semi-monthly period and then by the number of hours in the normal or regular workday. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the monthly or semi-monthly period for which the salary is paid.''

(b) Section 548.3(a) may be applied to salaried employees paid on a monthly or semi-monthly basis. Under section 7(a) of the Act the method of computing the regular rate of pay for an employee who is paid on a monthly or semi-monthly salary basis is to reduce the salary to its weekly equivalent by multiplying the monthly salary by 12 (the number of months) or the semi-monthly salary by 24, and dividing by 52 (the number of weeks). The weekly equivalent is then divided by the number of hours in the week which the salary is intended to compensate.[8] Section 548.3(a) is designed to provide an alternative method of computing the rate for overtime purposes in the case of an employee who is compensated on a monthly or semi-monthly salary basis, where this method is found more desirable. This method is applicable only where the salary is paid for a specified number of days per week and

[8] See § 778.113 of this chapter.

a specified number of hours per day normally or regularly worked by the employee. It permits the employer to take into account the variations in the number of regular working days in each pay period. The basic rate authorized by § 548.3(a) is obtained by dividing the monthly or semi-monthly salary by the number of regular working days in the month or half-month, and then by the number of hours of the normal or regular work day.

*Example.* An employee is compensated at a semi-monthly salary of $154 for a workweek of 5 days of 8 hours each, Monday through Friday. If a particular half-month begins on Tuesday and ends on the second Tuesday following, there are 11 working days in that half-month. The employee's basic rate would then be computed by dividing the $154 salary by 11 working days of 8 hours each, or 88 hours. The basic rate in this situation would therefore be $1.75 an hour. The basic rate would remain the same regardless of the fact that the employee did not actually work 11 days of 8 hours each because of the occurrence of a holiday, or because the employee took a day off, or because he worked longer than 8 hours on some days during the period, or because he worked fewer than 8 hours on some days, or because he worked more then 11 days. In any of these circumstances the employee's basic rate would still be $1.75 an hour. If in the next semimonthly period there are 10 working days the rate would be computed by dividing the salary of $154 by 80 working hours, or 10 days of 8 hours each. The basic rate would therefore be $1.925 an hour. The rate would remain $1.925 an hour even though the employee did not in fact work ten 8-hour days during the period for the reasons indicated above, or for any other reason.

(c) The overtime compensation for each workweek should be computed at not less than time and one-half the established basic rate applicable in the period during which the overtime is worked. Thus, in the example given above all overtime worked in the first half-month would be computed at not less than time and one-half the basic rate of $1.75 an hour; in the second half-month overtime would be paid for at not less than time and one-half the rate of $1.925 an hour. Where a workweek overlaps two semimonthly periods part of the overtime may be performed in one semimonthly period and part in another semimonthly period with a different basic rate. If it is desired to avoid computing overtime compensation in the same workweek at two different rates, the employment arrangement may provide that overtime compensation for each workweek should be computed at the established basic rate applicable in the half-monthly or monthly period during which the workweek ends.

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*)

[20 FR 5681, Aug. 6, 1955, as amended at 32 FR 3293, Feb. 25, 1967]

### § 548.302 Average earnings for period other than a workweek.

(a) Section 548.3(b) authorizes as an established basic rate: ''A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for all work performed during the workday or any other longer period not exceeding sixteen calendar days for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the particular period for which the earnings average is computed.''

(b)(1) The ordinary method of computing overtime under the act is at the employee's regular rate of pay, obtained by averaging his hourly earnings for each workweek. Section 548.3(b) authorizes overtime to be computed on the basis of the employee's average hourly earnings for a period longer or shorter than a workweek. It permits the payment of overtime compensation on the basis of average hourly earnings for a day, a week, two weeks or any period up to 16 calendar days, if the period is established and agreed to with the employee prior to the performance of the work.[9] The agreement or understanding may contemplate that the basic rate will be the average hourly earnings for a day or a specified number of days within the sixteen day limit, or it may provide that the basic rate will be the average

[9] Averaging over periods in excess of 16 calendar days may in appropriate cases be authorized by the Administrator under § 548.4.

hourly earnings for the period required to complete a specified job or jobs.

*Example 1.* An employee is employed on a piece-work basis with overtime after 8 hours a day and on Saturday. Ordinarily his overtime compensation would be computed by averaging his earnings for the entire workweek to arrive at the regular rate of pay and then computing the overtime compensation due. Under this subsection of the regulations the employer and the employee may agree to compute overtime on the basis of the average hourly earnings for each day. Similarly, in a situation involving a bi-weekly or a semi-monthly pay period the employer may find it convenient to compute overtime on the basis of the average hourly earnings for the bi-weekly or semi-monthly period.[10]

*Example 2.* An employee, who normally would come within the forty hour provision of section 7(a) of the Act, is paid a fixed amount of money for the completion of each job. Each job takes 2 or 3 days to complete. Under the employment agreement, the employee is entitled to time and one-half an authorized basic rate for all hours worked in excess of forty in the workweek. The authorized basic rate is the employee's average hourly earnings for each job. Suppose he completes two jobs in a particular workweek and all his overtime hours are on job No. 2. The employee's average hourly earnings on job No. 2 may be used to compute his overtime pay.

(2) In this connection it should be noted that although the basic rate is obtained by averaging earnings over a period other than a workweek the number of overtime hours under the act must be determined on a workweek basis.

(c) In computing the basic rate under § 548.3(b), the employer may exclude from the computation the payments which he could exclude in computing the ''regular'' rate of pay.[11]

[20 FR 5681, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

### § 548.303 Average earnings for each type of work.

(a) Section 548.3(c) authorizes as an established basic rate: ''A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for each type of work performed during each workweek, or any other longer period not exceeding sixteen calendar days, for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation, during the particular period for which such average is computed, for all the overtime hours worked by the employee at the type of work for which the rate is obtained.''

(b) Section 548.3(c) differs from § 548.3(b) in this way: Section 548.3(b) provides for the computation of the basic rate on the average of all earnings during the specified period; § 548.3(c) permits the basic rate to be computed on the basis of the earnings for each particular type of work. Thus, if the employee performs different types of work, each involving a different rate of pay such as different piece-rate, job rates, or a combination of these with hourly rates, a separate basic rate may be computed for each type of work and overtime computed on the basis of the rate or rates applicable to the type of work performed during the overtime hours.

*Example.* An employee who is paid on a weekly basis with overtime after 40 hours works six 8-hour days in a workweek under an agreement or understanding reached pursuant to this subsection. He performs three different types of piecework, each at a different rate of pay. The basic rates to be used for computing overtime in this situation would be arrived at by dividing the earnings for each type of work by the number of hours during which that type of work was performed. There would thus be three different basic rates, one for each type of work. Since the overtime hours used in this illustration occur on the sixth day, the types of work performed on the sixth day would determine the basic rate or rates on which overtime would be computed that week. Thus, if the average hourly earnings for the three types of work are respectively $1.70 an hour in type A, $1.80 an hour in type B, and $2 an hour in type C, and on the sixth day the employee works on type B, his overtime premium for the sixth day would be one-half the basic

[10] See § 548.301 (c) for a discussion of the method of computing overtime for an employee paid on a semi-monthly basis.

[11] See §§ 778.200 through 778.225 of this chapter for an explanation of what payments may be excluded.

rate of $1.80 an hour, multiplied by the 8 hours worked on that day.

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*)

[20 FR 5681, Aug. 6, 1955, as amended at 32 FR 3293, Feb. 25, 1967]

### § 548.304 Excluding value of lunches furnished.

(a) Section 548.3(d) authorizes as established basic rates:

The rate or rates which may be used under the Act to compute overtime compensation of the employee but excluding the cost of meals where the employer customarily furnishes not more than a single meal per day.

(b) It is the purpose of § 548.3(d) to permit the employer upon agreement with his employees to omit from the computation of overtime the cost of a free daily lunch or other single daily meal furnished to the employees. The policy behind § 548.3(d) is derived from the Administrator's experience that the amount of additional overtime compensation involved in such cases is trivial and does not justify the bookkeeping required in computing it. Section 548.3(d) is applicable only in cases where the employer customarily furnishes no more than a single meal a day. If more than one meal a day is customarily furnished by the employer all such meals must be taken into account in computing the regular rate of pay and the overtime compensation due.[12] In a situation where the employer furnishes three meals a day to his employees he may not, under § 548.3(d), omit one of the three meals in computing overtime compensation. However, if an employer furnishes a free lunch every day and, in addition, occasionally pays ''supper money''[13] when the employees work overtime, the cost of the lunches and the supper money may both be excluded from the overtime rates.

[20 FR 5682, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

### § 548.305 Excluding certain additions to wages.

(a) Section 548.3(e) authorizes as established basic rates: ''The rate or rates (not less than the rates required by section 6 (a) and (b) of the Act) which may be used under the Act to compute overtime compensation of the employee but excluding additional payments in cash or in kind which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the Act) in the period for which such additional payments are made.''

(b) Section 548.3(e) permits the employer, upon agreement or understanding with the employee, to omit from the computation of overtime certain incidental payments which have a trivial effect on the overtime compensation due. Examples of payments which may be excluded are: modest housing, bonuses or prizes of various sorts, tuition paid by the employer for the employee's attendance at a school, and cash payments or merchandise awards for soliciting or obtaining new business. It may also include such things as payment by the employer of the employee's social security tax.

(c) The exclusion of one or more additional payments under § 548.3(e) must not affect the overtime compensation of the employee by more than 50 cents a week on the average for the overtime weeks.

*Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid a cost-of-living bonus of $260 each calendar quarter, or $20 per week. The employee works overtime in only 2 weeks in the 13-week period, and in each of these overtime weeks he works 50 hours. He is therefore entitled to $2 as overtime compensation on the bonus for each week in which overtime was worked (i.e., $20 bonus divided by 50 hours equals 40 cents an hour; 10 overtime hours, times one-half, times 40 cents an hour, equals $2 per week). Since the overtime on the bonus is more than 50 cents on the average for the 2 overtime weeks, this cost-of-living bonus would not be excluded from the overtime computation under § 548.3(e).

[12] See § 531.37 of this chapter.

[13] See § 778.217(b)(4) of this chapter.

(d) It is not always necessary to make elaborate computations to determine whether the effect of the exclusion of a bonus or other incidental payment on the employee's total compensation will exceed 50 cents a week on the average. Frequently the addition to regular wages is so small or the number of overtime hours is so limited that under any conceivable circumstances exclusion of the additional payments from the rate used to compute the employee's overtime compensation would not affect the employee's total earnings by more than 50 cents a week. The determination that this is so may be made by inspection of the payroll records or knowledge of the normal working hours.

*Example.* An employer has a policy of giving employees who have a perfect attendance record during a 4-week period a bonus of $10. The employee never works more than 50 hours a week. It is obvious that exclusion of this attendance bonus from the rate of pay used to compute overtime compensation could not affect the employee's total earnings by more than 50 cents a week.[14]

(e) There are many situations in which the employer and employee cannot predict with any degree of certainty the amount of bonus to be paid at the end of the bonus period. They may not be able to anticipate with any degree of certainty the number of hours an employee might work each week during the bonus period. In such situations the employer and employee may agree prior to the performance of the work that a bonus will be disregarded in the computation of overtime pay if the employee's total earnings are not affected by more than 50 cents a week on the average for all overtime weeks during the bonus period. If it turns out at the end of the bonus period that the effect on the employee's total compensation would not exceed 50 cents a week on the average, then additional overtime compensation must be paid on the bonus. (See § 778.209 of this chapter, for an explanation of how to compute overtime on the bonus.)

[14] For a 50-hour week, an employee's bonus would have to amount to $5 a week to affect his overtime compensation by 50 cents.

(f) In order to determine whether the exclusion of a bonus or other incidental payment would affect the total compensation of the employee by not more than 50 cents a week on the average, a comparison is made between his total compensation computed under the employment agreement and his total compensation computed in accordance with the applicable overtime provisions of the Act.

*Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid at piece rates and at one and one-half times the applicable piece rates for work performed during hours in excess of 40 in the workweek. The employee is also paid a bonus, which when apportioned over the bonus period, amounts to $2 a week. He never works more than 50 hours a week. The piece rates could be established as basic rates under the employment agreement and no additional overtime compensation paid on the bonus. The employee's total compensation computed in accordance with the applicable overtime provision of the Act, section 7(g)(1)[15] would be affected by not more than 20 cents in any week by not paying overtime compensation on the bonus.[16]

(g) Section 548.3(e) is not applicable to employees employed at subminimum wage rates under learner certificates, or special certificates for handicapped workers, or in the case of employees in Puerto Rico or the Virgin Islands employed at special minimum rates authorized by wage orders issued pursuant to the Act.

[31 FR 6769, May 6, 1966]

### § 548.306 Average earnings for year or quarter year preceding the current quarter.

(a) Section 548.3(f)(1) authorizes as an established basic rate:

A rate per hour for each workweek equal to the average hourly remuneration of the employee for employment during the annual period or the quarterly period immediately

[15] Section 7(g)(1) of the Act provides that overtime compensation may be paid at one and one-half times the applicable piece rate but extra overtime compensation must be properly computed and paid on additional pay required to be included in computing the regular rate.

[16] Bonus of $2 divided by fifty hours equals 4 cents an hour. Half of this hourly rate multiplied by ten overtime hours equals 20 cents.

preceding the calendar or fiscal quarter year in which such workweek ends, provided (i) it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during such prior period, including weekly hours of work, work assignments and duties, and the basis of remuneration for employment, were not significantly different from the terms, conditions, and circumstances of employment which affect the employee's regular rates of pay during the current quarter year, and (ii) such average hourly remuneration during the prior period is computed by the method or methods authorized in the following subparagraphs.

(b) There may be circumstances in which it would be impossible or highly impracticable for an employer at the end of a pay period to compute, allocate, and pay to an employee certain kinds of remuneration for employment during that pay period. This may be true in the case of such types of compensation as commissions, recurring bonuses, and other incentive payments which are calculated on work performance over a substantial period of time. Since the total amount of straight-time remuneration is unknown at the time of payment the full regular rate cannot be ascertained and overtime compensation could not be paid immediately except for the provisions of § 548.3(f). In many such situations, the necessity for any subsequent computation and payment of the additional overtime compensation due on these types of remuneration can be avoided and all overtime premium pay due under the Act, including premium pay due on such a commission, bonus or incentive payment, can be paid at the end of the pay period rather than at some later date, if the parties to the employment agreement so desire. This is authorized by § 548.3(f)(1), which provides an alternate method of paying overtime premium pay by permitting an employer, under certain conditions, to use an established basic rate for computing overtime premium pay at the end of each pay period rather than waiting until some later date when the exact amounts of the commission, bonus, or other incentive payment can be ascertained. Such established rate may also be used in other appropriate situations where the parties desire to avoid the necessity of recomputing the regular rate from week to week.

(c)(1) The rate authorized by §§ 548.3(f)(1) is an average hourly rate based on earnings and hours worked during the workweeks ending in a representative period consisting of either the four quarter-years or the last quarter-year immediately preceding the calendar or fiscal quarter-year in which the established rate is to be used. Such a rate may be used only if it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during this prior period were not significantly different from those affecting the employee's regular rates of pay during the current quarterly period. Significant differences in weekly hours of work, work assignments and duties, the basis of remuneration for employment, or other factors in the employment which could result in substantial differences in regular rates of pay as between the two periods will render the use of an established rate based on such a prior period inappropriate, and its use is not authorized under such circumstances.

(2) However, an increase in the basic salary or other constant factor would not preclude the use of such a rate provided that accurate adjustments are made. For instance, assume that during the previous annual period an employee was compensated on the basis of a weekly salary of $70 plus a commission of 1 percent of sales. If his weekly salary is raised to $80 for the next annual period (assuming he still receives his commission of 1 percent of sales) the annual rate on which the established rate is to be computed must be adjusted by an increase of $520 ($10×52 weeks). For instance, assume the above employee earned a total of $4,244 and worked 2,318 hours during the previous annual period when his salary was $70 per week. Normally his established basic rate would be computed by dividing 2,318 hours into $4,244, thus arriving at a rate of $1.83. However, since the rate must reflect the increase in salary it must be computed by adding the anticipated increase to the pay received during the previous annual period ($4,244+ $520=$4,764). The established basic rate would then be $2.05.

(d) Establishment of the rate explained in paragraphs (b) and (c) of this

section is authorized under the circumstances there stated, provided it is computed in accordance with § 548.3(f)(2), which prescribes the following method: First, all of the employees' remuneration for employment during the workweeks ending in the representative four-quarter or quarter-year period immediately preceding the current quarter, except overtime premiums and other payments excluded from the regular rate under section 7(e) of the Act, must be totaled. All straight-time earnings at hourly or piece rates or in the form of salary, commissions, bonus or other incentive payments, and board, lodging, or other facilities to the extent required under section 3(m) of the Act and Part 531 of this chapter, together with all other forms of remuneration paid to or on behalf of the employee must be included in the above total. Second, this total sum must be divided by the total number of hours worked during all the workweeks ending in the prior period for which such remuneration was paid. The average hourly rate obtained through this division may be used as the established rate for computing overtime compensation in any workweek, in which the employee works in excess of the applicable maximum standard number of hours, ending in the calendar or fiscal quarter-year period following the four-quarter or quarterly period used for determination of this rate. This is authorized irrespective of any fluctuations of average straight-time hourly earnings above or below such rate from workweek to workweek within the quarter.

(e) As a variant to the method of computation described in paragraph (d) of this section, it is provided in § 548.3(f)(3), with respect to situations where it is not practicable for an employer to compute the total remuneration of an employee for employment in the prior period in time to determine obligations under the Act for the current quarter year, a one-month grace period may be used. This method is authorized, for example, in employment situations where the computation of bonuses, commissions, or other incentive payments cannot be made immediately at the end of the four-quarter or quarterly base period. If this one month grace period is used, it will be deemed in compliance with § 548.3(f)(1) to use the basic rate authorized therein for the quarter commencing one month after the next preceding four-quarter or quarter-year period. To illustrate, suppose an employer and employee agree that the employee will be paid for overtime work at one and one-half times a basic rate computed in accordance with § 548.3(f)(1), but on the pay day for the first workweek ending in the current quarter his records do not show all commissions earned by the employee in the preceding quarter. The employer and employee may therefore elect to use a one month grace period. This would mean that a basic rate for the quarter January 1–March 31, for example, which is derived from the prior four-quarter (January 1–December 31) or quarterly (October 1–December 31) period, as the case may be, would be applied during a quarterly period commencing one month later (February 1–April 30) than the period (January 1–March 31) in which it would otherwise be applicable. The same adjustment would be made in succeeding quarters. Once the grace method of computation is adopted it must be used for each successive quarter.

(f) The established basic rate must be designated and substantiated in the employer's records as required by part 516 of this chapter, and other requirements of such part with respect to records must be met. An agreement or understanding between the parties to use such rate must be reached prior to the quarter-year period in which the work to which it is applied is performed. The agreement or understanding may be limited to a fixed period or may be a continuing one, but use of the established rate under such an agreement or understanding is not authorized for any period in which terms, conditions, and circumstances of employment become significantly different from those obtaining during the period from which the rate was derived. This method of computation cannot be used if there is any change in the employee's position, method of pay, or amount of salary or if the employee was not employed during the full period used to determine the rate.

(g) To function properly and to provide, over an extended period, overtime premium pay substantially equivalent to the pay the employee would receive if overtime were paid on the true regular rate, the plan must provide that overtime be computed on the established basic rate in every overtime week without regard to the fact that in some weeks the employee receives more premium pay than he would using the true regular rate and in some weeks less. Plans initiated pursuant to this section are based on averages and, if properly applied, will yield substantially the same overtime compensation in a representative period as the employee would have received if it were computed on the true regular rate.

(h) The following examples assume the employee is due overtime premium pay for hours worked over 40 in the workweek.

(1) *Example.* A sales employee whose applicable maximum hours standard is 40 hours enters into an agreement with his employer that he will be paid a salary plus a commission based on a certain percentage of sales. He agrees that this compensation will constitute his total straight-time earnings for all hours worked each week, provided such compensation equals or exceeds the applicable minimum wage.

The employee further agrees that he is to receive overtime premium pay for each workweek on the normal pay day for that week; based each quarter on one-half his established basic rate derived by taking the hourly average of the total straight-time remuneration he received during the workweeks ending in the four-quarter period immediately preceding the current quarter. For example, his established basic rate for each workweek ending in the first quarter of 1964 (January through March) is determined by computing his average hourly rate for employment during all workweeks ending in the four quarter periods of 1963.

Assume the employee worked the following number of hours and received the straight-time pay indicated:

| Line No. | Quarters | Pay | | Hours worked | |
|---|---|---|---|---|---|
| | | | | | |
| 1 ..... | 1st—1963 ..... | $1,074 | ..... | 550 | ..... |
| 2 ..... | 2d—1963 ..... | 980 | $980 | 480 | 489 |
| 3 ..... | 3d—1963 ..... | 1,069 | 1,069 | 542 | 542 |
| 4 ..... | 4th—1963 ..... | 1,365 | 1,365 | 619 | 619 |
| 5 ..... | 1, 2, 3, 4—1963 | 4,488 | ..... | 2,200 | ..... |
| 6 ..... | 1st—1964 ..... | ..... | 1,168 | ..... | 531 |
| 7 ..... | 2, 3, 4 (1963) 1 (1964). | ..... | 4,582 | ..... | 2,181 |

The employee's basic rate for the first quarter of 1964 (line 6) is determined by the hours worked and pay received in the four previous quarters (lines 1, 2, 3 and 4). Total pay received during that period ($4,488.00, line 5) is divided by the total hours worked (2,200 hours, line 5) to derive the established basic rate ($2.04 per hour). This is the hourly rate on which overtime is computed in each workweek ending in the first quarter of 1964 in which the employee worked in excess of the applicable maximum hours standard. For instance, if in the first week of that quarter the employee worked 47 hours he would be due his guaranteed salary, his commission (at a later date) plus $7.14 as overtime premium pay (7 hours×2.04× 1/2 ). It does not matter that the employee actually earned and ultimately received $90.71 in salary and commission as his total straight-time pay for that week and that his true hourly rate would be only $1.93 ($90.71÷47 hours). The established basic rate is an average rate and is designed to be used, and must be used, in every overtime week in the quarter for which it was computed, without regard to the employee's true hourly rate in the particular week.

The employee's basic rate for the second quarter of 1964 will be similarly computed at the end of the first quarter of that year by adding together the hours worked and pay received in the second, third, and fourth quarters of 1963 and the first quarter of 1964 (lines 2, 3, 4 and 6) so that the totals now reflect the figures in line 7. The regular rate is again computed by dividing pay received ($4,582.00) by hours worked (2,181) and the new basic rate would be $2.10.

(2) *Example.* Assume that an employee employed under a similar arrangement agrees to receive overtime premium pay for each workweek on the

normal pay day, based each quarter on one-half his established basic rate determined by the *quarterly* method rather than by the *annual* method previously discussed. His established basic rate for the first quarter of 1964 would therefore be determined by computing his average hourly rate for the *last quarter* of 1963. To illustrate, if in the latter quarter the employee received $1,156.00 in straight time compensation and worked 561 hours, his basic rate for the first quarter of 1964 would therefore be $2.06 ($1,156.00÷561 hours). During the overtime weeks in this quarter there would be due him, in addition to his straight time compensation, premium pay of $1.03 ($2.06× 1/2) for each hour he works in excess of the applicable maximum hours standard.

As in the previous example the established basic rate must be used in every overtime week in the quarter for which it was computed without regard to the employee's true hourly rate in the particular quarter.

(Sec. 1, 52 Stat. 1060, 1062, as amended, 29 U.S.C. 201, *et seq.*)

[28 FR 11266, Oct. 22, 1963, as amended at 32 FR 3293, Feb. 26, 1967]

RATES AUTHORIZED ON APPLICATION

### § 548.400 Procedures.

(a) If an employer wants to use an established basic rate other than one of those authorized under § 548.3, he must obtain specific prior approval from the Administrator. For example, if an employer wishes to compute overtime compensation for piece workers for each workweek in a 4-week period at established basic rates which are the straight-time average hourly earnings for each employee for the immediately preceding 4-week period, he should apply to the Administrator for authorization. The application for approval of such a basic rate should be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. No particular form of application is required but the minimum necessary information outlined in § 548.4 should be included. The application may be made by an employer or a group of employers. If any of the employees covered by the application is represented by a collective bargaining agent, a joint application of the employer and the bargaining agent should be filed. It is not necessary to file separate applications for each employee. One application will cover as many employees as will be paid at the proposed basic rate or rates.

(b) Prior approval of the Administrator is also required if the employer desires to use a basic rate or basic rates which come within the scope of a combination of two or more of the paragraphs in § 548.3 unless the basic rate or rates sought to be adopted meet the requirements of a single paragraph in § 548.3. For instance, an employee may receive free lunches, the cost of which, by agreement or understanding, is not to be included in the rate used to compute overtime compensation.[17] In addition, the employee may receive an attendance bonus which, by agreement or understanding, is to be excluded from the rate used to compute overtime compensation.[18] Since these exclusions involve two paragraphs of § 548.3, prior approval of the Administrator would be necessary unless the exclusion of the cost of the free lunches together with the attendance bonus do not affect the employee's overtime compensation by more than 50 cents a week on the average, in which case the employer and the employee may treat the situation as one falling within a single paragraph, § 548.3(e).

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*)

[20 FR 5682, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956; 32 FR 3294, Feb. 25, 1967]

### § 548.401 Agreement or understanding.

If the agreement or understanding establishing the basic rate is in writing, whether incorporated in a collective bargaining agreement or not, a copy of the agreement or understanding should be attached to the application. If it is not in writing, however, the application to the Administrator for approval of a basic rate should contain a written statement describing the substance of the agreement or understanding, including the proposed effective date and

[17] See § 548.304.
[18] See § 548.305.

term of the agreement or understanding. The term of the agreement or understanding may be of definite duration, or may run indefinitely until modified or changed. If an agreement or understanding is modified, a new application for authorization should be made.[19]

[20 FR 5683, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

### § 548.402 Applicable overtime provisions.

The application should also contain a description of the terms of employment relating to overtime so that the Administrator can determine how the established basic rate will be used if it is approved. For instance, if the employees are to be paid time and one-half the basic rate for all hours worked in excess of 35 each workweek, this should be stated in the application. If the employees are to be paid double time for work on Sundays the application should so state.

[20 FR 5683, Aug. 6, 1955]

### § 548.403 Description of method of calculation.

The established basic rate for which approval will be sought will normally be a formula or method of calculation of a rate rather than a specific dollars and cents rates.[20] The application should contain a complete description of the formula or method of calculation of the established basic rate, including any necessary examples which will enable the Administrator to understand how the rate will be computed and applied.

[20 FR 5683, Aug. 6, 1955]

### § 548.404 Kinds of jobs or employees.

The application should describe or otherwise identify the employees to whom the established basic rate will apply. The individual employees need not be identified by name but may be described in terms of job classification, department, location or other appropriate identifying characteristics.

[20 FR 5683, Aug. 6, 1955]

### § 548.405 Representative period.

(a) The application must set forth the facts relied upon to show that the established basic rate is substantially equivalent to the average hourly earnings of the employee exclusive of overtime premiums over a representative period of time.[21] The basic rate will be considered ''substantially equivalent'' to the average hourly earnings of the employee if, during a representative period, the employee's total overtime earnings calculated at the basic rate in accordance with the applicable overtime provisions are approximately equal to the employee's total overtime earnings computed on his average hourly earnings for each workweek in accordance with section 7(a) of the Act.[22]

(b) The length of time constituting a representative period will depend on the factors that cause the employee's average hourly earnings to vary appreciably from week to week. For instance, if the variation in earnings of an employee paid on an incentive basis is due to the difference in availability of work in the slow and busy seasons the period used for comparison of overtime earnings would have to include both a slow and a busy season in order to be representative. Likewise, if a piece-worker's average hourly earnings vary appreciably from week to week because of differences in materials or styles worked on, the period used for purposes of comparison would have to include work on the different materials and styles in order to be representative.

[20 FR 5683, Aug. 6, 1955]

[19] See § 548.200 for a further explanation of the requirements as to the agreement or understanding establishing the basic rate.

[20] See § 548.200.

[21] See §§ 778.200 through 778.207 of this chapter for further discussion of overtime premiums which may be excluded from the regular rate of pay.

[22] See §§ 778.208 through 778.225 of this chapter for further discussion of the exclusion of vacation pay, holiday pay, discretionary bonuses and other payments from the average hourly earnings which comprise the employee's regular rate of pay.

COMPUTATION OF OVERTIME PAY

### § 548.500 Methods of computation.

The methods of computing overtime pay on the basic rates for piece workers, hourly rated employees, and salaried employees are the same as the methods of computing overtime pay at the regular rate.

*Example 1.* Under an employment agreement the basic rate to be used in computing overtime compensation for a piece worker for hours of work in excess of 8 in each day is the employee's average hourly earnings for all work performed during that day.[23] The employee is entitled to one-half the basic rate for each daily overtime hour in addition to the total piece work earnings for the day.

*Example 2.* An employee, who normally would come within the forty hour provision of section 7(a) of the Act, has a basic rate which is his monthly salary divided by the number of regular hours of work in the month.[24] If the salary is intended to cover straight-time compensation for a forty hour week he would be entitled to overtime for every hour after forty computed on the basis of one and one-half times the established basic rate, in addition to his monthly salary. If the salary is intended to cover a workweek shorter than forty hours, such as thirty-five hours, he would be entitled to additional straight time at the basic rate for the hours between thirty-five and forty and also to overtime at one and one-half time that rate for all hours worked in excess of forty in a week.

[20 FR 5683, Aug. 6, 1955, as amended at 26 FR 7732, Aug. 18, 1961]

### § 548.501 Overtime hours based on nonstatutory standards.

Many employees are paid daily overtime pay or Saturday overtime pay or overtime pay on a basis other than the statutory standard of overtime pay required by section 7(a) of the Act. In these cases, the number of hours for which an employee is paid at least one and one-half times an established basic rate must equal or exceed the number of hours worked in excess of the applicable number of hours established in section 7(a) of the Act in the workweek. However, only overtime hours under the employment agreement which also qualify as overtime hours under section 7(e) (5), (6), or (7) of the Act[25] may be offset against the hours of work in excess of the applicable number of hours established in section 7(a) of the Act.

[26 FR 7732, Aug. 18, 1961]

### § 548.502 Other payments.

Extra overtime compensation must be separately computed and paid on payments such as bonuses or shift differentials which are not included in the computation of the established basic rate and which would have been included in the regular rate of pay.[26]

*Example 1.* An employee is paid on an hourly rate basis plus a production bonus, and also a shift differential of 10 cents for each hour worked on the second shift. The authorized basic rate under the agreement is the employee's daily average hourly earnings, and under the employment agreement he is paid one and one-half times the basic rate for all hours worked in excess of 8 each day. Suppose his production bonus is included in the computation of the basic rate, but the shift differential is not. In addition to overtime compensation computed at the basic rate the employee must be paid an extra 5 cents for each overtime hour worked on the second shift.

*Example 2.* A piece worker, under his employment agreement, is paid overtime compensation for daily overtime and for hours of work on Saturday based on an authorized basic rate obtained by averaging his piece work earnings for the half-month. In addition, he is paid a monthly cost-of-living bonus which is not included in the computation of the basic rate. It will be necessary for the employer to compute and pay overtime compensation separately on the bonus.[27]

[20 FR 5683, Aug. 6, 1955]

## PART 549—REQUIREMENTS OF A "BONA FIDE PROFIT-SHARING PLAN OR TRUST"

Sec.
549.0 Scope and effect of regulations.
549.1 Essential requirements for qualifications.
549.2 Disqualifying provisions.

[23] See § 548.302.

[24] See § 548.301.

[25] See §§ 778.201 through 778.207 of this chapter.

[26] Unless specifically excluded by agreement or understanding and prior authorization is obtained from the Administrator. See § 548.400(b).

[27] See § 778.209 of this chapter for an explanation of how to compute overtime on the bonus.

549.3 Distinction between plan and trust.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

SOURCE: 18 FR 3292, June 10, 1953, unless otherwise noted.

## § 549.0 Scope and effect of regulations.

(a) The regulations in this part set forth the requirements of a ''bona fide profit-sharing plan or trust'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the Act). In determining the total remuneration for employment which section 7(e) of the Act requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide profit-sharing plan or trust meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) The inclusion or exclusion from the regular rate of contributions made by an employer pursuant to any plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees (regardless of whether the plan or trust is financed out of profits) is governed by section 7(e)(4) of the Act, the requirements of which are set forth in the Interpretative Bulletin on Overtime Compensation, part 778, of this chapter, §§ 778.214 and 778.215. However, where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the regulations in this part and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in the Interpretative Bulletin, part 778, of this chapter, §§ 778.214 and 778.215.

## § 549.1 Essential requirements for qualifications.

(a) A bona fide profit-sharing plan or trust for purposes of section 7(e)(3)(b) of the Act is required to meet all of the standards set forth in paragraphs (b) through (g) of this section and must not contain any of the disqualifying provisions set forth in § 549.2.

(b) The profit-sharing plan or trust constitutes a definite program or arrangement in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of such profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(c) All contributions or allocations by the employer to the fund or trust to be distributed to the employees are:

(1) Derived solely from profits of the employer's business enterprise, establishment or plant as a whole, or an established branch or division of the business or enterprise which is recognized as such for general business purposes and for which profits are separately and regularly calculated in accordance with accepted accounting practice; and

(2) Made periodically, but not more frequently than is customary or consonant with accepted accounting practice to make periodic determinations of profit.

(d) Eligibility to share in profits extends:

(1) At least to all employees who are subject to the minimum wage and overtime provisions of the Act, or to all such employees in an established part of the employer's business as described in paragraph (c) of this section: *Provided, however,* That such eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

(2) To such classifications of employees as the employer may designate with the approval of the Administrator

upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing, that it is in accord with the meaning and intent of the provisions of section 7(e)(3)(b) of the Act and this part. The Administrator may give such notice by requiring the employer to post a notice approved by the Administrator for a specified period in a place or places where notices to employees are customarily posted or at such other place or places designated by the Administrator, or he may require notice to be given in such other manner as he deems appropriate.

(e) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more or more of such factors as straight-time earnings, total earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(f) An employee's total share determined in accordance with paragraph (e) of this section may not be diminished because of any other remuneration received by him.

(g) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust: *Provided, however*, That the right of an employee to receive his share is not made dependent upon his continuing in the employ of the employer after the period for which the determination of profits has been made.

(Approved by the Office of Management and Budget under control number 1215–0119)

[18 FR 3292, June 10, 1953, as amended at 47 FR 145, Jan. 5, 1982; 71 FR 16666, Apr. 3, 2006]

### § 549.2 Disqualifying provisions.

No plan or trust which contains any one of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust under section 7(e)(3)(b) of the Act:

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost.

### § 549.3 Distinction between plan and trust.

As used in this part:

(a) *Profit-sharing plan* means any such program or arrangement as qualifies hereunder which provides for the distribution by the employer to his employees of their respective shares of profits;

(b) *Profit-sharing trust* means any such program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares.

## PART 550—DEFINING AND DELIMITING THE TERM ''TALENT FEES''

Sec.
550.1 ''Talent fees'' as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.
550.2 Definitions.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

### § 550.1 "Talent fees" as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.

The term *talent fees* in section 7(e)(3)(c) of the Act shall mean extra payments made to performers, including announcers on radio and television programs, where the payment is made:

(a) To an employee having regular duties as a staff performer (including announcers), as an extra payment for services as a performer on a particular commercial program or a particular series of commercial programs (including commercial spot announcements) or for special services as a performer on a particular sustaining program or a particular series of sustaining programs;

(b) In pursuance of an applicable employment agreement or understanding or an applicable collective bargaining agreement in a specific amount agreed upon in advance of the performance of the services or special services for which the extra payment is made: *Provided, however,* That where services described in paragraph (a) of this section are performed on a program falling outside of the regular workday or workweek as established and scheduled in good faith in accordance with the provisions of the applicable employment agreement, the Administrator will not regard the Act as requiring additional compensation as a result of the time worked on the program if the parties agree in advance of such program that a special payment made therefor shall include any increased statutory compensation attributable to the additional worktime thereon and if such special payment, when made, is actually sufficient in amount to include the statutory straight time and overtime compensation (computed without regard to talent fees) for the additional time worked in the workweek resulting from the performer's services on such program.

[15 FR 402, Jan. 25, 1950, as amended at 18 FR 5069, Aug. 25, 1953]

### § 550.2 Definitions.

As used in the regulations in this part:

(a) The term *extra payment* shall mean a payment, in a specific amount, made in addition to the straight-time and overtime compensation which would be due the performer under the agreement applicable to his employment and under the Act if the time spent in performing the services or special services referred to in paragraph (a) of § 550.1 had been devoted exclusively to duties as a staff performer; but shall not include any payment any part of which is credited or offset against any remuneration otherwise payable to the performer under any contract or statutory provision;

(b) The term *performer* shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands;

(c) The term *special services* shall mean services beyond the scope of a performer's regular or ordinary duties as a staff performer under the agreement applicable to the employment.

[15 FR 402, Jan. 25, 1950]

## PART 551—LOCAL DELIVERY DRIVERS AND HELPERS; WAGE PAYMENT PLANS

Sec.

551.1 Statutory provision.
551.2 Findings authorized by this part.
551.3 Petition for a finding.
551.4 Requirements for a petition.
551.5 Information to be submitted.
551.6 Action on petition.
551.7 Finding.
551.8 Definitions.

551.9 Recordkeeping requirements.

AUTHORITY: Sec. 9, 75 Stat. 74; 29 U.S.C. 213(b).

SOURCE: 30 FR 8585, July 7, 1965, unless otherwise noted.

### § 551.1 Statutory provision.

The following provision for exemption from the overtime pay provision is contained in section 13(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(b)):

(b) The provisions of section 7 shall not apply with respect to:

* * * * *

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a).

Under this provision, an employee employed and compensated as described in the quoted paragraph (11) may be employed without payment of overtime compensation for a workweek longer than the maximum workweek applicable to him under section 7(a) of the Act, but only if it is established by a finding of the Secretary that the employee is compensated for his employment as a driver or driver's helper making local deliveries on the basis of trip rates or other delivery payment plan that has the general purpose and effect stated in section 13(b)(11). Such a finding is prescribed by the statute as one of the ''explicit prerequisites to exemption''. (See *Arnold* v. *Kanowsky*, 361 U.S. 388, 392.)

### § 551.2 Findings authorized by this part.

(a) The Administrator, pursuant to the authority vested in him by the Secretary of Labor, will make and apply findings under section 13(b)(11) of the Act as provided in this part. Such findings shall be made only upon petitions meeting the requirements of this part, and only as authorized in this section.

(b) For the purpose of establishing whether a wage payment plan has the purpose and effect required by section 13(b)(11) for an exemption from the overtime provisions of the Act, the Administrator shall have authority, upon a proper showing and in accordance with the provisions of this part, to make a finding as to the general purpose and effect of any specific plan of compensation on the basis of trip rates or other delivery payment plan, with respect to the reduction of the length of the workweeks worked by the employees of any specific employer who are compensated in accordance with such plan for their employment by such employer as drivers or drivers' helpers making local deliveries.

(c) Any finding made as to the purpose and effect of such a wage payment plan pursuant to a petition therefor will be based upon a consideration of all relevant facts shown or represented to exist with respect to such plan that are made available to the Administrator. A finding that such plan has the general effect of reducing the hours worked by drivers or drivers' helpers compensated thereunder to, or below, the maximum workweek applicable to them under section 7(a) of the Act is not authorized under this part unless the Administrator finds that during the most recently completed representative period of one year (based on the experience of the employer in question, or if such employer has not previously used such plan, on the experience of another employer using such plan under substantially the same conditions, all as defined in § 551.8(g)(1)), the average weekly hours, taken in the aggregate, of all full-time employees covered by the plan are not in excess of the maximum workweek applicable to such employees under section 7(a), or unless the Administrator makes an interim finding with respect to such plan that, notwithstanding a lack of experience under it for a representative period of 1 year, its provisions and manner of operation, together with the other available information concerning the plan, indicate clearly that by the end of such first representative year the effect of the plan will have been to reduce the average weekly hours worked by the employees covered by the plan in such first year of operation to, or below, such maximum applicable workweek.

**§ 551.3 Petition for a finding.**

Any employer desiring to establish an exemption from the overtime pay requirements of the Act with respect to employees whose employment and compensation may be considered to qualify therefor under section 13(b)(11) may petition the Administrator, in writing, for a finding under such section and this part. If the wage payment plan with respect to which the finding is sought has been the subject of collective bargaining with representatives of employees covered by the plan, the employer shall provide timely notice of such petition, in writing, to the authorized representatives or representatives of such employees and shall submit a copy of such notice to the Administrator.

**§ 551.4 Requirements for petition.**

A petition for a finding under section 13(b)(11) of the Act and this part shall include in such detail as the Administrator may deem necessary for evaluation under the standards provided by the statute and this part, all the information required by § 551.5. Such information may be presented in any form convenient to the petitioner; no particular form is prescribed for the petition. The petition shall also include, by attachment, a copy of any collective bargaining agreement or other document governing the method of payment for the work of employees covered by the wage payment plan with respect to which a finding is requested. The petition, together with any such documents, shall be filed with the Administrator, Wage and Hour Division, United States Department of Labor, Washington, DC 20210.

**§ 551.5 Information to be submitted.**

Every petition filed under §§ 551.3 and 551.4 shall contain the following information:

(a) A full statement of the facts relied upon by the petitioner to establish, under the applicable definitions in § 551.8, that the wage payment plan submitted for consideration: (1) Applies to employees employed (i) as drivers or drivers' helpers, or both, (ii) in ''making local deliveries'' and (2) determines, ''on the basis of trip rates or other delivery payment plan'', the compensation which such employees receive for such employment; and

(b) A complete description of the wage payment plan and full information concerning its application showing, among other things: (1) The method of compensation which it provides and the types of payments made to employees covered by the plan, together with such information as may be necessary to show how these payments are computed and how and to what extent they are actually used in determining the total compensation received by employees covered by the plan, (2) a full description of all duties performed by the employees compensated under the plan, including information as to the types of goods delivered, their points of origin and destination and the purposes for and geographical area within which they are transported by the employees, the relationship of the employer to the consignor and consignee, and the numbers, (minimum, maximum, and average or typical) of round trips made by such employees in transporting such goods during the workday and of deliveries made during each such trip, and (3) other relevant information concerning the employees compensated under the plan including the total number of such employees employed full-time as drivers or drivers' helpers making local deliveries under the provisions of the plan during the most recent representative annual period as defined in § 551.8(g)(1), the weekly hours worked and the average workweek of such employees during such period and, if there are any significant variations in the number of such employees so employed in the particular workweeks within the period, a full statement of the facts concerning such variations, information as to any workweeks in which any employees compensated under the plan devote less than eighty percent of their worktime to duties as drivers or drivers' helpers making local deliveries; and

(c) A statement of the facts and reasons based on the history and application of the plan which are relied upon to support a finding that the plan has the general purpose and effect of reducing the hours worked by drivers or

drivers' helpers covered by its provisions to, or below, the statutory maximum workweek applicable to them under the Act.

**§551.6 Action on petition.**

(a) Upon the filing of a petition as provided in this part, the Administrator will give consideration thereto, and make any further inquiry into the facts that he may deem necessary. The Administrator may require, before taking further action thereof, that notice of the petition be given to affected employees in such manner as he shall determine to be appropriate to afford them an opportunity to submit any facts or reasons supporting or opposing the finding prayed for in the petition. If the Administrator determines that the petition fails to satisfy any of the requirements of this part, he shall deny the request for a finding or, in his discretion, advise petitioners that further consideration will be given to the submission if the deficiencies are remedied within a specified time. No further consideration will be given, however, to a request for a finding if the Administrator determines that the factual situation as described in the petition is not one in which authority to make the finding is provided by section 13(b)(11) and this part.

(b) If the Administrator determines that a petition meets all requirements of this part and if he is satisfied from consideration of all relevant facts and information available to him that the wage payment plan submitted has, within the meaning of section 13(b)(11) of the Act and this part, the general purpose and effect with respect to drivers or drivers' helpers making local deliveries, who are employed pursuant to its provisions on the basis of trip rates or other delivery payment plan, of reducing the hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a) of the Act, the Administrator will make an appropriate finding to this effect, and notify the petitioner; otherwise the request for such a finding will be denied.

**§551.7 Finding.**

(a) A finding by the Administrator under paragraph (b) of §551.6 that a wage payment plan has the purpose and effect required for exemption of employees under section 13(b)(11) and this part shall be effective in accordance with its terms upon notification to petitioners as provided in §551.6(b). The finding shall include such terms and conditions and such limitations with respect to its application as the Administrator shall deem necessary to ensure that no exemption will be based thereon in the event of any significant change in any of the essential supporting facts.

(b) A finding made pursuant to this part may be amended or revoked by the Administrator at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor. Before taking such action, the Administrator shall afford opportunity to interested persons to present their views and shall give consideration to any relevant information that they may present.

**§551.8 Definitions.**

As used in this part:

(a) *Secretary* means the Secretary of Labor.

(b) *Administrator* means the Administrator of the Wage and Hour Division, United States Department of Labor.

(c) *Finding* means a finding made pursuant to section 13(b)(11) of the Fair Labor Standards Act as provided in this part.

(d) *Making local deliveries* includes the activities customarily and regularly performed in the physical transfer, to customers of a business establishment situated within the rural or urban community or metropolitan area in which the establishment is located, of goods sold or otherwise disposed of to such local customers by such establishment. Included are activities performed by the driver or driver's helpers as an incident to or in conjunction with making such deliveries, such as picking up and returning the delivery vehicle at the beginning and end of the workday, cleaning the vehicle, checking it to see that it is in operating condition, loading and unloading or assisting in loading or unloading the goods, and picking up empty containers or other goods from customers for return to the establishment. Not included in the making

of local deliveries are such transportation as the carriage of passengers; the transportation of any load of goods that would normally require a round trip longer than a single workday for delivery and return to the starting point; any movement of goods which does not accomplish a transfer of possession from one person to another; transportation of goods as a part of a process of production; and transportation of goods within a local community or metropolitan area as an integral part of a carriage of such goods from a point outside such community or area to a destination within it, rather than as a part of the activities customarily performed in making local deliveries, as defined in this section, in the same manner as deliveries of goods held locally for local disposition.

(e) *Employee employed as a driver or driver's helper making local deliveries* includes any employee who is employed in any workweek:

(1) To drive a delivery vehicle used in making local deliveries, or

(2) To assist the driver of such a vehicle in making such deliveries, being required to ride on the vehicle to perform such work,

and whose work in making local deliveries, as defined in paragraph (d) of this section, accounts for at least 80 percent of his hours of work in such workweek. In making and applying any finding as provided in this part, no employee shall be considered to be employed as a driver or driver's helper making local deliveries in any workweek when more than 20 percent of his hours of work results from the performance of duties other than those included in making such local deliveries.

(f) A plan of compensation *on the basis of trip rates or other delivery payment plan* means any plan whereby employees employed as drivers or drivers' helpers making local deliveries are compensated for their employment on a basis such that the amount of payment which they receive is governed in substantial part by a system of wage payments based on units of work measurement such as numbers of trips taken, miles driven, stops made, or units of goods delivered (but not including any plan based solely on the number of hours worked) so that there is a substantial inducement to employees to minimize the number of hours worked.

(g) For purposes of determining whether and to what extent a plan of compensation on the basis of trip rates or other delivery payment plan has the effect of reducing the weekly hours worked by employees employed by an employer as drivers or drivers' helpers making local deliveries pursuant to such plan:

(1) The *most recently completed representative period of one year* (§ 551.2(c)) or *most recent representative annual period* (§ 551.5(b)(3)) shall mean a one-year period within which such employees were so employed on a regular full-time basis by such employer (or, if such employer has not previously used such plan, by another employer using the plan under substantially the same conditions, which period shall include a calendar or fiscal quarter-year ending not more than four months prior to the date as of which the effect of such plan is to be considered, together with the three quarter-year periods immediately preceding such recently completed quarter-year; and

(2) The *average weekly hours* or *average workweek* of the full-time employees so employed during such annual period shall mean the number of hours obtained by the following computation: (i) All the hours worked during such annual period by all the full-time employees regularly employed under the plan shall be totaled; (ii) the number of workweeks worked by each such employee during such annual period under such plan shall be computed, and the totals added together; and (iii) the average weekly hours, taken in the aggregate, of all such employees shall be computed by dividing the sum resulting from computation (i) by the sum resulting from computation (ii).

### § 551.9 Recordkeeping requirements.

The records which must be kept and the computations which must be made with respect to employees for whom the overtime pay exemption under section 13(b)(11) is taken are specified in § 516.15 of this chapter.

[35 FR 17841, Nov. 20, 1970]

# PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

### Subpart A—General Regulations

Sec.
552.1 Terms used in regulations.
552.2 Purpose and scope.
552.3 Domestic service employment.
552.4 Babysitting services.
552.5 Casual basis.
552.6 Companionship services for the aged or infirm.

### Subpart B—Interpretations

552.99 Basis for coverage of domestic service employees.
552.100 Application of minimum wage and overtime provisions.
552.101 Domestic service employment.
552.102 Live-in domestic service employees.
552.103 Babysitting services in general.
552.104 Babysitting services performed on a casual basis.
552.105 Individuals performing babysitting services in their own homes.
552.106 Companionship services for the aged or infirm.
552.107 Yard maintenance workers.
552.108 Child labor provisions.
552.109 Third party employment.
552.110 Recordkeeping requirements.

AUTHORITY: Secs. 13(a)(15) and 13(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21)), 88 Stat. 62; Sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93–259, 88 Stat. 76), unless otherwise noted.

SOURCE: 40 FR 7405, Feb. 20, 1975, unless otherwise noted.

## Subpart A—General Regulations

### § 552.1 Terms used in regulations.

(a) *Administrator* means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

### § 552.2 Purpose and scope.

(a) This part provides necessary rules for the application of the Act to domestic service employment in accordance with the following amendments made by the Fair Labor Standards Amendments of 1974, 88 Stat. 55, *et seq*.

(b) Section 2(a) of the Act finds that the ''employment of persons in domestic service in households affects commerce.'' Section 6(f) extends the minimum wage protection under section 6(b) to employees employed as domestic service employees under either of the following circumstances:

(1) If the employee's compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than $1,000 in 1995, or the amount designated for subsequent years pursuant to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or

(2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

Section 7(l) extends generally the protection of the overtime provisions of section 7(a) to such domestic service employees. Section 13(a)(15) provides both a minimum wage and overtime exemption for ''employees employed on a casual basis in domestic service employment to provide babysitting services'' and for domestic service employees employed'' to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.'' Section 13(b)(21) provides an overtime exemption for domestic service employees who reside in the household in which they are employed.

(c) The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76–2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 37221, June 26, 1979; 60 FR 46767, 46768, Sept. 8, 1995]

### § 552.3 Domestic service employment.

As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he

or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

### § 552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term *babysitting services* shall mean the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term ''babysitting services'' does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household.

### § 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term *casual basis,* when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: *Provided, however,* That such work is incidental, *i.e.,* does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

### § 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however,* That such work is incidental, *i.e.,* does not exceed 20 percent of the total weekly hours worked. The term ''companionship services'' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

## Subpart B—Interpretations

### § 552.99 Basis for coverage of domestic service employees.

Congress in section 2(a) of the Act specifically found that the employment of persons in domestic service in households affects commerce. In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce (S. Rep. 93–690, pp. 21–22). The Senate Committee on Labor and Public Welfare ''took note of the expanded use of the interstate commerce clause by the Supreme Court in numerous recent cases (particularly *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)),'' and concluded ''that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act'' (S. Rep. 93–690, pp. 21–22).

### § 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

(2) In addition, domestic service employees who work more than 40 hours

in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for such excess hours, unless the employee is one who resides in the employer's household. In the case of employees who reside in the household where they are employed, section 13(b)(21) of the Act provides an overtime, but not a minimum wage, exemption. See § 552.102.

(b) In meeting the wage responsibilities imposed by the Act, employers may take appropriate credit for the reasonable cost or fair value, as determined by the Administrator, of food, lodging and other facilities customarily furnished to the employee by the employer such as drugs, cosmetics, drycleaning, etc. See S. Rep. 93–690, p. 19, and section 3(m) of the Act. Credit may be taken for the reasonable cost or fair value of these facilities only when the employee's acceptance of them is voluntary and uncoerced. See regulations, part 531. Where uniforms are required by the employer, the cost of the uniforms and their care may not be included in such credit.

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of up to 37.5 percent of the statutory minimum hourly wage for a breakfast (if furnished), up to 50 percent of the statutory minimum hourly wage for a lunch (if furnished), and up to 62.5 percent of the statutory minimum hourly wage for a dinner (if furnished), which meal credits when combined do not in total exceed 150 percent of the statutory minimum hourly wage for any day. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing meals, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the meal credits specified above: *Provided, however,* that employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the amount specified above, *provided, however,* that employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR part 531 are applicable.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary's Order No. 16–75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76–2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 6716, Feb. 2, 1979; 60 FR 46768, Sept. 8, 1995]

### § 552.101 Domestic service employment.

(a) The definition of *domestic service employment* contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from ''the generally accepted meaning'' of the term. Accordingly, the term includes persons who are frequently referred to as ''private household workers.'' See S. Rep. 93–690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

(b) Employees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places where they work are not private homes but commercial or business establishments. Likewise, employees employed in connection with a business or professional service which is conducted in a home (such as a real estate, doctor's, dentist's or lawyer's office) are not domestic service employees.

(c) In determining the total hours worked, the employer must include all time the employee is required to be on the premises or on duty and all time the employee is suffered or permitted to work. Special rules for live-in domestic service employees are set forth in § 552.102.

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995]

### § 552.102 Live-in domestic service employees.

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations part 785, § 785.23.

(b) Where there is a reasonable agreement, as indicated in (a) above, it may be used to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer shall keep a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If it is found by the parties that there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts.

### § 552.103 Babysitting services in general.

The term ''babysitting services'' is defined in § 552.4. Babysitting is a form of domestic service, and babysitters other than those working on a casual basis are entitled to the same benefits under the Act as other domestic service employees.

### § 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) Teenagers during nonschool hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a ''casual basis,'' whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a ''casual basis'' if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a ''casual basis'' (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a ''casual basis'' devotes more than 20 percent of his or her time to household work during a babysitting assignment, the exemption for ''babysitting services on a casual basis'' does not apply during that assignment and the individual must be

paid in accordance with the Act's minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a ''casual basis.''

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995]

### § 552.105 Individuals performing babysitting services in their own homes.

(a) It is clear from the legislative history that the Act's new coverage of domestic service employees is limited to those persons who perform such services in or about the private household of the employer. Accordingly, if such services are performed away from the employer's permanent, or temporary household there is no coverage under sections 6(f) and 7(l) of the Act. A typical example would be an individual who cares for the children of others in her own home. This type of operation, however, could, depending on the particular facts, qualify as a preschool or day care center and thus be covered under section 3(s)(1)(B) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a day care home, and who does not have more than one employee or whose only employees are members of that individual's immediate family is not covered by the Fair Labor Standards Act.

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995]

### § 552.106 Companionship services for the aged or infirm.

The term ''companionship services for the aged or infirm'' is defined in § 552.6. Persons who provide care and protection for babies and young children, who are not physically or mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The ''casual'' limitation does not apply to companion services.

### § 552.107 Yard maintenance workers.

Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.

### § 552.108 Child labor provisions.

Congress made no change in section 12 as regards domestic service employees. Accordingly, the child labor provisions of the Act do not apply unless the underaged minor (a) is individually engaged in commerce or in the production of goods for commerce, or (b) is employed by an enterprise meeting the coverage tests of sections 3(r) and 3(s)(1) of the Act, or (c) is employed in or about a home where work in the production of goods for commerce is performed.

### § 552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a ''casual basis'' for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation.

(c) Live-in domestic service employees who are employed by an employer

or agency other than the family or household using their services are exempt from the Act's overtime requirements by virtue of section 13(b)(21). This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be ''residing'' on the premises of such family or household.

**§ 552.110 Recordkeeping requirements.**

(a) The general recordkeeping regulations are found in part 516 of this chapter and they require that every employer having covered domestic service employees shall keep records which show for each such employee: (1) Name in full, (2) social security number, (3) address in full, including zip code, (4) total hours worked each week by the employee for the employer, (5) total cash wages paid each week to the employee by the employer, (6) weekly sums claimed by the employer for board, lodging or other facilities, and (7) extra pay for weekly hours worked in excess of 40 by the employee for the employer. No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(b) In the case of an employee who resides on the premises, records of the actual hours worked are not required. Instead, the employer may maintain a copy of the agreement referred to in § 552.102. The more limited recordkeeping requirement provided by this subsection does not apply to third party employers. No records are required for casual babysitters.

(c) Where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may: (1) Indicate by check marks, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer may require the domestic service employee to record the hours worked and submit such record to the employer.

# PART 553—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

## Subpart A—General

INTRODUCTION

Sec.
553.1 Definitions.
553.2 Purpose and scope.
553.3 Coverage—general.

SECTION 3(E)(2)(C)—EXCLUSIONS

553.10 General.
553.11 Exclusion for elected officials and their appointees.
553.12 Exclusion for employees of legislative branches.

SECTION 7(O)—COMPENSATORY TIME AND COMPENSATORY TIME OFF

553.20 Introduction.
553.21 Statutory provisions.
553.22 ''FLSA compensatory time'' and ''FLSA compensatory time off''.
553.23 Agreement or understanding prior to performance of work.
553.24 ''Public safety'', ''emergency response'', and ''seasonal'' activities.
553.25 Conditions for use of compensatory time (''reasonable period'', ''unduly disrupt'').
553.26 Cash overtime payments.
553.27 Payments for unused compensatory time.
553.28 Other compensatory time.

OTHER EXEMPTIONS

553.30 Occasional or sporadic employment—section 7(p)(2).
553.31 Substitution—section 7(p)(3).
553.32 Other FLSA exemptions.

RECORDKEEPING

553.50 Records to be kept of compensatory time.
553.51 Records to be kept for employees paid pursuant to section 7(k).

## Subpart B—Volunteers

553.100 General.
553.101 ''Volunteer'' defined.
553.102 Employment by the same public agency.
553.103 ''Same type of services'' defined.
553.104 Private individuals who volunteer services to public agencies.
553.105 Mutual aid agreements.

553.106 Payment of expenses, benefits, or fees.

## Subpart C—Fire Protection and Law Enforcement Employees of Public Agencies

GENERAL PRINCIPLES

553.200 Statutory provisions: section 13(b)(20).
553.201 Statutory provisions: section 7(k).
553.202 Limitations.

EXEMPTION REQUIREMENTS

553.210 Fire protection activities.
553.211 Law enforcement activities.
553.212 Twenty percent limitation on nonexempt work.
553.213 Public agency employees engaged in both fire protection and law enforcement activities.
553.214 Trainees.
553.215 Ambulance and rescue service employees.
553.216 Other exemptions.

TOUR OF DUTY AND COMPENSABLE HOURS OF WORK RULES

553.220 ''Tour of duty'' defined.
553.221 Compensable hours of work.
553.222 Sleep time.
553.223 Meal time.
553.224 ''Work period'' defined.
553.225 Early relief.
553.226 Training time.
553.227 Outside employment.

OVERTIME COMPENSATION RULES

553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).
553.231 Compensatory time off.
553.232 Overtime pay requirements.
553.233 ''Regular rate'' defined.

AUTHORITY: Secs. 1–19 52 Stat. 1060, as amended (29 U.S.C. 201–219); Pub. L. 99–150. 99 Stat. 787 (29 U.S.C. 203, 207, 211).

SOURCE: 52 FR 2032, Jan. 16, 1987, unless otherwise noted.

## Subpart A—General

INTRODUCTION

### § 553.1 Definitions.

(a) *Act* or *FLSA* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) *1985 Amendments* means the Fair Labor Standards Amendments of 1985 (Pub. L. 99–150).

(c) *Public agency* means a State, a political subdivision of a State or an interstate governmental agency.

(d) *State* means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other Territory or possession of the United States (29 U.S.C. 203(c) and 213(f)).

### § 553.2 Purpose and scope.

(a) The 1985 Amendments to the Fair Labor Standards Act (FLSA) changed certain provisions of the Act as they apply to employees of State and local public agencies. The purpose of part 553 is to set forth the regulations to carry out the provisions of these Amendments, as well as other FLSA provisions previously in existence relating to such public agency employees.

(b) The regulations in this part are divided into three subparts. Subpart A interprets and applies the special FLSA provisions that are generally applicable to all covered and nonexempt employees of State and local governments. Subpart A also contains provisions concerning certain individuals (*i.e.*, elected officials, their appointees, and legislative branch employees) who are excluded from the definition of ''employee'' and thus from FLSA coverage. This subpart also interprets and applies sections 7(o), and 7(p)(2), 7(p)(3), and 11(c) of the Act regarding compensatory time off, occasional or sporadic part-time employment, and the performance of substitute work by public agency employees, respectively.

(c) Subpart B of this part deals with ''volunteer'' services performed by individuals for public agencies. Subpart C applies various FLSA provisions as they relate to fire protection and law enforcement employees of public agencies.

### § 553.3 Coverage—general.

(a)(1) In 1966, Congress amended the FLSA to extend coverage to State and local government employees engaged in the operation of hospitals, nursing homes, schools, and mass transit systems.

(2) In 1972, the Education Amendments further extended coverage to employees of public preschools.

(3) In 1974, the FLSA Amendments extended coverage to virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 legislation.

(b) Certain definitions already in the Act were modified by the 1974 Amendments. The definition of the term ''employer'' was changed to include public agencies and that of ''employee'' was amended to include individuals employed by public agencies. The definition of ''enterprise'' contained in section 3(r) of the Act was modified to provide that activities of a public agency are performed for a ''business purpose.'' The term ''enterprise engaged in commerce or in the production of goods for commerce'' defined in section 3(s) of the Act was expanded to include public agencies.

SECTION 3(E)(2)(C)—EXCLUSIONS

### § 553.10 General.

Section 3(e)(2)(C) of the Act excludes from the definition of ''employee'', and thus from coverage, certain individuals employed by public agencies. This exclusion applies to elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. In addition, the 1985 Amendments exclude employees of legislative branches of State and local governments. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency.

### § 553.11 Exclusion for elected officials and their appointees.

(a) Section 3(e)(2)(C) provides an exclusion from the Act's coverage for officials elected by the voters of their jurisdictions. Also excluded under this provision are personal staff members and officials in policymaking positions who are selected or appointed by the elected public officials and certain advisers to such officials.

(b) The statutory term ''member of personal staff'' generally includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such official. The term typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

(c) In order to qualify as personal staff members or officials in policymaking positions, the individuals in question must not be subject to the civil service laws of their employing agencies. The term ''civil service laws'' refers to a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment of employees under civil service, except for cause, is provided. In addition, such personal staff members must be appointed by, and serve solely at the pleasure or discretion of, the elected official.

(d) The exclusion for ''immediate adviser'' to elected officials is limited to staff who serve as advisers on constitutional or legal matters, and who are not subject to the civil service rules of their employing agency.

### § 553.12 Exclusion for employees of legislative branches.

(a) Section 3(e)(2)(C) of the Act provides an exclusion from the definition of the term ''employee'' for individuals who are not subject to the civil service laws of their employing agencies and are employed by legislative branches or bodies of States, their political subdivisions or interstate governmental agencies.

(b) Employees of State or local legislative libraries do not come within this statutory exclusion. Also, employees of school boards, other than elected officials and their appointees (as discussed in § 553.11), do not come within this exclusion.

SECTION 7(O)—COMPENSATORY TIME AND COMPENSATORY TIME OFF

### § 553.20 Introduction.

Section 7 of the FLSA requires that covered, nonexempt employees receive

not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

### § 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) Pursuant to—

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) The term *overtime compensation* means the compensation required by subsection (a), and

(B) The terms *compensatory time* and *compensatory time off* means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

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### § 553.22 "FLSA compensatory time" and "FLSA compensatory time off".

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

### § 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least ''time and one-half'' is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

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### § 553.24 "Public safety", "emergency response", and "seasonal" activities.

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in ''public safety'', ''emergency response'', or ''seasonal'' activity. Employees whose work includes ''seasonal'', ''emergency response'', or ''public safety'' activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve ''seasonal'', ''emergency response'', or ''public safety'' activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in ''public safety'', ''emergency response'', or ''seasonal'' activities, who transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the

number of accrued hours of compensatory time falls below the 240-hour limit.

(c) ''Public safety activities'': The term ''public safety activities'' as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in §§ 553.210 (a) and (b) and 553.211 (a)–(c), and (f). An employee whose work regularly involves such activities will qualify for the 480-hour accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in ''public safety'' activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.201)

(d) ''Emergency response activity'': The term ''emergency response activity'' as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with ''public safety'' and ''seasonal'' activities, an employee must regularly engage in ''emergency response'' activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in ''emergency response'' activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.215.)

(e)(1) ''Seasonal activity'': The term ''seasonal activity'' includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240 compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have

lengthy periods of peak seasonal demand would remain under the lower cap.

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### § 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a ''reasonable period'' after making the request, if such use does not ''unduly disrupt'' the operations of the agency. This provision, however, does not apply to ''other compensatory time'' (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) *Reasonable period.* (1) Whether a request to use compensatory time has been granted within a ''reasonable period'' will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of ''reasonable period''.

(d) *Unduly disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be ''unduly disruptive'' to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99–331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

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### § 553.26 Cash overtime payments.

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See § 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include

> . . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term ''other similar cause'' refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this ''other similar cause'' category.

### § 553.27 Payments for unused compensatory time.

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than—

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase *last 3 years of employment* means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term ''regular rate'' is defined in 29 CFR 778.108. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does not require employers to compensate employees on an hourly basis.

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### § 553.28 Other compensatory time.

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered ''other'' compensatory time. The term ''other'' compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a non-overtime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are ''overtime'' hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered ''other'' compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of ''other'' compensatory time.

(d) The FLSA does not require that the rate at which ''other'' compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which ''other'' compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to ''other'' compensatory time as described above.

OTHER EXEMPTIONS

**§ 553.30 Occasional or sporadic employment-section 7(p)(2).**

(a) Section 7(p)(2) of the FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability under the Act.

(b) *Occasional or sporadic.* (1) The term *occasional or sporadic* means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee's regular work.

(2) In order for an employee's occasional or sporadic work on a part-time basis to qualify for exemption under section 7(p)(2), the employee's decision to work in a different capacity must be made freely and without coercion, implicit or explicit, by the employer. An employer may suggest that an employee undertake another kind of work for the same unit of government when the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

(3) Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (*e.g.*, concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of State or local government agencies even where the need can be anticipated because it recurs seasonally (*e.g.*, a holiday concert at a city college, a program of scheduled sports events, or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly works additional hours on a part-time basis (*e.g.*, every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

(c) *Different capacity.* (1) In order for employment in these occasional or sporadic activities not to be considered subject to the overtime requirements of section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, *i.e.*, it must not fall within the same general occupational category.

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* (except in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.

(3) For example, if a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer

and subject to the Act's overtime requirements because it is not in a *different capacity*. This would be the case even though the work was *occasional or sporadic*, and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a *different capacity*.

(4) However, if a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on the regular job. A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity.

(5) In addition, any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will not be considered as employment in a *different capacity*. However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a *different capacity*, provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

### § 553.31 Substitution—section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ''trade time'' with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or ''trade time'' under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

### § 553.32 Other FLSA exemptions.

(a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain employees of public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.

(b) Section 7(k) of the Act provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel

in correctional institutions). In addition, section 13(b)(20) provides a complete overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement activities, if the public agency employs less than five employees in such activities. (See subpart C of this part.)

(c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as these terms are defined and delimited in part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

(d) Section 7(j) of the Act provides that a hospital or residential care establishment may, pursuant to a prior agreement or understanding with an employee or employees, adopt a fixed work period of 14 consecutive days for the purpose of computing overtime pay in lieu of the regular 7-day workweek. Workers employed under section 7(j) must receive not less than one and one-half times their regular rates of pay for all hours worked over 8 in any workday, and over 80 in the 14-day work period. (See § 778.601 of this title.)

(e) Section 13(a)(3) of the Act provides a minimum wage and overtime pay exemption for any employee employed by an amusement or recreational establishment if (1) it does not operate for more than 7 months in any calendar year or (2) during the preceding calendar year, its average receipts for any 6 months of such year were not more than 33⅓ percent of its average receipts for the other 6 months of such year. In order to meet the requirements of section 13(a)(3)(B), the establishment in the previous year must have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months. State and local governments operate parks and recreational areas to which this exemption may apply.

(f) Section 13(b)(1) of the Act provides an exemption from the overtime pay requirements for ''Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935.'' (recodified at section 3102, 49 U.S.C.). With regard to State or local governments, this overtime pay exemption may affect mass transit systems engaged in interstate commerce. This exemption is applicable to drivers, driver's helpers, loaders, and mechanics employed by a common carrier whose activities directly affect the safety of operation of motor vehicles in the transportation on the public highways of passengers or property. (See part 782 of this title.)

(g) Section 7(n) of the Act provides that, for the purpose of computing overtime pay, the hours of employment of a mass transit employee do not include the time spent in charter activities if (1) pursuant to a prior agreement the time is not to be so counted, and (2) such charter activities are not a part of the employee's regular employment.

(h) Additional overtime pay exemptions which may apply to emloyees of public agencies are contained in sections 13(b)(2) (employees of certain common carriers by rail), 13(b)(9) (certain employees of small market radio and television stations), and section 13(b)(12) (employees in agriculture) of the Act. Further, section 13(a)(6) of the Act provides a minimum wage and overtime pay exemption for agricultural employees who work on small farms. (See part 780 of this title.)

RECORDKEEPING

### § 553.50 Records to be kept of compensatory time.

For each employee subject to the compensatory time and compensatory time off provisions of section 7(o) of the Act, a public agency which is a State, a political subdivision of a State or an interstate governmental agency shall maintain and preserve records containing the basic information and data required by § 516.2 of this title and, in addition:

(a) The number of hours of compensatory time earned pursuant to section 7(o) each workweek, or other applicable work period, by each employee at

the rate of one and one-half hour for each overtime hour worked;

(b) The number of hours of such compensatory time used each workweek, or other applicable work period, by each employee;

(c) The number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and

(d) Any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off. If such agreement or understanding is not in writing, a record of its existence must be kept.

### § 553.51 Records to be kept for employees paid pursuant to section 7(k).

For each employee subject to the partial overtime exemption in section 7(k) of the Act, a public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall maintain and preserve records containing the information and data required by § 553.50 and, in addition, make some notation on the payroll records which shows the work period for each employee and which indicates the length of that period and its starting time. If all the workers (or groups of workers) have a work period of the same length beginning at the same time on the same day, a single notation of the time of day and beginning day of the work period will suffice for these workers.

## Subpart B—Volunteers

### § 553.100 General.

Section 3(e) of the Fair Labor Standards Act, as amended in 1985, provides that individuals performing volunteer services for units of State and local governments will not be regarded as ''employees'' under the statute. The purpose of this subpart is to define the circumstances under which individuals may perform hours of volunteer service for units of State and local governments without being considered to be their employees during such hours for purposes of the FLSA.

### § 553.101 "Volunteer" defined.

(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4)(A) and (B) of the FLSA and the guidelines in this subpart.

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ''volunteer'' their services.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

### § 553.102 Employment by the same public agency.

(a) Section 3(e)(4)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.

(b) Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

### § 553.103 "Same type of services" defined.

(a) The 1985 Amendments provide that employees may volunteer hours of service to their public employer or agency provided ''such services are not the same type of services which the individual is employed to perform for such public agency.'' Employees may volunteer their services in one capacity or another without contemplation of pay for services rendered. The phrase ''same type of services'' means similar or identical services. In general, the Administrator will consider, but not as the only criteria, the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* in determining whether the volunteer activities constitute the ''same type of services'' as the employment activities. Equally important in such a determination will be the consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.

(b) An example of an individual performing services which constitute the ''same type of services'' is a nurse employed by a State hospital who proposes to volunteer to perform nursing services at a State-operated health clinic which does not qualify as a separate public agency as discussed in § 553.102. Similarly, a firefighter cannot volunteer as a firefighter for the same public agency.

(c) Examples of volunteer services which do not constitute the ''same type of services'' include: A city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; an employee of the city parks department who serves as a volunteer city firefighter; and an office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours as an act of charity.

### § 553.104 Private individuals who volunteer services to public agencies.

(a) Individuals who are not employed in any capacity by State or local government agencies often donate hours of service to a public agency for civic or humanitarian reasons. Such individuals are considered volunteers and not employees of such public agencies if their hours of service are provided with no promise expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106. There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies.

(b) Examples of services which might be performed on a volunteer basis when so motivated include helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals or nursing homes; assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer as firefighters or auxiliary police, or volunteer to perform such tasks as working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, soliciting contributions or participating in civic or charitable benefit programs and volunteering other services needed to carry out charitable or educational programs.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]

### § 553.105 Mutual aid agreements.

An agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies pursuant to said agreement. For example, where Town A and Town B have entered into a mutual aid agreement related to fire protection, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of volunteer service for Town B counted as part of his or her hours of employment with Town A. The mere fact that services volunteered to Town B may in some instances involve performance in Town

A's geographic jurisdiction does not require that the volunteer's hours are to be counted as hours of employment with Town A.

### § 553.106 Payment of expenses, benefits, or fees.

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for purposes of the FLSA. A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service. (A uniform allowance must be reasonably limited to relieving the volunteer of the cost of providing or maintaining a required uniform from personal resources.) Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.

(c) Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. Likewise, the volunteer status of such individuals is not lost if they are provided books, supplies, or other materials essential to their volunteer training or reimbursement for the cost thereof.

(d) Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or ''length of service'' awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section.

(e) Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a ''per call'' or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

(f) Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

## Subpart C—Fire Protection and Law Enforcement Employees of Public Agencies

GENERAL PRINCIPLES

### § 553.200 Statutory provisions: section 13(b)(20).

(a) Section 13(b)(20) of the FLSA provides a complete overtime pay exemption for ''any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be.''

(b) In determining whether a public agency qualifies for the section 13(b)(20) exemption, the fire protection and law enforcement activities are considered separately. Thus, if a public agency employs less than five employees in fire protection activities, but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, or between employees on duty and employees on leave status, and all such categories must be counted in determining whether the exemption applies. Individuals who are not considered ''employees'' for purposes of the FLSA by virtue of section 3(e) of the Act (including persons who are ''volunteers'' within the meaning of § 553.101, and ''elected officials and their appointees'' within the meaning of § 553.11) are not counted in determining whether the section 13(b)(20) exemption applies.

(c) The section 13(b)(20) exemption applies on a workweek basis. It is therefore possible that employees may be subject to maximum hours standard in certain workweeks, but not in others. In those workweeks in which the section 13(b)(20) exemption does not apply, the public agency is entitled to utilize the section 7(k) exemption which is explained below in § 553.201.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]

### § 553.201 Statutory provisions: section 7(k).

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § 553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

(b) As specified in §§ 553.20 through 553.28 of subpart A, workers employed under section 7(k) may, under certain conditions, be compensated for overtime hours worked with compensatory time off rather than immediate overtime premium pay.

### § 553.202 Limitations.

The application of sections 13(b)(20) and 7(k), by their terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

EXEMPTION REQUIREMENTS

### § 553.210 Fire protection activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term ''any employee . . . in fire protection activities'' refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as ''trainee,'' ''probationary,'' or ''permanent,'' or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and

regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.

(b) The term ''any employee in fire protection activities'' also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as maintenance and office personnel who do not fight fires on a regular basis. It may include such employees during emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraphs (b)(1), (2) and (3) of this section. Additionally, for those persons who actually engage in those fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term ''employee in fire protection activities'' are the so-called ''civilian'' employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]

### § 553.211 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term ''any employee . . . in law enforcement activities'' refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.215.

(c) Typically, employees engaged in law enforcement activities include city police; district or local police, sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon

the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(d) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdiction. Section 3(e)(2)(C) of the Act excludes from its definition of ''employee'' elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C), and see § 553.11. Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(e) Employees who do not meet each of the three tests described above are not engaged in ''law enforcement activities'' as that term is used in sections 7(k) and 13(b)(20). Employees who normally would not meet each of these tests include

(1) Building inspectors (other than those defined in § 553.213(a)),

(2) Health inspectors,

(3) Animal control personnel,

(4) Sanitarians,

(5) civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(6) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(7) Wage and hour compliance officers,

(8) Equal employment opportunity compliance officers,

(9) Tax compliance officers,

(10) Coal mining inspectors, and

(11) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(f) The term ''any employee in law enforcement activities'' also includes, by express reference, ''security personnel in correctional instititions.'' A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (*e.g.*, warden, assistant warden or guard) or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(g) Not included in the term ''employee in law enforcement activities'' are the so-called ''civilian'' employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may,

when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

### § 553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. (See § 553.30.) The performance of such work does not affect the application of the section 13(b)(20) or 7(k) exemptions with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

### § 553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called ''public safety officers'') who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat either the section 13(b)(20) or 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.210 and 553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.

(b) As specified in § 553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

### § 553.214 Trainees.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in § 553.210 or § 553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

### § 553.215 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or

firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered and nonexempt employees. This would include, for example, employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

### § 553.216 Other exemptions.

Although the 1974 Amendments to the FLSA provided special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of sections 13(b)(20) and 7(k). For example, section 13(a)(1) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part 541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as ''executive'' employees. Similarly, certain criminal investigative agents may qualify as ''administrative'' employees under section 13(a)(1). However, the election to take the section 13(a)(1) exemption for an employee who qualifies for it will not result in excluding that employee from the count that must be made to determine the application of the section 13(b)(20) exemption to the agency's other employees.

## TOUR OF DUTY AND COMPENSABLE HOURS OF WORK RULES

### § 553.220 "Tour of duty" defined.

(a) The term ''tour of duty'' is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include ''shifts'' assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the ''shift'' which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in § 553.227. The tour of duty does not include time spent working on an occasional or sporadic and part-time basis in a different capacity from the regular work as provided in § 553.30. The tour of

duty does not include time spent substituting for other employees by mutual agreement as specified in § 553.31.

(d) The tour of duty does not include time spent in volunteer firefighting or law enforcement activities performed for a different jurisdiction, even where such activities take place under the terms of a mutual aid agreement in the jurisdiction in which the employee is employed. (See § 553.105.)

### § 553.221 Compensable hours of work.

(a) The general rules on compensable hours of work are set forth in 29 CFR part 785 which is applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (§ 553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (§ 553.223). Part 785 does not discuss the special provisions that apply to State and local government workers with respect to the treatment of substitution, special details for a separate and independent employer, early relief, and work performed on an occasional or sporadic and part-time basis, all of which are covered in this subpart.

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

(g) The fact that employees cannot return home after work does not necessarily mean that they continue on duty after their shift. For example, firefighters working on a forest fire may be transported to a camp after their shift in order to rest and eat a meal. As a practical matter, the firefighters may be precluded from going to their homes because of the distance of the fire from their residences.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]

### § 553.222 Sleep time.

(a) Where a public employer elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency

may exclude sleep time from hours worked if all the conditions in § 785.22 of this title are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where

(1) The employee is on a tour of duty of less than 24 hours, which is the general rule applicable to all employees under § 785.21, and

(2) Where the employee is on a tour of duty of exactly 24 hours, which is a departure from the general rules in part 785.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

### § 553.223 Meal time.

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the tests in § 785.19 of this title are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in § 785.19 of this title are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., ''stakeouts''), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates Congressional intent to mandate a departure from the usual FLSA ''hours of work'' rules and adoption of an overtime standard keyed to the unique concept of ''tour of duty'' under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours, which is a departure from the general rules in § 785.22 of this title.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the tests in §§ 785.19 and 785.22 of this title are met.

### § 553.224 "Work period" defined.

(a) As used in section 7(k), the term ''work period'' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

**§ 553.225 Early relief.**

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

**§ 553.226 Training time.**

(a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (*e.g.*, where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

**§ 553.227 Outside employment.**

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) The special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local

ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

OVERTIME COMPENSATION RULES

### § 553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

| Work period (days) | Maximum hours standards | |
|---|---|---|
| | Fire protection | Law enforcement |
| 28 | 212 | 171 |
| 27 | 204 | 165 |
| 26 | 197 | 159 |
| 25 | 189 | 153 |
| 24 | 182 | 147 |
| 23 | 174 | 141 |
| 22 | 167 | 134 |
| 21 | 159 | 128 |
| 20 | 151 | 122 |
| 19 | 144 | 116 |
| 18 | 136 | 110 |
| 17 | 129 | 104 |
| 16 | 121 | 98 |
| 15 | 114 | 92 |
| 14 | 106 | 86 |
| 13 | 98 | 79 |
| 12 | 91 | 73 |
| 11 | 83 | 67 |
| 10 | 76 | 61 |
| 9 | 68 | 55 |
| 8 | 61 | 49 |
| 7 | 53 | 43 |

### § 553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in § 553.230. The rules for compensatory time off are set forth in §§ 553.20 through 553.28 of this part.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the

fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

### § 553.232 Overtime pay requirements.

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay. In addition, employees who have accrued the maximum 480 hours of compensatory time must be paid cash wages of time and one-half their regular rates of pay for overtime hours in excess of the maximum for the work period set forth in § 553.230.

### § 553.233 "Regular rate" defined.

The rules for computing an employee's ''regular rate'', for purposes of the Act's overtime pay requirements, are set forth in part 778 of this title. These rules are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages. However, wherever the word ''workweek'' is used in part 778, the words ''work period'' should be substituted.

# PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

## Subpart A—General

Sec.
570.1 Definitions.
570.2 Minimum age standards.

## Subpart B—Certificates of Age

570.5 Certificates of age and their effect.
570.6 Contents and disposition of certificates of age.
570.7 Documentary evidence required for issuance of a certificate of age.
570.8 Issuance of a Federal certificate of age.
570.9 States in which State certificates of age are accepted.
570.10 Rules for certificates of age in the State of Alaska and the Territory of Guam.
570.11 Continued acceptability of certificates of age.
570.12 Revoked certificates of age.

PROVISIONS OF OTHER LAWS

570.25 Effect on laws other than the Federal child labor standards.

## Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

570.31 Secretary's determinations concerning the employment of minors 14 and 15 years of age.
570.32 Effect of subpart C.
570.33 Prohibited occupations for minors 14 and 15 years of age.
570.34 Occupations minors 14 and 15 years of age are permitted to perform in retail, food service, and gasoline service establishments.
570.35 Hours of work and conditions of employment permitted for minors 14 and 15 years of age.
570.35a Work experience and career exploration program.
570.36 Effect of a certificate of age under this subpart.
570.37 Effect of this subpart on other laws.

## Subpart D [Reserved]

## Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

570.50 General.
570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).
570.52 Occupations of motor-vehicle driver and outside helper (Order 2).
570.53 Coal-mine occupations (Order 3).
570.54 Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).
570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).
570.57 Exposure to radioactive substances and to ionizing radiations (Order 6).
570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).
570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).
570.60 Occupations in connection with mining, other than coal (Order 9).

570.61 Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat packing or processing, or rendering (Order 10).
570.62 Occupations involved in the operation of bakery machines (Order 11).
570.63 Occupations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors (Order 12).
570.64 Occupations involved in the manufacture of brick, tile, and kindred products (Order 13).
570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).
570.66 Occupations involved in wrecking, demolition, and shipbreaking operations (Order 15).
570.67 Occupations in roofing operations and on or about a roof (Order 16).
570.68 Occupations in excavation operations (Order 17).

### Subpart E–1—Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16

570.70 Purpose and scope.
570.71 Occupations involved in agriculture.
570.72 Exemptions.

### Subpart F [Reserved]

### Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

GENERAL

570.101 Introductory statement.
570.102 General scope of statutory provisions.
570.103 Comparison with wage and hour provisions.

COVERAGE OF SECTION 12(a)

570.104 General.
570.105 ''Producer, manufacturer, or dealer''.
570.106 ''Ship or deliver for shipment in commerce''.
570.107 ''Goods''.
570.108 ''Produced''.
570.109 ''Establishment situated in the United States''.
570.110 ''In or about''.
570.111 Removal ''within 30 days''.

COVERAGE OF SECTION 12(c)

570.112 General.
570.113 Employment ''in commerce or in the production of goods for commerce''.

JOINT AND SEPARATE APPLICABILITY OF SECTIONS 12(a) AND 12(c)

570.114 General.
570.115 Joint applicability.
570.116 Separate applicability.

OPPRESSIVE CHILD LABOR

570.117 General.
570.118 Sixteen-year minimum.
570.119 Fourteen-year minimum.
570.120 Eighteen-year minimum.
570.121 Age certificates.

EXEMPTIONS

570.122 General.
570.123 Agriculture.
570.124 Delivery of newspapers.
570.125 Actors and performers.
570.126 Parental exemption.

ENFORCEMENT

570.127 General.
570.128 Good faith defense.
570.129 Relation to other laws.

SOURCE: 16 FR 7008, July 20, 1951, unless otherwise noted. Redesignated at 28 FR 1634, Feb. 21, 1963, and further redesignated and amended at 36 FR 25156, Dec. 29, 1971.

## Subpart A—General

AUTHORITY: Secs. 3, 11, 12, 52 Stat. 1060, as amended, 1066, as amended, 1067, as amended; 29 U.S.C. 203, 211, 212.

SOURCE: 41 FR 26834, June 29, 1976, unless otherwise noted.

### § 570.1 Definitions.

As used in this part:

(a) *Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) *Oppressive child labor* means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in § 570.2 of this subpart.

(c) *Oppressive child labor age* means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) A *certificate of age* means a certificate as provided in § 570.5(b) (1) or (2) of this part.

(e) [Reserved]

(f) *Secretary'' or Secretary of Labor* means the Secretary of Labor, United

States Department of Labor, or his authorized representative.

(g) *Wage and Hour Division* means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative.

(i) *State agency* means any officer, executive department, board, bureau or commission of a State or any division or unit thereof authorized to take action with respect to the application of laws relating to minors.

### § 570.2 Minimum age standards.

(a) *All occupations except in agriculture.* (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being (see subpart E of this part).

(2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

(b) *Occupations in agriculture.* The Act sets a 16-year age minimum for employment in agriculture during school hours for the school district in which the employed minor is living at the time, and also for employment in any occupation in agriculture that the Secretary of Labor finds and declares to be particularly hazardous except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person (see Subpart E–1 of this part). There is a minimum age requirement of 14 years generally for employment in agriculture outside school hours for the school district where such employee is living while so employed. However, (1) a minor 12 or 13 years of age may be so employed with written consent of his parent or person standing in place of his parent, or may work on a farm where such parent or person is also employed, and (2) a minor under 12 years of age may be employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person, or may be employed with consent of such parent or person on a farm where all employees are exempt from the minimum wage provisions by virtue of section 13(a) (6) (A) of the Act.

## Subpart B—Certificates of Age

AUTHORITY: 29 U.S.C. 203(l), 211, 212.

SOURCE: 41 FR 26835, June 29, 1976, unless otherwise noted.

### § 570.5 Certificates of age and their effect.

(a) To protect an employer from unwitting violation of the minimum age standards under the Act, section 3(1) of the Act provides that ''oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age.'' The provisions of this subpart provide for age certificates based on the best available documentary evidence of age. Certificates issued and effective pursuant to this subpart furnish an employer with proof of the age of a minor employee upon which he may rely in determining whether the minor

is at least the minimum age for the occupation in which he is to be employed.

(b) The employment of any minor shall not be deemed to constitute oppressive child labor under the Act if his employer shall have on file an unexpired certificate, issued and held in accordance with this subpart, which shall be either:

(1) A Federal certificate of age, issued by a person authorized by the Administrator of the Wage and Hour Division, showing that such minor is above the oppressive child-labor age applicable to the occupation in which he is employed, or

(2) A State certificate, which may be in the form of and known as an age, employment, or working certificate or permit, issued by or under the supervision of a State agency in a State which has been designated for this purpose by the Administrator showing that such minor is above the oppressive child-labor age applicable to the occupation in which the minor is employed. States so designated are listed in § 570.9(a). Any such certificate shall have the force and effect specified in § 570.9.

(c) The prospective employer of a minor, in order to protect himself from unwitting violation of the Act, should obtain a certificate (as specified in paragraphs (b) (1) and (2) of this section) for the minor if there is any reason to believe that the minor's age may be below the applicable minimum for the occupation in which he is to be employed. Such certificate should always be obtained where the minor claims to be only 1 or 2 years above the applicable minimum age for the occupation in which he is to be employed. It should also be obtained for every minor claiming to be older than 2 years above the applicable minimum age if his physical appearance indicates that this may not be true.

### § 570.6 Contents and disposition of certificates of age.

(a) Except as provided in §§ 570.9 and 570.10, a certificate of age which shall have the effect specified in § 570.5 shall contain the following information:

(1) Name and address of minor.

(2) Place and date of birth of minor, together with a statement indicating the evidence on which this is based. The place of birth need not appear on the certificate if it is obtained and kept on file by the person issuing the certificate.

(3) Sex of minor.

(4) Signature of minor.

(5) Name and address of minor's parent or person standing in place of parent. This information need not appear on the certificate if it is obtained and kept on file by the person issuing the certificate.

(6) Name and address of employer, if minor is under 18.

(7) Industry of employer, if minor is under 18.

(8) Occupation of minor, if minor is under 18.

(9) Signature of issuing officer.

(10) Date and place of issuance.

(b)(1) We will send a certificate of age for a minor under 18 years of age to the prospective employer of the minor. That employer must keep the certificate on file at the minor's workplace. When the minor terminates employment, the employer must give the certificate to the minor. The minor may then present the previously issued certificate to future employers as proof of age as described in § 570.5.

(2) Whenever a certificate of age is issued for a minor 18 or 19 years of age it may be given to the minor by the person issuing the certificate. Every minor 18 or 19 years of age shall, upon entering employment, deliver his certificate of age to his employer for filing and upon the termination of the employment, the employer shall return the certificate to the minor.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1215–0083)

[41 FR 26835, June 29, 1976, as amended at 49 FR 18294, Apr. 30, 1984; 69 FR 75402, Dec. 16, 2004]

### § 570.7 Documentary evidence required for issuance of a certificate of age.

(a) Except as otherwise provided in §§ 570.9 and 570.10, a certificate of age which shall have the effect specified in § 570.5 shall be issued only upon application of the minor desiring employment or of the prospective employer to

the person authorized to issue such certificate and only after acceptable documentary evidence of age has been received, examined, and approved. Such evidence shall consist of one of the following to be required in the order of preference herein designated:

(1) A birth certificate or attested transcript thereof or a signed statement of the recorded date and place of birth, issued by a registrar of vital statistics or other officer charged with the duty of recording births.

(2) A record of baptism or attested transcript thereof showing the date and place of birth and date and place of baptism of the minor, or a bona fide contemporary record of the date and place of the minor's birth kept in the Bible in which the records of the births in the family of the minor are preserved, or other documentary evidence satisfactory to the Administrator, such as a passport showing the age of the minor, or a certificate of arrival in the United States issued by the United States immigration office and showing the age of the minor, or a life-insurance policy: *Provided,* That such other documentary evidence has been in existence at least 1 year prior to the time it is offered as evidence: And *provided further,* That a school record of age or an affidavit of a parent or a person standing in place of a parent, or other written statement of age shall not be accepted except as specified in paragraph (a) (3) of this section;

(3) The school record or the school-census record of the age of the minor, together with the sworn statement of a parent or person standing in place of a parent as to the age of the minor and also a certificate signed by a physician specifying what in his opinion is the physical age of the minor. Such certificate shall show the height and weight of the minor and other facts concerning his physical development which were revealed by such examination and upon which the opinion of the physician as to the physical age of the minor is based. If the school or school-census record of age is not obtainable, the sworn statement of the parent or person standing in place of a parent as to the date of birth of the minor, together with a physician's certificate of age as hereinbefore specified, may be accepted as evidence of age.

(b) The officer issuing a certificate of age for a minor shall require the evidence of age specified in paragraph (a)(1) of this section in preference to that specified in paragraphs (a)(2) and (3) of this section, and shall not accept the evidence of age permitted by either subsequent paragraph unless he shall receive and file evidence that reasonable efforts have been made to obtain the preferred evidence required by the preceding paragraph or paragraphs before accepting any subsequently named evidence: *Provided,* That to avoid undue delay in the issuance of certificates, evidence specified in paragraph (a)(2) of this section may be accepted, or if such evidence is not available, evidence specified in paragraph (a)(3) of this section may be accepted if a verification of birth has been requested but has not been received from the appropriate bureau of vital statistics.

### § 570.8 Issuance of a Federal certificate of age.

A Federal certificate of age which shall have the effect specified in § 570.5 shall be issued by a person authorized by the Administrator of the Wage and Hour Division and shall be issued in accordance with the provisions of §§ 570.6 and 570.7.

### § 570.9 States in which State certificates of age are accepted.

(a) The States in which age, employment, or working certificates or permits have been found by the Administrator to be issued by or under the supervision of a State agency substantially in accordance with the provisions of §§ 570.6 and 570.7 and which are designated as States in which certificates so issued shall have the force and effect specified in § 570.5, except as individual certificates may be revoked in accordance with § 570.11 of this subpart, are:

Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto

Rico, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

(b) State certificates requiring conditions or restrictions additional to those required by this subpart shall not be deemed to be inconsistent herewith.

(c) The designation of a State under this section shall have force and effect indefinitely unless withdrawal of such designation is deemed desirable for the effective administration of the Act. No withdrawal of the designation of a State under this section shall make any certificate invalid if it was issued by or under the supervision of a State agency as herein provided prior to such withdrawal.

### § 570.10 Rules for certificates of age in the State of Alaska and the Territory of Guam.

The State of Alaska and the Territory of Guam are designated as States in which any of the following documents shall have the same effect as Federal certificates of age as specified in § 570.5:

(a) A birth certificate or attested transcript thereof, or a signed statement of the recorded date and place of birth issued by a registrar of vital statistics or other officer charged with the duty of recording births, or

(b) A record of baptism or attested transcript thereof showing the date of birth of the minor, or

(c) With respect to the State of Alaska, a statement on the census records of the Bureau of Indian Affairs and signed by an administrative representative thereof showing the name, date of birth, and place of birth of the minor.

### § 570.11 Continued acceptability of certificates of age.

(a) Whenever a person duly authorized to make investigations under this Act shall obtain substantial evidence that the age of the minor as given on a certificate held by an employer subject to this Act is incorrect, he shall inform the employer and the minor of such evidence and of his intention to request through the appropriate channels that action be taken to establish the correct age of the minor and to determine the continued acceptability of the certificate as proof of age under the Act. The said authorized person shall request in writing through the appropriate channels that action be taken on the acceptability of the certificate as proof of age under the Fair Labor Standards Act and shall state the evidence of age of the minor which he has obtained and the reasons for such request. A copy of this request shall be sent to the Administrator of the Wage and Hour Division for further handling through the State agency responsible for the issuance of certificates, except that in those States where Federal certificates of age are issued, action necessary to establish the correct age of the minor and to revoke the certificate if it is found that the minor is under age shall be taken by the Administrator of the Wage and Hour Division or his designated representative.

(b) The Administrator shall have final authority in those States in which State certificates are accepted as proof of age under the Act for determining the continued acceptability of the certificate, and shall have final authority for such determination in those States in which Federal certificates of age are issued. When such determination has been made in any case, notice thereof shall be given to the employer and the minor. In those cases involving the continued acceptability of State certificates, the appropriate State agency and the official who issued the certificate shall also be notified.

### § 570.12 Revoked certificates of age.

A certificate which has been revoked as proof of age under the Act shall be of no force and effect under the Act after notice of such revocation.

## PROVISIONS OF OTHER LAWS

### § 570.25 Effect on laws other than the Federal child labor standards.

No provision of this subpart shall under any circumstances justify or be construed to permit noncompliance with the provisions of any other Federal law or of any State law or municipal ordinance establishing higher standards than those established under this subpart.

## Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

AUTHORITY: 29 U.S.C. 203(l), 212.

### § 570.31 Secretary's determinations concerning the employment of minors 14 and 15 years of age.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

### § 570.32 Effect of subpart C.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § 570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

### § 570.33 Prohibited occupations for minors 14 and 15 years of age.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(l) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair);

except such office (including ticket office) work, or sales work, in connection with paragraphs (f)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

### § 570.34 Occupations minors 14 and 15 years of age are permitted to perform in retail, food service, and gasoline service establishments.

(a) This subpart shall apply to the following permitted occupations for minors between the ages of 14 and 16 employed by retail, food service, and gasoline service establishments.

(1) Office and clerical work, including the operation of office machines;

(2) Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping;

(3) Price marking and tagging by hand or by machine, assembling orders, packing and shelving;

(4) Bagging and carrying out customers' orders;

(5) Errand and delivery work by foot, bicycle, and public transportation;

(6) Clean up work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers, or cutters;

(7) Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work. Examples of permitted machines and devices include, but are not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, coffee grinders, automatic coffee machines, devices used to maintain the temperature of prepared foods (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to

warm above 140 °F. Minors are permitted to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100 °F;

(8) Work in connection with cars and trucks if confined to the following: Dispensing gasoline and oil; courtesy service; car cleaning, washing and polishing; and other occupations permitted by this section, but not including work involving the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring.

(9) Cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing and stocking goods when performed in areas physically separate from those where the work described in paragraph (b)(7) of this section is performed;

(b) Paragraph (a) of this section shall not be construed to permit the application of this subpart to any of the following occupations in retail, food service, and gasoline service establishments:

(1) All occupations listed in § 570.33 except occupations involving processing, operation of machines and work in rooms where processing and manufacturing take place which are permitted by paragraph (a) of this section;

(2) Work performed in or about boiler or engine rooms;

(3) Work in connection with maintenance or repair of the establishment, machines or equipment;

(4) Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes;

(5) Baking and cooking are prohibited except:

(i) Cooking is permitted with electric or gas grilles which does not involve cooking over an open flame (NOTE: this provision does not authorize cooking with equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures such as ''Neico broilers''); and

(ii) Cooking is permitted with deep fryers that are equipped with and utilize a device which automatically lowers the baskets into the hot oil or grease and automatically raises the baskets from the hot oil or grease;

(6) Occupations which involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers;

(7) Work in freezers and meat coolers and all work in the preparation of meats for sale except as described in paragraph (a)(9) of this section;

(8) Loading and unloading goods to and from trucks, railroad cars, or conveyors;

(9) All occupations in warehouses except office and clerical work.

[27 FR 4165, May 2, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971; 69 FR 75402, Dec. 16, 2004]

### § 570.35 Hours of work and conditions of employment permitted for minors 14 and 15 years of age.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

(b) In the case of minors 14 and 15 years of age who are employed to perform sports-attending services at professional sporting events, *i.e.*, baseball, basketball, football, soccer, tennis, etc., the requirements of paragraphs (a)(2) through (a)(6) of this section shall not apply, provided that the duties of the sports-attendant occupation

consist of pre- and post-game or practice setup of balls, items and equipment; supplying and retrieving balls, items and equipment during a sporting event; clearing the field or court of debris, moisture, etc. during play; providing ice, drinks, towels, etc., to players during play; running errands for trainers, managers, coaches, and players before, during, and after a sporting event; and returning and/or storing balls, items and equipment in club house or locker room after a sporting event. For purposes of this exception, impermissible duties include grounds or field maintenance such as grass mowing, spreading or rolling tarpaulins used to cover playing areas, etc.; cleaning and repairing equipment; cleaning locker rooms, showers, lavatories, rest rooms, team vehicles, club houses, dugouts or similar facilities; loading and unloading balls, items, and equipment from team vehicles before and after a sporting event; doing laundry; and working in concession stands or other selling and promotional activities.

[32 FR 15478, Nov. 8, 1967. Redesignated and amended at 36 FR 25156, Dec. 29, 1971; 37 FR 5246, Mar. 11, 1972; 60 FR 19339, Apr. 17, 1995]

### § 570.35a Work experience and career exploration program.

(a) This section varies some provisions of this subpart for the employment of minors between 14 and 16 years of age who are enrolled in and employed pursuant to a school-supervised and school-administered work-experience and career exploration program which meets the requirements of paragraph (b) of this section, in the occupations permitted under paragraph (c) of this section, and for the periods and under the conditions specified in paragraph (d) of this section. With these safeguards, such employment is found not to interfere with the schooling of the minors or with their health and well-being and therefore is not deemed to be oppressive child labor.

(b)(1) A school-supervised and school-administered work-experience and career exploration program shall meet the educational standards established and approved by the State Educational Agency in the respective State.

(2) The State Educational Agency shall file with the Administrator of the Wage and Hour Division a letter of application for approval of a State program as one not interfering with schooling or with the health and well-being of the minors involved and therefore not constituting oppressive child labor. The application must include information concerning the criteria listed in paragraph (b)(3) of this section. The Administrator of the Wage and Hour Division shall approve the application, or give prompt notice of any denial and the reasons therefor.

(3) The criteria to be used in consideration of applications are the following:

(i) *Eligibility*. Any student aged 14 or 15 years who authoritative local school personnel identify as being able to benefit from the program shall be eligible to participate.

(ii) *Credits*. Students shall receive school credits for both in-school related instruction and on-the-job experience.

(iii) *Size*. Each program unit shall be a reasonable size. A unit of 12 to 25 students to one teacher-coordinator would be generally considered reasonable. Whether other sizes are reasonable would depend upon the individual facts and circumstances involved.

(iv) *Instructional schedule*. There shall be (*a*) allotted time for the required classroom instruction in those subjects necessary for graduation under the State's standards and (*b*) regularly scheduled classroom periods of instruction devoted to job-related and to employability skill instruction.

(v) *Teacher-coordinator*. Each program unit shall be under the supervision of a school official to be designated for the purpose of the program as a teacher-coordinator, who shall generally supervise the program and coordinate the work and education aspects of the program and make regularly scheduled visits to the work stations.

(vi) *Written training agreement*. No student shall participate in the program until there has been made a written training agreement signed by the teacher-coordinator, the employer, and the student. The agreement shall also be signed or otherwise consented to by the student's parent or guardian.

(vii) *Other provisions.* Any other provisions of the program providing safeguards ensuring that the employment permitted under this section will not interfere with the schooling of the minors or with their health and well-being may also be submitted for use in consideration of the application.

(4) Every State Educational Agency having students in a program approved pursuant to the requirements of this section shall comply with the following:

(i) *Permissible occupations.* No student shall be assigned to work in any occupation other than one permitted under paragraph (c) of this section.

(ii) *Records and reports.* The names and addresses of each school enrolling work experience and career exploration program students and the number of enrollees in each unit shall be kept at the State Educational Agency office. A copy of the written training agreement for each student participating in the program shall be kept in the State Educational Agency office or in the local educational office. The records required for this paragraph shall be kept for a period of 3 years from the date of enrollment in the program and shall be made available for inspection or transcription to the representatives of the Administrator of the Wage and Hour Division.

(c) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be permitted in all occupations except the following:

(1) Manufacturing and mining.

(2) Occupations declared to be hazardous for the employment of minors between 16 and 18 years of age in subpart E of this part, and occupations in agriculture declared to be hazardous for employment of minors below the age of 16 in subpart E–1 of this part.

(3) Occupations other than those permitted under §§570.33 and 570.34, except upon approval of a variation by the Administrator of the Wage and Hour Division in acting on the program application of the State Educational Agency. The Administrator shall have discretion to grant requests for special variations if the applicant demonstrates that the activity will be performed under adequate supervision and training (including safety precautions) and that the terms and conditions of the proposed employment will not interfere with the health or well-being or schooling of the minor enrolled in an approved program. The granting of a special variation is determined on a case-by-case basis.

(i) The Administrator's decision on whether to grant a special variation will be based on information provided in the application filed by the State Educational Agency, and/or any supplemental information that may be requested by the Administrator.

(ii) The Administrator's decision shall be in writing, and may designate specific equipment safeguards or other terms and conditions governing the work-activity approved by variation. If the request is denied, in whole or part, the reason(s) for the decision will be provided to the applicant, who may request reconsideration.

(iii) A special variation will be valid only during the period covered by an approved program, and must be renewed with the filing of a new program application.

(iv) The Administrator shall revoke or deny a special variation, in whole or in part, where there is reason to believe that program participants have been or will be employed contrary to terms and conditions specified for the variation, or these regulations, other provisions of the Fair Labor Standards Act, or otherwise in conditions detrimental to their health or well-being or schooling.

(v) Requests for special variations and related documentation will be available for examination in the Branch of Child Labor and Polygraph Standards, Wage and Hour Division, Room S3510, 200 Constitution Avenue, NW., Washington, DC 20210. Any interested person may oppose the granting of a special variation or may request reconsideration or revocation of a special variation. Such requests shall set forth reasons why the special variation should be denied or revoked.

(d) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be confined to not more than 23 hours in any 1 week when school is in session and not more than 3 hours in any day when

school is in session, any portion of which may be during school hours. Insofar as these provisions are inconsistent with the provisions of § 570.35, this section shall be controlling.

(e) The employment of a minor enrolled in a program pursuant to the requirements of this section must not have the effect of displacing a worker employed in the establishment of the employer.

(f) Programs shall be in force and effect for a period of two (2) school years from the date of their approval by the Administrator of the Wage and Hour Division. A new application for approval must be filed at the end of that period. Failure to meet the requirements of this section may result in withdrawal of approval.

(The information collection requirements contained in paragraphs (b)(3)(vi) and (4) were approved by the Office of Management and Budget under control number 1215–0121)

[40 FR 40801, Sept. 4, 1975; 40 FR 44130, Sept. 25, 1975; 47 FR 145, Jan. 5, 1982; 47 FR 28095, June 29, 1982, as amended at 49 FR 18294, Apr. 30, 1984; 60 FR 19339, Apr. 17, 1995]

### § 570.36 Effect of a certificate of age under this subpart.

The employment of any minor in any of the occupations to which this subpart is applicable, if confined to the periods specified in § 570.35, shall not be deemed to constitute oppressive child labor within the meaning of the act if the employer shall have on file an unexpired certificate, issued in substantially the same manner as that provided for the issuance of certificates in subpart A of this part relating to certificates of age, certifying that such minor is of an age between 14 and 16 years.

[16 FR 7008, July 20, 1951. Redesignated at 27 FR 4165, May 2, 1962, and 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.37 Effect of this subpart on other laws.

No provision of this subpart shall under any circumstances justify or be construed to permit noncompliance with the wage and hour provisions of the act or with the provisions of any other Federal law or of any State law or municipal ordinance establishing higher standards than those established under this subpart.

[16 FR 7008, July 20, 1951. Redesignated at 27 FR 4165, May 2, 1962, and 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

## Subpart D [Reserved]

## Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

AUTHORITY: 29 U.S.C. 203(l), 212, 213(c).

NOTE: The provisions of this subpart declaring certain occupations to be particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being do not apply to employment in agriculture.

### § 570.50 General.

(a) *Higher standards.* Nothing in this subpart shall authorize non-compliance with any Federal or State law, regulation, or municipal ordinance establishing a higher standard. If more than one standard within this subpart applies to a single activity the higher standard shall be applicable.

(b) *Apprentices.* Some sections in this subpart contain an exemption for the employment of apprentices. Such an exemption shall apply only when: (1) The apprentice is employed in a craft recognized as an apprenticeable trade; (2) the work of the apprentice in the occupations declared particularly hazardous is incidental to his training; (3) such work is intermittent and for short periods of time and is under the direct and close supervision of a journeyman as a necessary part of such apprentice training; and (4) the apprentice is registered by the Bureau of Apprenticeship and Training of the United States Department of Labor as employed in accordance with the standards established by that Bureau, or is registered by a State agency as employed in accordance with the standards of the State apprenticeship agency recognized by the Bureau of Apprenticeship and

Training, or is employed under a written apprenticeship agreement and conditions which are found by the Secretary of labor to conform substantially with such Federal or State standards.

(c) *Student-learners.* Some sections in this subpart contain an exemption for the employment of student-learners. Such an exemption shall apply when:

(1) The student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized State or local educational authority or in a course of study in a substantially similar program conducted by a private school and;

(2) Such student-learner is employed under a written agreement which provides:

(i) That the work of the student-learner in the ocupations declared particularly hazardous shall be incidental to his training;

(ii) That such work shall be intermittent and for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) That safety instructions shall be given by the school and correlated by the employer with on-the-job training; and

(iv) That a schedule of organized and progressive work processes to be performed on the job shall have been prepared.

Each such written agreement shall contain the name of student-learner, and shall be signed by the employer and the school coordinator or principal. Copies of each agreement shall be kept on file by both the school and the employer. This exemption for the employment of student-learners may be revoked in any individual situation where it is found that reasonable precautions have not been observed for the safety of minors employed thereunder. A high school graduate may be employed in an occupation in which he has completed training as provided in this paragraph as a student-learner, even though he is not yet 18 years of age.

[28 FR 3449, Apr. 9, 1963, as amended at 33 FR 12777, Sept. 10, 1968. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).

(a) *Finding and declaration of fact.* The following occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components are particularly hazardous for minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations in or about any plant or establishment (other than retail establishments or plants or establishments of the type described in paragraph (a)(2) of this section) manufacturing or storing explosives or articles containing explosive components except where the occupation is performed in a ''nonexplosives area'' as defined in paragraph (b)(3) of this section.

(2) The following occupations in or about any plant or establishment manufacturing or storing small-arms ammunition not exceeding .60 caliber in size, shotgun shells, or blasting caps when manufactured or stored in conjunction with the manufacture of small-arms ammunition:

(i) All occupations involved in the manufacturing, mixing, transporting, or handling of explosive compounds in the manufacture of small-arms ammunition and all other occupations requiring the performance of any duties in the explosives area in which explosive compounds are manufactured or mixed.

(ii) All occupations involved in the manufacturing, transporting, or handling of primers and all other occupations requiring the performance of any duties in the same building in which primers are manufactured.

(iii) All occupations involved in the priming of cartridges and all other occupations requiring the performance of any duties in the same workroom in which rim-fire cartridges are primed.

(iv) All occupations involved in the plate loading of cartridges and in the operation of automatic loading machines.

(v) All occupations involved in the loading, inspecting, packing, shipping and storage of blasting caps.

(b) *Definitions.* For the purpose of this section:

(1) The term *plant or establishment manufacturing or storing explosives or articles containing explosive component* means the land with all the buildings and other structures thereon used in connection with the manufacturing or processing or storing of explosives or articles containing explosive components.

(2) The terms *explosives* and *articles containing explosive components* mean and include ammunition, black powder, blasting caps, fireworks, high explosives, primers, smokeless powder, and explosives and explosive materials as defined in 18 U.S.C. 841(c)–(f) and the implementing regulations at 27 CFR part 555. The terms include any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion, as well as all goods identified in the most recent list of explosive materials published by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice. This list is not intended to be all-inclusive and is updated and published annually in the FEDERAL REGISTER pursuant to 18 U.S.C. 841(d). A copy of the most recent version of the list may be found through the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Web site at *http://www.atf.gov*.

(3) An area meeting all of the criteria in paragraphs (b)(3) (i) through (iv) of this section shall be deemed a ''non-explosives area'':

(i) None of the work performed in the area involves the handling or use of explosives;

(ii) The area is separated from the explosives area by a distance not less than that prescribed in the American Table of Distances for the protection of inhabited buildings;

(iii) The area is separated from the explosives area by a fence or is otherwise located so that it constitutes a definite designated area; and

(iv) Satisfactory controls have been established to prevent employees under 18 years of age within the area from entering any area in or about the plant which does not meet criteria of paragraphs (b)(3) (i) through (iii) of this section.

[17 FR 4324, May 13, 1952. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971; 69 FR 75403, Dec. 16, 2004]

### § 570.52 Occupations of motor-vehicle driver and outside helper (Order 2).

(a) *Findings and declaration of fact.* Except as provided in paragraph (b) of this section, the occupations of motor-vehicle driver and outside helper on any public road, highway, in or about any mine (including open pit mine or quarry), place where logging or sawmill operations are in progress, or in any excavation of the type identified in § 570.68(a) are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Exemption—Incidental and occasional driving by 17-year-olds.* Minors who are at least 17 years of age may drive automobiles and trucks on public roadways when all the following criteria are met:

(1) The automobile or truck does not exceed 6,000 pounds gross vehicle weight, and the vehicle is equipped with a seat belt or similar restraining device for the driver and for any passengers and the employer has instructed the employee that such belts or other devices must be used;

(2) The driving is restricted to daylight hours;

(3) The minor holds a State license valid for the type of driving involved in the job performed and has no records of any moving violations at the time of hire;

(4) The minor has successfully completed a State-approved driver education course;

(5) The driving does not involve: the towing of vehicles; route deliveries or route sales; the transportation for hire of property, goods, or passengers; urgent, time-sensitive deliveries; or the transporting at any one time of more than three passengers, including the employees of the employer;

(6) The driving performed by the minor does not involve more than two trips away from the primary place of employment in any single day for the

purpose of delivering goods of the minor's employer to a customer (except urgent, time-sensitive deliveries which are completely banned in paragraph (b)(5) of this section;

(7) The driving performed by the minor does not involve more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than the employees of the employer);

(8) The driving takes place within a thirty (30) mile radius of the minor's place of employment; and,

(9) The driving is only occasional and incidental to the employee's employment.

(c) *Definitions.* For the purpose of this section:

(1) The term *motor vehicle* shall mean any automobile, truck, truck-tractor, trailer, semitrailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term *driver* shall mean any individual who, in the course of employment, drives a motor vehicle at any time.

(3) The term *outside helper* shall mean any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods.

(4) The term *gross vehicle weight* includes the truck chassis with lubricants, water and a full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload.

(5) The term *occasional and incidental* means no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(6) The term *urgent, time-sensitive deliveries* means trips which, because of such factors as customer satisfaction, the rapid deterioration of the quality or change in temperature of the product, and/or economic incentives, are subject to time-lines, schedules, and/or turn-around times which might impel the driver to hurry in the completion of the delivery. Prohibited trips would include, but are not limited to, the delivery of pizzas and prepared foods to the customer; the delivery of materials under a deadline (such as deposits to a bank at closing); and the shuttling of passengers to and from transportation depots to meet transport schedules. *Urgent, time-sensitive deliveries* would not depend on the delivery's points of origin and termination, and would include the delivery of people and things to the employer's place of business as well as from that business to some other location.

[56 FR 58630, Nov. 20, 1991, as amended at 69 FR 75403, Dec. 16, 2004]

### § 570.53 Coal-mine occupations (Order 3).

(a) *Finding and declaration of fact.* All occupations in or about any coal mine, except the occupation of slate or other refuse picking at a picking table or picking chute in a tipple or breaker and occupations requiring the performance of duties solely in offices or in repair or maintenance shops located in the surface part of any coal-mining plant, are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Definitions.* For the purpose of this section:

(1) The term *coal* shall mean any rank of coal including lignite, bituminous, and the anthracite coals.

(2) The term *all occupations in or about any coal mine* shall mean all types of work performed in any underground working, open-pit, or surface part of any coal-mining plant, that contribute to the extraction, grading, cleaning, or other handling of coal.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.54 Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).

(a) *Finding and declaration of fact.* All occupations in logging and all occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill are particularly hazardous for the employment of minors between

16 and 18 years of age, except the following:

(1) Exceptions applying to logging:

(i) Work in offices or in repair or maintenance shops.

(ii) Work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps.

(iii) Work in timber cruising, surveying, or logging-engineering parties; work in the repair or maintenance of roads, railroads, or flumes; work in forest protection, such as clearing fire trails or roads, piling and burning slash, maintaining fire-fighting equipment, constructing and maintaining telephone lines, or acting as fire lookout or fire patrolman away from the actual logging operations: *Provided*, That the provisions of this paragraph shall not apply to the felling of bucking of timber, the collecting or transporting of logs, the operation of power-driven machinery, the handling or use of explosives, and work on trestles.

(iv) Peeling of fence posts, pulpwood, chemicalwood, excelsior wood, cordwood, or similar products, when not done in conjunction with and at the same time and place as other logging occupations declared hazardous by this section.

(v) Work in the feeding or care of animals.

(2) Exceptions applying to the operation of any permanent sawmill or the operation of any lath mill, shingle mill, or cooperage-stock mill: *Provided*, That these exceptions do not apply to a portable sawmill the lumberyard of which is used only for the temporary storage of green lumber and in connection with which no office or repair or maintenance shop is ordinarily maintained: *And further provided*, That these exceptions do not apply to work which entails entering the sawmill building:

(i) Work in offices or in repair or maintenance shops.

(ii) Straightening, marking, or tallying lumber on the dry chain or the dry drop sorter.

(iii) Pulling lumber from the dry chain.

(iv) Clean-up in the lumberyard.

(v) Piling, handling, or shipping of cooperage stock in yards or storage sheds other than operating or assisting in the operation of power-driven equipment.

(vi) Clerical work in yards or shipping sheds, such as done by ordermen, tally-men, and shipping clerks.

(vii) Clean-up work outside shake and shingle mills, except when the mill is in operation.

(viii) Splitting shakes manually from precut and split blocks with a froe and mallet, except inside the mill building or cover.

(ix) Packing shakes into bundles when done in conjunction with splitting shakes manually with a froe and mallet, except inside the mill building or cover.

(x) Manual loading of bundles of shingles or shakes into trucks or railroad cars, provided that the employer has on file a statement from a licensed doctor of medicine or osteopathy certifying the minor capable of performing this work without injury to himself.

(b) *Definition*. As used in this section:

(1) The term *all occupations in logging* shall mean all work performed in connection with the felling of timber; the bucking or converting of timber into logs, poles, piles, ties, bolts, pulpwood, chemical wood, excelsior wood, cordwood, fence posts, or similar products; the collecting, skidding, yarding, loading, transporting and unloading of such products in connection with logging; the constructing, repairing and maintaining of roads, railroads, flumes, or camps used in connection with logging; the moving, installing, rigging, and maintenance of machinery or equipment used in logging; and other work performed in connection with logging. The term shall not apply to work performed in timber culture, timber-stand improvement, or in emergency fire-fighting.

(2) The term *all occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill* shall mean all work performed in or about any such mill in connection with storing of logs and bolts; converting logs or bolts into sawn lumber, laths, shingles, or cooperage stock; storing, drying, and shipping lumber, laths, shingles, cooperage stock, or other products of such mills; and other work performed in connection with the operation of any sawmill, lath mill, shingle mill, or

cooperage-stock mill. The term shall not include work performed in the planing-mill department or other remanufacturing departments of any sawmill, or in any planing mill or remanufacturing plant not a part of a sawmill.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963; 32 FR 6024, Apr. 15, 1967. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).

(a) *Finding and declaration of fact.* The following occupations involved in the operation of power-driven wood-working machines are particularly hazardous for minors between 16 and 18 years of age:

(1) The occupation of operating power-driven woodworking machines, including supervising or controlling the operation of such machines, feeding material into such machines, and helping the operator to feed material into such machines but not including the placing of material on a moving chain or in a hopper or slide for automatic feeding.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.

(3) The occupations of off-bearing from circular saws and from guillotine-action veneer clippers.

(b) *Definitions.* As used in this section:

(1) The term *power-driven woodworking machines* shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer.

(2) The term *off-bearing* shall mean the removal of material or refuse directly from a saw table or from the point of operation. Operations not considered as off-bearing within the intent of this section include: (i) The removal of material or refuse from a circular saw or guillotine-action veneer clipper where the material or refuse has been conveyed away from the saw table or point of operation by a gravity chute or by some mechanical means such as a moving belt or expulsion roller, and (ii) the following operations when they do not involve the removal of material or refuse directly from a saw table or from the point of operation: The carrying, moving, or transporting of materials from one machine to another or from one part of a plant to another; the piling, stacking, or arranging of materials for feeding into a machine by another person; and the sorting, tying, bundling, or loading of materials.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.57 Exposure to radioactive substances and to ionizing radiations (Order 6).

(a) *Finding and declaration of fact.* The following occupations involving exposure to radioactive substances and to ionizing radiations are particularly hazardous and detrimental to health for minors between 16 and 18 years of age:

(1) Any work in any workroom in which (i) radium is stored or used in the manufacture of self-luminous compound, (ii) self-luminous compound is made, processed, or packaged, (iii) self-luminous compound is stored, used, or worked upon, (iv) incandescent mantles are made from fabric and solutions containing thorium salts, or are processed or packaged, (v) other radioactive substances are present in the air in average concentrations exceeding 10 percent of the maximum permissible concentrations in the air recommended for occupational exposure by the National Committee on Radiation Protection, as set forth in the 40-hour week column of table one of the National Bureau of Standards Handbook No. 69 entitled ''Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure,'' issued June 5, 1959.

(2) Any other work which involves exposure to ionizing radiations in excess of 0.5 rem per year.

(b) *Definitions*. As used in this section:

(1) The term *self-luminous compound* shall mean any mixture of phosphorescent material and radium, mesothorium, or other radioactive element;

(2) The term *workroom* shall include the entire area bounded by walls of solid material and extending from floor to ceiling;

(3) The term *ionizing radiations* shall mean alpha and beta particles, electrons, protons, neutrons, gamma and X-ray and all other radiations which produce ionizations directly or indirectly, but does not include electromagnetic radiations other than gamma and X-ray.

[22 FR 3657, May 24, 1957, as amended at 26 FR 8885, Sept. 21, 1961. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).

(a) *Finding and declaration of fact*. The following occupations involved in the operation of power-driven hoisting apparatus are particularly hazardous for minors between 16 and 18 years of age:

(1) Work of operating an elevator, crane, derrick, hoist, or high-lift truck, except operating an unattended automatic operation passenger elevator or an electric or air-operated hoist not exceeding one ton capacity.

(2) Work which involves riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator.

(3) Work of assisting in the operation of a crane, derrick, or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

(b) *Definitions*. As used in this section:

(1) The term *elevator* shall mean any power-driven hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction. The term shall include both passenger and freight elevators (including portable elevators or tiering machines), but shall not include dumbwaiters.

(2) The term *crane* shall mean a power-driven machine for lifting and lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine. The term shall include all types of cranes, such as cantilever gantry, crawler, gantry, hammerhead, ingot-pouring, jib, locomotive, motor-truck, overhead traveling, pillar jib, pintle, portal, semi-gantry, semi-portal, storage bridge, tower, walking jib, and wall cranes.

(3) The term *derrick* shall mean a power-driven apparatus consisting of a mast or equivalent members held at the top by guys or braces, with or without a boom, for use with a hoisting mechanism or operating ropes. The term shall include all types of derricks, such as A-frame, breast, Chicago boom, gin-pole, guy and stiff-leg derrick.

(4) The term *hoist* shall mean a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists, such as base mounted electric, clevis suspension, hook suspension, monorail, overhead electric, simple drum and trolley suspension hoists.

(5) The term *high-lift truck* shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork-lift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material.

(6) The term *manlift* shall mean a device intended for the conveyance of persons which consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; such belt, cable or chain operating in a substantially vertical direction and being supported

by and driven through pulleys, sheaves or sprockets at the top and bottom.

(c) *Exception*. (1) This section shall not prohibit the operation of an automatic elevator and an automatic signal operation elevator provided that the exposed portion of the car interior (exclusive of vents and other necessary small openings), the car door, and the hoistway doors are constructed of solid surfaces without any opening through which a part of the body may extend; all hoistway openings at floor level have doors which are interlocked with the car door so as to prevent the car from starting until all such doors are closed and locked; the elevator (other than hydraulic elevators) is equipped with a device which will stop and hold the car in case of overspeed or if the cable slackens or breaks; and the elevator is equipped with upper and lower travel limit devices which will normally bring the car to rest at either terminal and a final limit switch which will prevent the movement in either direction and will open in case of excessive over travel by the car.

(2) For the purpose of this exception the term *automatic elevator* shall mean a passenger elevator, a freight elevator, or a combination passenger-freight elevator, the operation of which is controlled by pushbuttons in such a manner that the starting, going to the landing selected, leveling and holding, and the opening and closing of the car and hoistway doors are entirely automatic.

(3) For the purpose of this exception, the term *automatic signal operation elevator* shall mean an elevator which is started in response to the operation of a switch (such as a lever or pushbutton) in the car which when operated by the operator actuates a starting device that automatically closes the car and hoistway doors—from this point on, the movement of the car to the landing selected, leveling and holding when it gets there, and the opening of the car and hoistway doors are entirely automatic.

[16 FR 7008, July 20, 1951, as amended at 20 FR 6386, Aug. 31, 1955. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963; 32 FR 15479, Nov. 7, 1967. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

## § 570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).

(a) *Finding and declaration of fact*. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven metal forming, punching, and shearing machines:

(i) All rolling machines, such as beading, straightening, corrugating, flanging, or bending rolls; and hot or cold rolling mills.

(ii) All pressing or punching machines, such as punch presses except those provided with full automatic feed and ejection and with a fixed barrier guard to prevent the hands or fingers of the operator from entering the area between the dies; power presses; and plate punches.

(iii) All bending machines, such as apron brakes and press brakes.

(iv) All hammering machines, such as drop hammers and power hammers.

(v) All shearing machines, such as guillotine or squaring shears; alligator shears; and rotary shears.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those with automatic feed and ejection.

(b) *Definitions*. (1) The term *operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term *helper* shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term *forming, punching, and shearing machines* shall mean power-driven metal-working machines, other than machine tools, which change the shape of or cut metal by means of tools, such as dies, rolls, or knives which are mounted on rams, plungers, or other moving parts. Types of forming, punching, and shearing machines

enumerated in this section are the machines to which the designation is by custom applied.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[16 FR 7008, July 20, 1951, as amended at 25 FR 9848, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated at 36 FR 25156, Dec. 29, 1971]

### § 570.60 Occupations in connection with mining, other than coal (Order 9).

(a) *Finding and declaration of fact.* All occupations in connection with mining, other than coal, are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being and employment in such occupations is therefore prohibited under section 12 of the Fair Labor Standards Act, as amended, except the following:

(1) Work in offices, in the warehouse or supply house, in the change house, in the laboratory, and in repair or maintenance shops not located underground.

(2) Work in the operation and maintenance of living quarters.

(3) Work outside the mine in surveying, in the repair and maintenance of roads, and in general clean-up about the mine property such as clearing brush and digging drainage ditches.

(4) Work of track crews in the building and maintaining of sections of railroad track located in those areas of open-cut metal mines where mining and haulage activities are not being conducted at the time and place that such building and maintenance work is being done.

(5) Work in or about surface placer mining operations other than placer dredging operations and hydraulic placer mining operations.

(6) The following work in metal mills other than in mercury-recovery mills or mills using the cyanide process:

(i) Work involving the operation of jigs, sludge tables, flotation cells, or drier-filters;

(ii) Work of hand-sorting at picking table or picking belt;

(iii) General clean-up work:

*Provided, however,* That nothing in this section shall be construed as permitting employment of minors in any occupation prohibited by any other hazardous occupations order issued by the Secretary of Labor.

(b) *Definitions.* As used in this section: The term *all occupations in connection with mining, other than coal* shall mean all work performed underground in mines and quarries; on the surface at underground mines and underground quarries; in or about open-cut mines, open quarries, clay pits, and sand and gravel operations; at or about placer mining operations; at or about dredging operations for clay, sand or gravel; at or about bore-hole mining operations; in or about all metal mills, washer plants, or grinding mills reducing the bulk of the extracted minerals; and at or about any other crushing, grinding, screening, sizing, washing or cleaning operations performed upon the extracted minerals except where such operations are performed as a part of a manufacturing process. The term shall not include work performed in subsequent manufacturing or processing operations, such as work performed in smelters, electro-metallurgical plants, refineries reduction plants, cement mills, plants where quarried stone is cut, sanded and further processed, or plants manufacturing clay glass or ceramic products. Neither shall the term include work performed in connection with coal mining, in petroleum production, in natural-gas production, nor in dredging operations which are not a part of mining operations, such as dredging for construction or navigation purposes.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated at 36 FR 25156, Dec. 29, 1971]

### § 570.61 Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat packing or processing, or rendering (Order 10).

(a) *Findings and declaration of fact.* The following occupations in or about slaughtering and meat packing establishments, rendering plants, or wholesale, retail or service establishments

are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations on the killing floor, in curing cellars, and in hide cellars, except the work of messengers, runners, handtruckers, and similar occupations which require entering such workrooms or workplaces infrequently and for short periods of time.

(2) All occupations involved in the recovery of lard and oils, except packaging and shipping of such products and the operation of lard-roll machines.

(3) All occupations involved in tankage or rendering of dead animals, animal offal, animal fats, scrap meats, blood, and bones into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

(4) All occupations involved in the operation or feeding of the following power-driven machines, including setting-up, adjusting, repairing, oiling, or cleaning such machines, regardless of the product being processed by these machines (including, for example, the slicing in a retail delicatessen of meat, poultry, seafood, bread, vegetables, or cheese, etc.): Meat patty forming machines, meat and bone cutting saws, meat slicers, knives (except bacon-slicing machines), headsplitters, and guillotine cutters; snoutpullers and jawpullers; skinning machines; horizontal rotary washing machines; casing-cleaning machines such as crushing, stripping, and finishing machines; grinding, mixing, chopping, and hashing machines; and presses (except belly-rolling machines).

(5) All boning occupations.

(6) All occupations that involve the pushing or dropping of any suspended carcass, half carcass, or quarter carcass.

(7) All occupations involving handlifting or handcarrying any carcass or half carcass of beef, pork, or horse, or any quarter carcass of beef or horse.

(b) *Definitions.* As used in this section:

(1) The term *slaughtering and meat packing establishments* means places in or about which cattle, calves, hogs, sheep, lambs, goats, or horses are killed, butchered, or processed. The term also includes establishments which manufacture or process meat products or sausage casings from such animals.

(2) The term *rendering plants* means establishments engaged in the conversion of dead animals, animal offal, animal fats, scrap meats, blood, and bones into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

(3) The term *killing floor* includes a workroom, workplace where cattle, calves, hogs, sheep, lambs, goats, or horses are immobilized, shackled, or killed, and the carcasses are dressed prior to chilling.

(4) The term *curing cellar* includes a workroom or workplace which is primarily devoted to the preservation and flavoring of meat by curing materials. It does not include a workroom or workplace solely where meats are smoked.

(5) The term *hide cellar* includes a workroom or workplace where hides are graded, trimmed, salted, and otherwise cured.

(6) The term *boning occupations* means the removal of bones from meat cuts. It does not include work that involves cutting, scraping, or trimming meat from cuts containing bones.

(7) The term *retail/wholesale or service establishments* includes establishments where meat or meat products are processed or handled, such as butcher shops, grocery stores, restaurants/fast-food establishments, hotels, delicatessens, and meat-locker (freezer-locker) companies, and establishments where any food product is prepared or processed for serving to customers using machines prohibited by section (a) of this Order.

(c) *Exemptions.* This section shall not apply to:

(1) The killing and processing of poultry, rabbits, or small game in areas physically separated from the killing floor.

(2) The employment of apprentices or student-learners under the conditions prescribed in § 570.50(b) and (c).

[56 FR 58631, Nov. 20, 1991]

### § 570.62 Occupations involved in the operation of bakery machines (Order 11).

(a) *Finding and declaration of fact.* The following occupations involved in the operation of power-driven bakery machines are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operating, assisting to operate, or setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer; batter mixer; bread dividing, rounding, or molding machine; dough brake; dough sheeter; combination bread slicing and wrapping machine; or cake cutting band saw.

(2) The occupation of setting up or adjusting a cooky or cracker machine.

[17 FR 5610, June 21, 1952, as amended at 25 FR 9849, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.63 Occupations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors (Order 12).

(a) *Findings and declaration of fact.* The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operation or assisting to operate any of the following power-driven paper products machines:

(i) Arm-type wire stitcher or stapler, circular or band saw, corner cutter or mitering machine, corrugating and single-or-double facing machine, envelope die-cutting press, guillotine paper cutter or shear, horizontal bar scorer, laminating or combining machine, sheeting machine, scrap paper baler, paper box compactor, or vertical slotter.

(ii) Platen die-cutting press, platen printing press, or punch press which involves hand feeding of the machine.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those which do not involve hand feeding.

(b) *Definitions. Applicable ANSI Standard* means the American National Standard Institute's Standard ANSI Z245.5–1990 (''American National Standard for Refuse Collection, Processing, and Disposal—Baling Equipment—Safety Requirements'') for scrap paper balers or the American National Standard Institute's Standard ANSI Z245.2–1992 (''American National Standard for Refuse Collection, Processing, and Disposal Equipment—Stationary Compactors—Safety Requirements'') for paper box compactors. Additional applicable standards are the American National Standard Institute's Standard ANSI Z245.5–1997 (''American National Standard for Equipment Technology and Operations for Wastes and Recyclable Materials—Baling Equipment—Safety Requirements'') for scrap paper balers or the American National Standard Institute's Standard ANSI Z245.2–1997 (''American National Standard for Equipment Technology and Operations for Wastes and Recyclable Materials—Stationary Compactors—Safety Requirements'') for paper box compactors, which the Secretary has certified to be at least as protective of the safety of minors as Standard ANSI Z245.5–1990 for scrap paper balers or ANSI Z245.2–1992 for paper box compactors. The ANSI standards for scrap paper balers and paper box compactors govern the manufacture and modification of the equipment, the operation and maintenance of the equipment, and employee training. These ANSI standards are incorporated by reference in this paragraph and have the same force and effect as other standards in this part. Only the mandatory provisions (*i.e.*, provisions containing the word ''shall'' or other mandatory language) of these standards are adopted as standards under this part. These standards are incorporated by reference as they exist on the date of the approval; if any changes are made in these standards which the Secretary finds to be as protective of the safety of minors as the current standards, the Secretary will publish a Notice of the change of standards in the FEDERAL REGISTER. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these standards are available for purchase from the American National Standards Institute (ANSI), 23 West 43rd St., Fourth Floor, New York, NY,

10036. In addition, these standards are available for inspection at the National Archives and Records Administration (NARA) and at the Occupational Safety and Health Administration's Docket Office, Room N2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC, 20210, or any of its regional offices. For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

*Operating or assisting to operate* means all work which involves starting or stopping a machine covered by this section, placing materials into or removing materials from a machine, including clearing a machine of jammed paper or cardboard, or any other work directly involved in operating the machine. The term does not include the stacking of materials by an employee in an area nearby or adjacent to the machine where such employee does not place the materials into the machine.

*Paper box compactor* means a powered machine that remains stationary during operation, used to compact refuse, including paper boxes, into a detachable or integral container or into a transfer vehicle.

*Paper products machine* means:

(1) All power-driven machines used in—(i) Remanufacturing or converting paper or pulp into a finished product, including preparing such materials for recycling; or

(ii) Preparing such materials for disposal.

(2) The term applies to such machines whether they are used in establishments that manufacture converted paper or pulp products, or in any other type of manufacturing or nonmanufacturing establishment. The term also applies to those machines which, in addition to paper products, process other material for disposal.

*Scrap paper baler* means a powered machine used to compress paper and possibly other solid waste, with or without binding, to a density or form that will support handling and transportation as a material unit without requiring a disposable or reusable container.

(c) *Exemptions.* (1) Sixteen- and 17-year-olds minors may load materials into, but not operate or unload, those scrap paper balers and paper box compactors that are safe for 16- and 17-year-old employees to load and cannot be operated while being loaded. For the purpose of this exemption, a scrap paper baler or a paper box compactor is considered to be safe for 16- and 17-year-old to load only if all of the following conditions are met:

(i) The scrap paper baler or paper box compactor meets the applicable ANSI standard (the employer must initially determine if the equipment meets the applicable ANSI standard, and the Administrator or his/her designee may make a determination when conducting an investigation of the employer);

(ii) The scrap paper baler or paper box compactor includes an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) The on-off switch of the scrap paper baler or paper box compactor is maintained in an off position when the machine is not in operation; and

(iv) The employer posts a notice on the scrap paper baler or paper box compactor (in a prominent position and easily visible to any person loading, operating, or unloading the machine) that includes and conveys all of the following information:

(A) That the scrap paper baler or compactor meets the industry safety standard applicable to the machine, as specified in paragraph (b)(5) of this section. The notice shall completely identify the appropriate ANSI standard.

(B) That sixteen- and 17-year-old employees may only load the scrap paper baler or paper box compactor.

(C) That no employee under the age of 18 may operate or unload the scrap paper baler or paper box compactor.

(2) This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[56 FR 58632, Nov. 20, 1991, as amended at 69 FR 75403, Dec. 16, 2004]

### § 570.64 Occupations involved in the manufacture of brick, tile, and kindred products (Order 13).

(a) *Findings and declaration of fact.* The following occupations involved in the manufacture of clay construction products and of silica refractory products are particularly hazardous for the employment of minors between 16 and 18 years of age, and detrimental to their health and well-being.

(1) All work in or about establishments in which clay construction products are manufactured, except (i) work in storage and shipping: (ii) work in offices, laboratories, and storerooms; and (iii) work in the drying departments of plants manufacturing sewer pipe.

(2) All work in or about establishments in which silica brick or other silica refractories are manufactured, except work in offices.

(3) Nothing in this section shall be construed as permitting employment of minors in any occupation prohibited by any other hazardous occupations order issued by the Secretary of Labor.

(b) *Definitions.* (1) The term *clay construction products* shall mean the following clay products: Brick, hollow structural tile, sewer pipe and kindred products, refractories, and other clay products such as architectural terra cotta, glazed structural tile, roofing tile, stove lining, chimney pipes and tops, wall coping, and drain tile. The term shall not include the following non-structural-bearing clay products: Ceramic floor and wall tile, mosaic tile, glazed and enameled tile, faience, and similar tile, nor shall the term include non-clay construction products such as sand-lime brick, glass brick, or non-clay refractories.

(2) The term *silica brick or other silica refractories* shall mean refractory products produced from raw materials containing free silica as their main constituent.

[21 FR 5773, Aug. 2, 1956, as amended at 23 FR 6240, Aug. 14, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).

(a) *Findings and declaration of fact.* The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:

(i) Circular saws.

(ii) Band saws.

(iii) Guillotine shears.

(2) The occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

(b) *Definitions.* (1) The term *operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term *helper* shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term *machines equipped with full automatic feed and ejection* shall mean machines covered by this Order which are equipped with devices for full automatic feeding and ejection and with a fixed barrier guard to prevent completely the operator or helper from placing any part of his body in the point-of-operation area.

(4) The term *circular saw* shall mean a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials.

(5) The term *band saw* shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

(6) The term *guillotine shear* shall mean a machine equipped with a movable blade operated vertically and used to shear materials. The term shall not

include other types of shearing machines, using a different form of shearing action, such as alligator shears or circular shears.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[25 FR 9849, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.66 Occupations involved in wrecking, demolition, and shipbreaking operations (Order 15).

(a) *Finding and declaration of fact.* All occupations in wrecking, demolition, and shipbreaking operations are particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) *Definition.* The term *wrecking, demolition, and shipbreaking operations* shall mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, other structure, ship or other vessel.

[25 FR 9850, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.67 Occupations in roofing operations and on or about a roof (Order 16).

(a) *Finding and declaration of fact.* All occupations in roofing operations and all occupations on or about a roof are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health.

(b) *Definitions. On or about a roof* includes all work performed upon or in close proximity to a roof, including carpentry and metal work, alterations, additions, maintenance and repair, including painting and coating of existing roofs; the construction of the sheathing or base of roofs (wood or metal), including roof trusses or joists; gutter and downspout work; the installation and servicing of television and communication equipment such as cable and satellite dishes; the installation and servicing of heating, ventilation and air conditioning equipment or similar appliances attached to roofs; and any similar work that is required to be performed on or about roofs.

*Roofing operations* means all work performed in connection with the installation of roofs, including related metal work such as flashing, and applying weatherproofing materials and substances (such as waterproof membranes, tar, slag or pitch, asphalt prepared paper, tile, composite roofing materials, slate, metal, translucent materials, and shingles of asbestos, asphalt, wood or other materials) to roofs of buildings or other structures. The term also includes all jobs on the ground related to roofing operations such as roofing laborer, roofing helper, materials handler and tending a tar heater.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[27 FR 102, Jan. 5, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971; 69 FR 57404, Dec. 16, 2004]

### § 570.68 Occupations in excavation operations (Order 17).

(a) *Finding and declaration of fact.* The following occupations in excavation operations are particularly hazardous for the employment of persons between 16 and 18 years of age:

(1) Excavating, working in, or backfilling (refilling) trenches, except (i) manually excavating or manually backfilling trenches that do not exceed four feet in depth at any point, or (ii) working in trenches that do not exceed four feet in depth at any point.

(2) Excavating for buildings or other structures or working in such excavations, except: (i) Manually excavating to a depth not exceeding four feet below any ground surface adjoining the excavation, or (ii) working in an excavation not exceeding such depth, or (iii) working in an excavation where the side walls are shored or sloped to the angle of repose.

(3) Working within tunnels prior to the completion of all driving and shoring operations.

(4) Working within shafts prior to the completion of all sinking and shoring operations.

(b) *Exemptions*. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[28 FR 3449, Apr. 9, 1963. Redesignated at 36 FR 25156, Dec. 29, 1971]

## Subpart E–1—Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16

AUTHORITY: Secs. 12, 13, 18, 52 Stat. 1067, 1069, as amended; 29 U.S.C. 212, 213, 218.

### § 570.70 Purpose and scope.

(a) *Purpose*. Section 13(c)(2) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(c)(2)) states that the ''provisions of section 12 [of the Act] relating to child labor shall apply to an employee below the age of 16 employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of 16, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.'' The purpose of this subpart is to apply this statutory provision.

(b) *Exception*. This subpart shall not apply to the employment of a child below the age of 16 by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(c) *Statutory definitions*. As used in this subpart, the terms *agriculture*, *employer*, and *employ* have the same meanings as the identical terms contained in section 3 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203), which are as follows:

(1) *Agriculture* includes farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(2) *Employer* 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 (except with respect to employees of a State or a political subdivision thereof, employed:

(i) In a hospital, institution, or school referred to in the last sentence of section (r) of the Act, or

(ii) In the operation of a railway or carrier referred to in such sentence), 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.

(iii) *Employ* includes to suffer or permit to work.

[35 FR 221, Jan. 7, 1970, as amended at 35 FR 2822, Feb. 11, 1970. Redesignated at 36 FR 25156, Dec. 29, 1971]

### § 570.71 Occupations involved in agriculture.

(a) *Findings and declarations of fact as to specific occupations*. The following occupations in agriculture are particularly hazardous for the employment of children below the age of 16:

(1) Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.

(2) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner;

(ii) Feed grinder, crop dryer, forage blower, auger conveyor, or the unloading mechanism of a nongravity-type self-unloading wagon or trailer; or

(iii) Power post-hole digger, power post driver, or nonwalking type rotary tiller.

(3) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Trencher or earthmoving equipment;

(ii) Fork lift;

(iii) Potato combine; or

(iv) Power-driven circular, band, or chain saw.

(4) Working on a farm in a yard, pen, or stall occupied by a:

(i) Bull, boar, or stud horse maintained for breeding purposes; or

(ii) Sow with suckling pigs, or cow with newborn calf (with umbilical cord present)

(5) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than 6 inches.

(6) Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet.

(7) Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper.

(8) Working inside:

(i) A fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere;

(ii) An upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;

(iii) A manure pit; or

(iv) A horizontal silo while operating a tractor for packing purposes.

(9) Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 *et seq.*) as Category I of toxicity, identified by the word ''poison'' and the ''skull and crossbones'' on the label; or Category II of toxicity, identified by the word ''warning'' on the label;

(10) Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or

(11) Transporting, transferring, or applying anhydrous ammonia.

(b) *Occupational definitions*. In applying machinery, equipment, or facility terms used in paragraph (a) of this section, the Wage and Hour Division will be guided by the definitions contained in the current edition of *Agricultural Engineering*, a dictionary and handbook, Interstate Printers and Publishers, Danville, Ill. Copies of this dictionary and handbook are available for examination in Regional Offices of the Wage and Hour Division, U.S. Department of Labor.

[35 FR 221, Jan. 7, 1970. Redesignated at 36 FR 25156, Dec. 29, 1971]

### § 570.72 Exemptions.

(a) *Student-learners*. The findings and declarations of fact in § 570.71(a) shall not apply to the employment of any child as vocational agriculture student-learner in any of the occupations described in paragraph (1), (2), (3), (4), (5), or (6) of § 570.71(a) when each of the following requirements are met:

(1) The student-learner is enrolled in a vocational education training program in agriculture under a recognized State or local educational authority, or in a substantially similar program conducted by a private school;

(2) Such student-learner is employed under a written agreement which provides; (i) that the work of the student-learner is incidental to his training; (ii) that such work shall be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person; (iii) that safety instruction shall be given by the school and correlated by the employer with on-the-job training; and (iv) that a schedule of organized and progressive work processes to be performed on the job have been prepared;

(3) Such written agreement contains the name of the student-learner, and is signed by the employer and by a person authorized to represent the educational authority or school; and

(4) Copies of each such agreement are kept on file by both the educational

authority or school and by the employer.

(b) *Federal Extension Service.* The findings and declarations of fact in § 570.71(a) shall not apply to the employment of a child under 16 years of age in those occupations in which he has successfully completed one or more training programs described in paragraph (b) (1), (2), or (3) of this section provided he has been instructed by his employer on safe and proper operation of the specific equipment he is to use; is continuously and closely supervised by the employer where feasible; or, where not feasible, in work such as cultivating, his safety is checked by the employer at least at midmorning, noon, and midafternoon.

(1) *4–H tractor operation program.* The child is qualified to be employed in an occupation described in § 570.71(a)(1) provided:

(i) He is a 4–H member;

(ii) He is 14 years of age, or older;

(iii) He is familiar with the normal working hazards in agriculture;

(iv) He has completed a 10-hour training program which includes the following units from the manuals of the 4–H tractor program conducted by, or in accordance with the requirements of, the Cooperative Extension Service of a land grant university:

(*a*) First-year Manual:

Unit 1—Learning How to be Safe;
Unit 4—The Instrument Panel;
Unit 5—Controls for Your Tractor;
Unit 6—Daily Maintenance and Safety Check; and
Unit 7—Starting and Stopping Your Tractor;

(*b*) Second-year Manual:

Unit 1—Tractor Safety on the Farm;

(*c*) Third-year Manual:

Unit 1—Tractor Safety on the Highway;
Unit 3—Hitches, Power-take-off, and Hydraulic Controls;

(v) He has passed a written examination on tractor safety and has demonstrated his ability to operate a tractor safely with a two-wheeled trailed implement on a course similar to one of the 4–H Tractor Operator's Contest Courses; and

(vi) His employer has on file with the child's records kept pursuant to part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university to the effect that the child has completed all the requirements specified in paragraphs (b)(1) (i) through (v) of this section.

(2) *4–H machine operation program.* The child is qualified to be employed in an occupation described in § 570.71(a)(2) providing:

(i) He satisfies all the requirements specified in paragraphs (b)(2)(i) through (v) of this section;

(ii) He has completed an additional 10-hour training program on farm machinery safety, including 4–H Fourth-Year Manual, Unit 1, Safe Use of Farm Machinery;

(iii) He has passed a written and practical examination on safe machinery operation; and

(iv) His employer has on file with the child's records kept pursuant to part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university, to the effect that the child has completed all of the requirements specified in paragraphs (b)(2) (i) through (iii) of this section.

(3) *Tractor and machine operation program.* The child is qualified to be employed in an occupation described in § 570.71(a) (1) and (2) providing:

(i) He is 14 years of age, or older;

(ii) He has completed a 4-hour orientation course familiarizing him with the normal working hazards in agriculture;

(iii) He has completed a 20-hour training program on safe operation of tractors and farm machinery, which covers all material specified in paragraphs (b) (1)(iv) and (2)(ii) of this section.

(iv) He has passed a written examination on tractor and farm machinery safety, and has demonstrated his ability to operate a tractor with a two-wheeled trailed implement on a course similar to a 4–H Tractor Operator's

Contest Course, and to operate farm machinery safely.

(v) His employer has on file with the child's records kept pursuant to part 516 of this title (basically, name, address and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the volunteer leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university, to the effect that all of the requirements of paragraphs (b)(2) (i) through (iv) of this section have been met.

(c) *Vocational agriculture training.* The findings and declarations of fact in § 570.71(a) shall not apply to the employment of a vocational agriculture student under 16 years of age in those occupations in which he has successfully completed one or more training programs described in paragraph (c)(1) or (2) of this section and who has been instructed by his employer in the safe and proper operation of the specific equipment he is to use, who is continuously and closely supervised by his employer where feasible or, where not feasible, in work such as cultivating, whose safety is checked by the employer at least at midmorning, noon, and midafternoon, and who also satisfies whichever of the following program requirements are pertinent:

(1) *Tractor operation program.* The student is qualified to be employed in an occupation described in § 570.71(a)(1) provided:

(i) He is 14 years of age, or older;

(ii) He is familiar with the normal working hazards in agriculture;

(iii) He has completed a 15-hour training program which includes the required units specified in the Vocational Agriculture Training Program in Safe Tractor Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare and acceptable by the U.S. Department of Labor. The training program is outlined in Special Paper No. 8, April 1969, prepared at Michigan State University, East Lansing, Mich., for the Office of Education. Copies of this training program outline are available for examination in the Regional Offices of the Wage and Hour Division, U.S. Department of Labor, and a copy may be obtained from the Office of Education, U.S. Department of Health, Education, and Welfare, Washington, DC 20202.

(iv) He has passed both a written test and a practical test on tractor safety including a demonstration of his ability to operate safely a tractor with a two-wheeled trailed implement on a test course similar to that described in the Vocational Agriculture Training Program in Safe Tractor Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare; and

(v) His employer has on file with the child's records kept pursuant to part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the Vocational Agriculture teacher who conducted the program to the effect that the student has completed all the requirements specified in paragraphs (c)(1)(i) through (iv) of this section.

(2) *Machinery operation program.* The student is qualified to be employed in an occupation described in paragraph (2) of § 570.71(a) provided he has completed the Tractor Operation Program described in paragraph (c)(1) of this section and:

(i) He has completed an additional 10-hour training program which includes the required units specified in the Vocational Agriculture Training Program in Safe Farm Machinery Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare and approved by the U.S. Department of Labor;

(ii) He has passed both a written test and a practical test on safe machinery operation similar to that described in the Vocational Agriculture Training Program in Safe Farm Machinery Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare; and

(iii) His employer has on file with the child's records kept pursuant to part 516 of this title (basically, name, address and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the Vocational Agriculture teacher who conducted the program to the effect that

student has completed all the requirements specified in paragraphs (c)(2)(i) and (ii) of this section.

(d) *Agency review.* The provisions of paragraphs (a), (b), and (c) of this section will be reviewed and reevaluated before January 1, 1972. In addition, determinations will be made as to whether the use of protective frames, crush resistant cabs, and other personal protective devices should be made a condition of these exemptions.

[35 FR 221, Jan. 7, 1970. Redesignated at 36 FR 25156, Dec. 29, 1971]

## Subpart F [Reserved]

## Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

AUTHORITY: 52 Stat. 1060–1069, as amended; 29 U.S.C. 201–219.

GENERAL

### § 570.101 Introductory statement.

(a) This subpart discusses the meaning and scope of the child labor provisions contained in the Fair Labor Standards Act, as amended (hereinafter referred to as the Act). These provisions seek to protect the safety, health, well-being, and opportunities for schooling of youthful workers and authorize the Secretary of Labor to issue legally binding orders or regulations in certain instances and under certain conditions. The child labor provisions are found in sections 3(1), 11(b), 12, 13 (c) and (d), 15(a)(4), 16(a), and 18 of the Act. They are administered and enforced by the Secretary of Labor who has delegated to the Wage and Hour Division the duty of making investigations to obtain compliance, and of developing standards for the issuance of regulations and orders relating to: (1) Hazardous occupations, (2) employment of 14- and 15-year-old children, and (3) age certificates.

(b) The interpretations of the Secretary contained in this subpart indicate the construction of the law which will guide him in performing his duties until he is directed otherwise by authoritative rulings of the courts or until he shall subsequently decide that his prior interpretation is incorrect.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.102 General scope of statutory provisions.

The most important of the child labor provisions are contained in sections 12(a), 12(c), and 3(l) of the Act. Section 12(a) provides that no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any goods produced in an establishment in or about which oppressive child labor was employed within 30 days before removal of the goods. The full text of this subsection is set forth in § 570.104 and its terms are discussed in §§ 570.105 to 570.111, inclusive. Section 12(c) prohibits any employer from employing oppressive child labor in interstate or foreign commerce or in the production of goods for such commerce. The text and discussion of this provision appear in §§ 570.112 and 570.113. Section 3(l) of the Act, which defines the term ''oppressive child labor,'' is set forth in § 570.117 and its provisions are discussed in §§ 570.118 to 570.121, inclusive. It will further be noted that the Act provides various specific exemptions from the foregoing provisions which are set forth and discussed in §§ 570.122 to 570.126, inclusive.

### § 570.103 Comparison with wage and hour provisions.

A comparison of the child labor provisions with the so-called wage and hours provisions contained in the Act discloses some important distinctions which should be mentioned.

(a) The child labor provisions contain no requirements in regard to wages. The wage and hours provisions, on the other hand, provide for minimum rates of pay for straight time and overtime pay at a rate not less than one and one-half times the regular rate of pay for overtime hours worked. Except as provided in certain exemptions contained in the Act, these rates are required to be paid all employees subject to the wage and hours provisions, regardless of their age or sex. The fact therefore,

that the employment of a particular child is prohibited by the child labor provisions or that certain shipments or deliveries may be proscribed on account of such employment, does not relieve the employer of the duties imposed by the wage and hours provisions to compensate the child in accordance with those requirements.

(b) There are important differences between the child labor provisions and the wage and hours provisions with respect to their general coverage. As pointed out in § 570.114, two separate and basically different coverage provisions are contained in section 12 relating to child labor. One of these provisions (section 12(c)), which applies to the employment by an employer of oppressive child labor in commerce or in the production of goods for commerce, is similar to the wage and hours coverage provisions, which include employees engaged in commerce or in the production of goods for commerce or employed in enterprises having employees so engaged. The other provision (section 12(a)), however, differs fundamentally in its basic concepts of coverage from the wage and hours provisions, as will be explained in §§ 570.104 to 570.111.

(c) Another distinction is that the exemptions provided by the Act from the minimum wage and/or overtime provisions are more numerous and differ from the exemptions granted from the child labor provisions. There are only four specific child labor exemptions of which only one applies to the minimum wage and overtime pay requirements as well. This is the exemption for employees engaged in the delivery of newspapers to the consumer.[3] With this exception, none of the specific exemptions from the minimum wage and/or overtime pay requirements applies to the child labor provisions. However, it should be noted that the exclusion of certain employers by section 3(d)[4] of the Act applies to the child labor provisions as well as the wage and hours provisions.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

COVERAGE OF SECTION 12(a)

### § 570.104 General.

Section 12(a) of the Act provides as follows:

> No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

In determining the applicability of this provision, consideration of the meaning of the terms used is necessary. These terms are discussed in §§ 570.105 to 570.111, inclusive.

### § 570.105 "Producer, manufacturer, or dealer".

It will be observed that the prohibition of section 12(a) with respect to certain shipments or deliveries for shipment is confined to those made by producers, manufacturers, and dealers. The terms ''producer, manufacturer, or dealer'' used in this provision are not expressly defined by the statute. However, in view of the definition of ''produced'' in section 3(j), for purposes of this section a ''producer'' is considered to be one who engages in producing, manufacturing, handling or in any other manner working on goods in any

[3] Section 13(d) of the Act.

[4] Section 13(d) defines ''employer'' to include ''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''.

State.[5] Since manufacturing is considered a specialized form of production, the word ''manufacturer'' does not have as broad an application as the word ''producer.'' Manufacturing generally involves the transformation of raw materials or semifinished goods into new or different articles. A person may be considered a ''manufacturer'' even though his goods are made by hand, as is often true of products made by homeworkers. Moreover, it is immaterial whether manufacturing is his sole or main business. Thus, the term includes retailers who, in addition to retail selling, engage in such manufacturing activities as the making of slipcovers or curtains, the baking of bread, the making of candy, or the making of window frames. The word ''dealer'' refers to anyone who deals in goods (as defined in section 3(i) of the Act),[6] including persons engaged in buying, selling, trading, distributing, delivering, etc. It includes middlemen, factors, brokers, commission merchants, wholesalers, retailers and the like.

### § 570.106 "Ship or deliver for shipment in commerce".

(a) Section 12(a) forbids producers, manufacturers, and dealers to ''ship or deliver for shipment in commerce'' the goods referred to therein. A producer, manufacturer, or dealer may ''ship'' goods in commerce either by moving them himself in interstate or foreign commerce or by causing them to so move, as by delivery to a carrier.[7] Thus, a baker ''ships'' his bread in commerce whether he carries it in his own truck across State lines or sends it by contract or common carrier to his customers in other States. The word ''ship'' must be applied in its ordinary meaning. For example, it does not apply to the transmission of telegraphic messages.[8]

(b) To ''deliver for shipment in commerce'' means to surrender the custody of goods to another under such circumstances that the person surrendering the goods knows or has reason to believe that the goods will later be shipped in commerce.[9] Typical is the case of a Detroit manufacturer who delivers his goods in Detroit to a distributor who, as the manufacturer is well aware, will ship the goods into another State. A delivery for shipment in commerce may also be made where raw materials are delivered by their producer to a manufacturer in the same State who converts them into new products which are later shipped across State lines. If the producer in such case is aware or has reason to believe that the finished products will ultimately be sent into another State, his delivery of the raw materials to the manufacturer is a delivery for shipment in commerce. Another example is a paper box manufacturer who ships a carton of boxes to a fresh fruit or vegetable packing shed within the same State, with knowledge or reason to believe that the boxes will there be filled with fruits or vegetables and shipped outside the State. In such case the box manufacturer has delivered the boxes for shipment in commerce.

### § 570.107 "Goods".[10]

(a) Section 12(a) prohibits the shipment or delivery for shipment in commerce of ''any goods'' produced in an establishment which were removed within 30 days of the employment there of oppressive child labor. It should be noted that the statute does not base

[5] For a discussion of the definition of ''produced'' as it relates to section 12(a), see § 570.108.

[6] See § 570.107.

[7] Section 3(b) of the Act defines ''commerce'' to mean ''trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.''

[8] *Western Union Telegraph Co.* v. *Lenroot,* 323 U.S. 490.

[9] *Tobin* v. *Grant,* N. D. Calif., 79 Sup. 975 which was a suit for injunction by the Secretary of Labor against a manufacturer of books and book covers employing oppressive child labor. The facts showed that the manufactured articles sold by defendant to purchasers in the same State had an ultimate out-of-State destination which was manifest to defendant. The court construed the words ''deliver for shipment in commerce'' as sufficiently broad to cover this situation even though the purchasers acquired title to the goods.

[10] The term *goods* is discussed in more detail in part 776 of this title (Interpretative Bulletin on the coverage of the wage and hours provisions) issued by the Administrator of the Wage and Hour Division.

the prohibition of section 12(a) upon the percentage of an establishment's output which is shipped in commerce.

(b) The Act furnishes its own definition of ''goods'' in section 3(i), as follows:

*Goods* 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.

The term includes such things as foodstuffs, clothing, machinery, printed materials, blueprints and also includes intangibles such as news, ideas, and intelligence. The statute expressly excludes goods after their delivery into the actual physical possession of an ultimate consumer other than a producer, manufacturer, or processor thereof. Accordingly, such a consumer may lawfully ship articles in his possession although they were ineligible for shipments (commonly called ''hot goods'') before he received them.[11]

### § 570.108 "Produced".

The word ''produced'' as used in the Act is defined by section 3(j) to mean:

* * * produced, manufactured, mined, handled, or in any other manner worked on in any state; * * *[12]

(a) The prohibition of section 12(a) cannot apply to a shipment of goods unless those goods (including any part or ingredient thereof) were actually ''produced'' in and removed from an establishment where oppressive child labor was employed. This provision is applicable even though the under-age employee does not engage in the production of the goods themselves if somewhere in the establishment in or about which he is employed goods are ''produced'' which are subsequently shipped or delivered for shipment in commerce. In contrast to this restrictive requirement of section 12(a), it will be noted that the employees covered under the wage and hours provisions as engaged in the production of goods for commerce are not limited to those in or about establishments where such goods are being produced. If the requisite relationship[13] to production of such goods is present, an employee is covered for wage and hours purposes regardless of whether his work brings him in or near any establishment where the goods are produced.[14]

(b) Since the first word in the definition of ''produced'' repeats the term being defined, it seems clear that the first word must carry the meaning that it has in everyday language. Goods are commonly spoken of as ''produced'' if they have been brought into being as a result of the application of work. The words ''manufactured'' and ''mined'' in the definition refer to special forms of production. The former term is generally applied to the products of industry where existing raw materials are transformed into new or different articles by the use of industrial methods, either by the aid of machinery or by manual operations. Mining is a type of productive activity involving the taking of materials from the ground, such as coal from a coal mine, oil from oil wells, or stone from quarries. The statute also defines the term ''produced'' to mean ''handled'' or ''in any other manner work on.''[15] These words relate not only to operations carried on in the course of manufacturing, mining, or production as commonly described, but include as well all kinds of operations which prepare goods for their entry into the stream of commerce, without

[11] For a discussion of the exclusionary clause in section 3(i) of the Act, see *Powell et al.* v. *United States Cartridge Co.*, 70 S. CT. 755.

[12] The remaining portion of section 3(j) provides: '' * * * 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.''

[13] See footnote 12.

[14] See part 776 of this title (interpretative Bulletin on the coverage of the wage and hours provisions) issued by the Administrator of the Wage and Hour Division. Also, see §§ 570.112 and 570.113.

[15] For a more complete discussion of these words, see § 776.16 of part 776 (bulletin on coverage of the wage and hours provisions) of chapter V of this title.

regard to whether the goods are to be further processed or are so-called ''finished goods.''[16] Accordingly, warehouses, fruit and vegetable packing sheds, distribution yards, grain elevators, etc., where goods are sorted, graded, stored, packed, labeled or otherwise handled or worked on in preparation for their shipment out of the State are producing establishments for purposes of section 12(a).[17] However, the handling or working on goods, performed by employees of carriers which accomplishes the interstate transit or movement in commerce itself, does not constitute production under the Act.[18]

### § 570.109 "Establishment situated in the United States".

(a)(1) The statute does not expressly define ''establishment.'' Accordingly, the term should be given a meaning which is not only consistent with its ordinary usage, but also designed to accomplish the general purposes of the Act. As normally used in business and in Government, the word ''establishment'' refers to a distinct physical place of business. This is the meaning attributed to the term as it is used in section 13(a)(2) of the Act.[19] Since the establishments covered under section 12(a) of the Act are those in which goods are produced, the term ''establishment'' there refers to a physical place where goods are produced. Typical producing establishments are industrial plants, mines, quarries, and the like. The producing establishment, however, need not have a permanently fixed location as is the case with a factory or mine. A boat, for instance, where productive activities such as catching or canning fish are carried on is considered a producing establishment for purposes of section 12(a).

(2) Frequently, questions arise as to what should be considered a single establishment. No hard and fast rule can be laid down which will fix the area of all establishments. Accordingly, a determination of the area contained in a single establishment must be based upon the facts of each individual situation. Facts which are particularly pertinent in this connection, however, are those which relate to the physical characteristics and the manner of operation and control of the business. Sometimes, an establishment may extend over an area of several square miles as is common with farms, logging enterprises, mines, and quarries. On the other hand, it may be confined to a few square feet. A typical illustration of this is a loft building that houses the workshops of hundreds of independent manufacturing firms. Each of the workshops is, for purposes of this section, a separate establishment.

(3) Similar principles are applicable in determining whether several buildings located on the same premises constitute one establishment or more than one. For example, where several factory buildings are located on the same premises and owned and operated by the same person, they are generally to be considered as a single establishment. On the other hand, factory buildings located on the same premises, but owned and operated by different persons, will not ordinarily be treated as a single establishment. Where the several factories, however, are engaged in a joint productive enterprise, they may constitute a single establishment. This is the case, for example, where a large shipyard contains the plants of a number of subcontractors who are engaged in making parts or equipment for the boats that are built in the yard.

(b) The phrase ''situated in the United States'' is construed to include

[16] In *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, the Supreme Court stated that these words bring within the statutory definition ''every step in putting the subject of commerce in a state to enter commerce,'' including ''all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce'' and ''every kind of incidental operation preparatory to putting goods into the stream of commerce.''

[17] *Lenroot* v. *Kemp* and *Lenroot* v. *Hazlehurst Mercantile Co.*, 153 F. 2d 153 (C.A. 5), where the court directed issuance of injunctions to restrain violations of the child labor provisions by operators of vegetable packing sheds at which they bought, then washed, sorted, crated, and packed cabbage and tomatoes for shipment in interstate commerce.

[18] *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490.

[19] *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490. See part 779 (bulletin on the retail and service establishment exemption from the wage and hours provisions) of chapter V of this title.

any of the 50 States or the District of Columbia or any Territory or possession of the United States.

### § 570.110 "In or about".

(a) Section 12(a) excludes from the channels of interstate commerce goods produced in an establishment ''in or about'' which oppressive child labor has been employed. In a great many situations it is obviously easy to determine whether a minor is employed ''in'' an establishment. Thus, he is so employed where he performs his occupational duties on the premises of the producing establishment. Furthermore, a minor is also considered as employed in an establishment where he performs most of his duties off the premises but is regularly required to perform certain occupational duties in the establishment, such as loading or unloading a truck, checking in or out, or washing windows. This is true in such cases even though the minor is employed by someone other than the owner or operator of the particular establishment. On the other hand, a minor is not considered to be employed in an establishment other than his employer's merely because such establishment is visited by him for brief periods of time and for the sole purpose of picking up or delivering a message or other small article.

(b) If, in the light of the statements in paragraph (a) of this section, the minor cannot be considered as employed in the establishment, he may, nevertheless, be employed ''about'' it if he performs his occupational duties sufficiently close in proximity to the actual place of production to fall within the commonly understood meaning of the term ''about.'' This would be true in a situation where the foregoing proximity test is met and the occupation of the minor is directly related to the activities carried on in the producing establishment, in this connection, occupations are considered sufficiently related to the activities carried on in the producing establishment to meet the second test above at least where the requisite relationship to production of goods exists within the meaning of section 3(j) of the Act.[20] By way of example, a driver's helper employed to assist in the distribution of the products of a bottling company who regularly boards the delivery truck immediately outside the premises of the bottling plant is considered employed ''in or about'' such establishment, without regard to whether he ever enters the plant itself. On the other hand, employees working entirely within one establishment are not considered to be employed ''in or about'' a wholly different establishment occupying separate premises and operated by another employer. This would be true even though the two establishments are contiguous. But in other situations the distance between the producing establishment and the minor's place of employment may be a decisive factor. Thus, a minor employed in clearing rights-of-way for power lines many miles away from the power plant cannot well be said to be employed ''in or about'' such establishment. In view of the great variety of establishments and employments, however, no hard and fast rule can be laid down which will once and for all distinguish between employments that are ''about'' an establishment and those that are not. Therefore, each case must be determined on its own merits. In determining whether a particular employment is ''about'' an establishment, consideration of the following factors should prove helpful:

(1) Actual distance between the producing establishment and the minor's place of employment;

(2) Nature of the establishment;

(3) Ownership or control of the premises involved;

(4) Nature of the minor's activities in relation to the establishment's purpose;

(5) Identity of the minor's employer and the establishment's owner;

(6) Extent of control by the producing establishment's owner over the minor's employment.

### § 570.111 Removal "within 30 days".

According to section 12(a) goods produced in an establishment in or about which oppressive child labor has been employed are barred as ''hot goods'' from being shipped or delivered for shipment in commerce in the following

[20] See part 776 (bulletin on coverage of the wage and hours provisions) of this title.

two situations: First, if they were removed from the establishment while any oppressive child labor was still being employed in or about it; second, if they were removed from an establishment in or about which oppressive child labor was no longer employed but less than 30 days had then elapsed since any such employment of oppressive child labor came to an end. Once any goods have been removed from a producing establishment within the abovementioned thirty-day period, they are barred at any time theafter from being shipped or delivered for shipment in commerce so long as they remain ''goods'' for purposes of the Act.[21] Goods are considered removed from an establishment just as soon as they are taken away from the establishment as that term has been defined.[22] The statute does not require that this ''removal'' from the establishment be made for the purpose or in the course of a shipment or delivery for shipment in commerce. A ''removal'' within the meaning of the statute also takes place where the goods are removed from the establishment for some other purpose such as storage, the granting of a lien or other security interest, or further processing.

[16 FR 7008, July 20, 1951, as amended at 23 FR 6240, Aug. 14, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

COVERAGE OF SECTION 12(c)

### § 570.112 General.

(a) Section 12(c) of the Act provides as follows:

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce.

(b) This provision, which was added by amendments of 1949 and 1961 to the Act, broadens child labor coverage to include employment in commerce. Moreover, it establishes a direct prohibition of the employment of oppressive child labor in commerce or in the production of goods for commerce. The legislative history pertaining to this provision leads to the conclusion that Congress intend its application to be generally consistent with that of wage and hours coverage provisions. The application of the provision depends on the existence of two necessary elements: (1) The employment of ''oppressive child labor''[24] by some employer and (2) the employment of such oppressive child labor in activities or enterprises which are in commerce or in the production of goods for commerce within the meaning of the Act.

[36 FR 25156, Dec. 29, 1971]

### § 570.113 Employment "in commerce or in the production of goods for commerce".

(a) The term ''employ'' is broadly defined in section 3(g) of the Act to include ''to suffer or permit to work.'' The Act expressly provides that the term ''employer'' includes ''any person acting directly or indirectly in the interest of an employer in relation to an employee''. The nature of an employer-employee relationship is ordinarily to be determined not solely on the basis of the contractual relationship between the parties but also in the light of all the facts and circumstances. Moreover, the terms ''employer'' and ''employ'' as used in the Act are broader than the common-law concept of employment and must be interpreted broadly in the light of the mischief to be corrected. Thus, neither the technical relationship between the parties nor the fact that the minor is unsupervised or receives no compensation is controlling in determining whether an employer-employee relationship exists for purposes of section 12(c) of the Act. However, these are matters which should be

[21] However, section 12(a) contains a provision relieving innocent purchasers from liability thereunder provided certain conditions are met. For a discussion of this provision, see § 570.128.

Also, section 15(a)(1) relieves any common carrier from liability under the Act for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier.

[22] For a discussion of the meaning of ''establishment,'' see § 570.109.

[23] [Reserved]

[24] ''Oppressive child labor'' is discussed in §§ 570.117 to 570.121, inclusive.

[25] [Reserved]

considered along with all other facts and circumstances surrounding the relationship of the parties in arriving at such determination. The words ''suffer or permit to work'' include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract. A typical illustration of employment of oppressive child labor by suffering or permitting an under-aged minor to work is that of an employer who knows that his employee is utilizing the services of such a minor as a helper or substitute in performing his employer's work. If the employer acquiesces in the practice or fails to exercise his power to hinder it, he is himself suffering or permitting the helper to work and is, therefore, employing him, within the meaning of the Act. Where employment does exist within the meaning of the Act, it must, of course, be in commerce or in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce in order for section 12(c) to be applicable.

(b) As previously indicated, the scope of coverage of section 12(c) of the Act is, in general, coextensive with that of the wage and hours provisions. The basis for this conclusion is provided by the similarity in the language used in the respective provisions and by statements appearing in the legislative history concerning the intended effect of the addition of section 12(c). Accordingly, it may be generally stated that employees considered to be within the scope of the phrases ''in commerce or in the production of goods for commerce'' for purposes of the wage and hours provisions are also included within the identical phrases used in section 12(c). To avoid needless repetition, reference is herein made to the full discussion of principles relating to the general coverage of the wage and hours provisions contained in parts 776 and 779 of this chapter. In this connection, however, it should be borne in mind that lack of coverage under the wage and hours provisions or under section 12(c) does not necessarily preclude the applicability of section 12(a) of the Act.[26]

[36 FR 25156, Dec. 29, 1971]

JOINT AND SEPARATE APPLICABILITY OF SECTIONS 12(a) AND 12(c)

**§ 570.114 General.**

It should be noted that section 12(a) does not directly outlaw the employment of oppressive child labor. Instead, it prohibits the shipment or delivery for shipment in interstate or foreign commerce of goods produced in an establishment where oppressive child labor has been employed within 30 days before removal of the goods. Section 12(c), on the other hand, is a direct prohibition against the employment of oppressive child labor in commerce, or in the production of goods for commerce. Moreover, the two subsections provide different methods for determining the employees who are covered thereby. Thus, subsection (a) may be said to apply to young workers on an ''establishment'' basis. If the standards for child labor are not observed in the employment of minors in or about an establishment where goods are produced and from which such goods are removed within the statutory 30-day period, it becomes unlawful for any producer, manufacturer, or dealer (other than an innocent purchaser who is in compliance with the requirements for a good faith defense as provided in the subsection) to ship or deliver those goods for shipment in commerce. It is not necessary for the minor himself to have been employed by the producer of such goods or in their production in order for the ban to apply. On the other hand, whether the employment of a particular minor below the applicable age standard will subject his employer to the prohibition of subsection (c) is dependent upon the minor himself being employed in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in production of goods for commerce within the meaning of the Act. If such a minor is so employed by his employer and is not specifically exempt from the

[26] See § 570.116

child labor provisions then his employment under such circumstances constitutes a violation of section 12(c) regardless of where he may be employed or what his employer may do. Moreover, a violation of section 12(c) occurs under the foregoing circumstances without regard to whether there is a ''removal'' of goods or a shipment or delivery for shipment in commerce.

[36 FR 25157, Dec. 29, 1971]

### § 570.115 Joint applicability.

The child labor coverage provisions contained in sections 12(a) and 12(c) of the Act may be jointly applicable in certain situations. For example, a manufacturer of women's dresses who ships them in interstate commerce, employs a minor under 16 years of age who gathers and bundles scraps of material in the cutting room of the plant. Since the employment of the minor under such circumstances constitutes oppressive child labor and involves the production of goods for commerce, the direct prohibition of section 12(c) is applicable to the case. In addition, section 12(a) also applies to the manufacturer if the dresses are removed from the establishment during the course of the minor's employment or within 30 days thereafter. To illustrate further, suppose that a transportation company employs a 17-year-old boy as helper on a truck used for hauling materials between railroads and the plants of its customers who are engaged in producing goods for shipment in commerce. The employment of the minor as helper on a truck is oppressive child labor because such occupation has been declared particularly hazardous by the Secretary for children between 16 and 18 years of age. Since his occupation involves the transportation of goods which are moving in interstate commerce, his employment in such occupation by the transportation company is, therefore, directly prohibited by the terms of section 12(c). If the minor's duties in this case should, for example, include loading and unloading the truck at the establishments of the customers of his employer, then the provisions of section 12(a) might be applicable with respect to such customers. This would be true where any goods which they produce and ship in commerce are removed from the producing establishment within 30 days after the minor's employment there.

### § 570.116 Separate applicability.

There are situations where section 12(c) does not apply because the minor himself is not considered employed in commerce or in the production of goods for commerce. This does not exclude the possibility of coverage under the provisions of section 12(a), however. In those cases where oppressive child labor is employed in commerce but not in or about a producing establishment, coverage exists under section 12(c) but not under the provisions of section 12(a). The employment of telegraph messengers under 16 years of age would normally involve this type of situation.[27] There may also be cases where oppressive child labor is employed in occupations closely related and directly essential to the production of goods in a separate establishment and therefore covered by section 12(c) but due to the fact that none of the goods produced in the establishment where the minors work are ever shipped or delivered for shipment in commerce either in the same form or as a part or ingredient of other goods, coverage of section 12(a) is lacking. An illustration of this type of situation would be the employment of a minor under the applicable age minimum in a plant engaged in the production of electricity which is sold and consumed exclusively within the same State and some of which is used by establishments in the production of goods for commerce.

[36 FR 25157, Dec. 29, 1971]

## OPPRESSIVE CHILD LABOR

### § 570.117 General.

(a) Section 3(1) of the Act defines ''oppressive child labor'' as follows:

*Oppressive child labor* means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a

[27] In ''Western Union Telegraph Co. v. Lenroot,'' 323 U.S. 490, the court held section 12(a) inapplicable to Western Union on the grounds that the company does not ''produce'' or ''ship'' goods within the meaning of that subsection.

person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being, but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(b) It will be noted that the term includes generally the employment of young workers under the age of 16 years in any occupation. In addition, the term includes employment of minors 16 and 17 years of age by an employer in any occupation which the Secretary finds and declares to be particularly hazardous for the employment of children of such ages or detrimental to their health or well-being. Authority is also given the Secretary to issue orders or regulations permitting the employment of children 14 and 15 years of age in nonmanufacturing and nonmining occupations where he determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being. The subsection further provides for the issuance of age certificates pursuant to regulations of the Secretary which will protect an employer from unwitting employment of oppressive child labor.

### § 570.118 Sixteen-year minimum.

The Act sets a 16-year-age minimum for employment in manufacturing or mining occupations. Furthermore, this age minimum is applicable to employment in all other occupations unless otherwise provided by regulation or order issued by the Secretary.

### § 570.119 Fourteen-year minimum.

With respect to employment in occupations other than manufacturing and mining, the Secretary is authorized to issue regulations or orders lowering the age minimum to 14 years where he finds that such employment is confined to periods which will not interfere with the minors' schooling and to conditions which will not interfere with their health and well-being. Pursuant to this authority, the Secretary permits the employment of 14- and 15-year-old children in a limited number of occupations where the work is performed outside school hours and is confined to other specified limits. Under the provisions of Child Labor Regulation No. 3, as amended,[28] employment of minors in this age group is not permitted in the following occupations:

(a) Manufacturing, mining, or processing occupations;

(b) Occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed;

(c) Occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(d) Public messenger service;

(e) Occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary; or

(f) Occupations (except office or sales work) in connection with: (1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means; (2) warehousing and storage; (3) communications and public utilities, and (4) construction (including demolition and repair).

The exception permitting office and sales work performed in connection

[28] Subpart C of this part.

[29] [Reserved]

[30] [Reserved]

with the occupations specified in paragraph (f) of this section does not apply if such work is performed on trains or any other media of transportation or at the actual site of construction operations. Employment of 14- and 15-year-olds in all occupations other than the foregoing is permitted by the regulation, if the following conditions are observed: (i) Employment only outside school hours and between the hours of 7 a.m. and 7 p.m., except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.; (ii) employment for not more than 3 hours a day nor more than 18 hours a week when school is in session; and, (iii) employment for not more than 8 hours a day nor more than 40 hours a week when school is not in session. The employment of minors under 14 years of age is not permissible under any circumstances if the employment is covered by the child labor provisions and not specifically exempt.

[36 FR 25157, Dec. 29, 1971]

### § 570.120 Eighteen-year minimum.

To protect young workers from hazardous employment, the Act provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to health or well-being for minors 16 and 17 years of age. Hazardous-occupations orders are the means through which occupations are declared to be particularly hazardous for minors. They are issued after public hearing and advice from committees composed of representatives of employers and employees of the industry and the public and in accordance with procedure established in Child Labor Regulations No. 5 published in subpart D of this part. The effect of these orders is to raise the minimum age for employment to 18 years in the occupations covered. Seventeen orders, published in subpart E of this part, have thus far been issued under the Act and are now in effect. In general, they cover:

No. 1. Occupations in or about plants manufacturing explosives or articles containing explosive components.

No. 2. Occupations of motor-vehicle driver and helper.

No. 3. Coal-mine occupations.

No. 4. Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill.

No. 5. Occupations involved in the operation of power-driven woodworking machines.

No. 6. Occupations involving exposure to radioactive substances.

No. 7. Occupations involved in the operation of power-driven hoisting apparatus.

No. 8. Occupations involved in the operation of power-driven metal forming, punching, and shearing machines.

No. 9. Occupations in connection with mining, other than coal.

No. 10. Occupations in or about slaughtering and meat packing establishments and rendering plants.

No. 11. Occupations involved in the operation of bakery machines.

No. 12. Occupations involved in the operations of paper products machines.

No. 13. Occupations involved in the manufacture of brick, tile, and kindred products.

No. 14. Occupations involved in the operation of circular saws, bandsaws, and guillotine shears.

No. 15. Occupations in wrecking, demolition, and shipbreaking operations.

No. 16. Occupations in roofing operations.

No. 17. Occupations in excavation operations.

[36 FR 25158, Dec. 29, 1971]

### § 570.121 Age certificates.

(a) To protect an employer from unwitting violation of the minimum age standards, it is provided in section 3(1)(2) of the Act that ''oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age.'' An age certificate is a statement of a minor's age issued under regulations of the Secretary (Child Labor Regulation No. 1),[31] based on the best available documentary evidence of age, and carrying the signatures of the minor and the issuing officer. Its purpose is to furnish an employer with reliable proof of the age of a minor employee in order that he may, as specifically provided by the

[31] Subpart A of this part.

act, protect himself against unintentional violation of the child labor provisions. Pursuant to the regulations of the Secretary, State employment or age certificates are accepted as proof of age in 45 States, the District of Columbia, and Puerto Rico, and Federal certificates of age in Idaho, Mississippi, South Carolina and Texas. If there is a possibility that the minor whom he intends to employ is below the applicable age minimum for the occupation in which he is to be employed, the employer should obtain an age certificate for him.

(b) It should be noted that the age certificate furnishes protection to the employer as provided by the act only if it shows the minor to be above the minimum age applicable thereunder to the occupation in which he is employed. Thus, a State certificate which shows a minor's age to be above the minimum required by State law for the occupation in which he is employed does not protect his employer for purposes of the Fair Labor Standards Act unless the age shown on such certificate is also above the minimum provided under that act for such occupation.

EXEMPTIONS

### § 570.122 General.

Specific exemptions from the child labor requirements of the Act are provided for:

(a) Employment of children in agriculture outside of school hours for the school district where they live while so employed;

(b) Employment of employees engaged in the delivery of newspapers to the consumer;

(c) Employment of children as actors or performers in motion pictures or in theatrical, radio, or television productions; and

(d) Employment by a parent or a person standing in a parent's place of his own child or a child in his custody under the age of sixteen years in any occupation other than the following:

(1) Manufacturing,

(2) Mining,

(3) An occupation found by the Secretary to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being.

In his interpretations of these provisions, the Secretary will be guided by the principle that such exemptions should be narrowly construed and their application limited to those employees who are plainly and unmistakably within their terms. Thus, the fact that a child's occupation involves the performance of work which is considered exempt from the child labor provisions will not relieve his employer from the requirements of section 12(c) or the producer, manufacturer, or dealer from the requirements of section 12(a) if, during the course of his employment, the child spends any part of his time doing work which is covered but not so exempt.

### § 570.123 Agriculture.

(a) Section 13(c) of the Act provides an exemption from the child labor provisions for ''any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.'' This is the only exemption from the child labor provisions relating to agriculture or the products of agriculture. The various agricultural exemptions provided by sections 7(b)(3), 7(c), 13(a)(6), 13(a)(10) and 13(b)(5) from all or part of the minimum wage and overtime pay requirements are not applicable to the child labor provisions. This exemption, it will be noted, is limited to periods outside of school hours in contrast to the complete exemption for employment in ''agriculture'' under the wage and hours provisions. Under the original act, the exemption became operative whenever the applicable State law did not require the minor to attend school. The legislative history clearly indicates that in amending this provision, Congress sought to establish a clearer and simpler test for permissive employment which could be applied without the necessity of exploring State legal requirements regarding school attendance in the particular State. It recognized that the original provision fell short of achieving the objective of permitting agricultural work only so long

as it did not infringe upon the opportunity of children for education. By recasting the exemption on an ''outside of school hours'' basis, Congress intended to provide a test which could be more effectively applied toward carrying out this purpose.

(b) The applicability of the exemption to employment in agriculture as defined in section 3(f)[32] of the Act depends in general upon whether such employment conflict with school hours for the locality where the child lives. Since the phrase ''school hours'' is not defined in the Act, it must be given the meaning that it has in ordinary speech. Moreover, it will be noted that the statute speaks of school hours ''for the school district'' rather than for the individual child. Thus, the provision does not depend for its application upon the individual student's requirements for attendance at school. For example, if an individual student is excused from his studies for a day or a part of a day by the superintendent or the school board, the exemption would not apply if school was in session then. ''Outside of school hours'' generally may be said to refer to such periods as before or after school hours, holidays, summer vacation, Sundays, or any other days on which the school for the district in which the minor lives does not assemble. Since ''school hours for the school district'' do not apply to minors who have graduated from high school, the entire year would be considered ''outside of school hours'' and, therefore, their employment in agriculture would be permitted at any time. While it is the position of the Department that a minor who leaves one district where schools are closed and who moves into and lives in another district where schools are in session may not work during the hours that schools are in session in the new district, it will not be asserted that this position prevents the employment of a minor in a district where schools are in session, if the school last attended by the minor has closed for summer vacation. As a reasonable precaution, however, no employer should employ a child under such circumstances before May 15, and after that date he should do so only if he is shown by the minor satisfactory evidence in the form of a written statement signed by a school official stating that the school with which he is connected is the one last attended by the minor and that the school is closed for summer vacation. Such statement should contain the minor's name, the name and address of the school, the date the school closed for the current year, the date the statement was signed, and the title of the school official signing the statement.

(c) Attention is directed to the fact that by virtue of the parental exemption provided in section 3(1) of the Act, children under 16 years of age are permitted to work, for their parents on their parents' farms at any time provided they are not employed in a manufacturing or mining occupation.

(d) The orders (subpart E of this part) declaring certain occupations to be particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being do not apply to employment in agriculture, pending study as to the hazardous or detrimental nature of occupations in agriculture.[33]

[16 FR 7008, July 20, 1951, as amended at 23 FR 3062, May 8, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

### § 570.124 Delivery of newspapers.

Section 13(d) of the Act provides an exemption from the child labor as well as the wage and hours provisions for employees engaged in the delivery of newspapers to the consumer. This provision applies to carriers engaged in

[32] *Agriculture* as defined in section 3(f) includes ''farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry, or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.''

[33] See note to subpart E of this part.

making deliveries to the homes of subscribers or other consumers of newspapers (including shopping news). It also includes employees engaged in the street sale or delivery of newspapers to the consumer. However, employees engaged in hauling newspapers to drop stations, distributing centers, newsstands, etc., do not come within the exemption because they do not deliver to the consumer.

### § 570.125 Actors and performers.

Section 13(c) of the Act provides an exemption from the child labor provisions for ''any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.'' The term ''performer'' used in this provision is obviously more inclusive than the term ''actor.'' In regulations issued pursuant to section 7(d)(3) of the Act, the Administrator of the Wage and Hour Division has defined a ''performer'' on radio and television programs for purposes of that section.[34] The Secretary will follow this definition in determining whether a child is employed as a ''* * * performer * * * in radio or television productions'' for purposes of this exemption. Moreover, in many situations the definition will be helpful in determining whether a child qualifies as a ''* * * performer in motion pictures or theatrical productions * * *'' within the meaning of the exemption.

[34] Section 550.2(b) of this title provides:

(b) The term ''performer'' shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands.

### § 570.126 Parental exemption.

By the parenthetical phrase included in section 3(l)(1) of the Act, a parent or a person standing in place of a parent may employ his own child or a child in his custody under the age of 16 years in any occupation other than the following: (a) Manufacturing; (b) mining; (c) an occupation found by the Secretary to be particularly hazardous or detrimental to health or well-being for children between the ages of 16 and 18 years. This exemption may apply only in those cases where the child is exclusively employed by his parent or a person standing in his parents' place. Thus, where a child assists his father in performing work for the latter's employer and the child is considered to be employed both by his father and his father's employer, the parental exemption would not be applicable. The words ''parent'' or a ''person standing in place of a parent'' include natural parents, or any other person, where the relationship between that person and a child is such that the person may be said to stand in place of a parent. For example, one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own, is generally said to stand to the child in place of a parent. It should further be noted that occupations found by the Secretary to be hazardous or detrimental to health or well-being for children between 16 and 18 years of age, as well as manufacturing and mining occupations, are specifically excluded from the scope of the exemption.

## ENFORCEMENT

### § 570.127 General.

Section 15(a)(4) of the Act makes any violation of the provisions of sections 12(a) or 12(c) unlawful. Any such unlawful act or practice may be enjoined by the United States District Courts under section 17 upon court action, filed by the Secretary pursuant to section 12(b) and, if willful will subject the offender to the criminal penalties provided in section 16(a) of the Act.[35]

[35] Section 16(a) provides:

*Continued*

### § 570.128 Good faith defense.

A provision is contained in section 12(a) of the Act relieving any purchaser from liability thereunder who ships or delivers for shipment in commerce goods which he acquired in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with section 12, and which he acquired for value without notice of any violation.[36]

### § 570.129 Relation to other laws.

Section 18 provides, in part, that ''no provision of this act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this act.'' The child labor requirements of the Fair Labor Standards Act, as amended, must be complied with as to the employment of minors within their general coverage and not excepted from their operation by special provision of the act itself regardless of any State, local, or other Federal law that may be applicable to the same employment. Furthermore, any administrative action pursuant to other laws, such as the issuance of a work permit to a minor or the referral by an employment agency of a minor to an employer does not necessarily relieve a person of liability under this act. Where such other legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, however, nothing in the act, the regulations or the interpretations announced by the Secretary should be taken to override or nullify the provisions of these laws. Although compliance with other applicable legislation does not constitute compliance with the act unless the requirements of the act are thereby met, compliance with the act, on the other hand, does not relieve any person of liability under other laws that establish higher child labor standards than those prescribed by or pursuant to the act. Moreover, such laws, if at all applicable, continue to apply to the employment of all minors who either are not within the general coverage of the child labor provisions of the act or who are specifically excepted from their requirements.

Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

[36] For a complete discussion of this subject see part 789 of this title, General Statement on the Provisions of section 12(a) and section 15(a)(1) of the Fair Labor Standards Act, as amended, relating to Written Assurances.

## PART 575—WAIVER OF CHILD LABOR PROVISIONS FOR AGRICULTURAL EMPLOYMENT OF 10 AND 11 YEAR OLD MINORS IN HAND HARVESTING OF SHORT SEASON CROPS

Sec.
575.1 Purpose and scope.
575.2 Definitions.
575.3 Application for waiver.
575.4 Information to be included in application.
575.5 Supporting data to accompany application.
575.6 Procedure for action on an application.
575.7 Statutory conditions for employment under the waiver.
575.8 Secretary's conditions for employment under the waiver.
575.9 Failure to comply with terms and conditions of the waiver.

AUTHORITY: Secs. 11, 12, 13, 18, 52 Stat. 1067, 1069, as amended; 29 U.S.C. 211, 212, 213, 218; Secretary of Labor's Order No. 16–75, 40 FR 55913; Employment Standards Order No. 2–75, 40 FR 56743.

SOURCE: 43 FR 26562, June 21, 1978, unless otherwise noted.

### § 575.1 Purpose and scope.

(a) Section 13(c)(4) was added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1977. This section provides that:

(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 to the employment for not more than 8 weeks in any calendar year of individuals who are less than 12 years of age, but not less than 10 years of

age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that:

(i) The crop to be harvested is one with a particularly short harvesting season and the application of section 12 would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) The employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) The level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) Individuals age 12 and above are not available for such employment; and

(v) The industry of such employer or group of employers has traditionally and substantially employed individuals under 12 years of age without displacing substantial job opportunities for individuals over 16 years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that:

(i) The individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) Such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) Such individuals be employed under such waiver (I) for not more than 8 weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(b) The child labor provisions of the Fair Labor Standards Act, section 12, require the following age standards for employment in agriculture:

(1) 16 years of age in any occupation at any time;

(2) 14 and 15 years of age outside of school hours except in occupations found and declared by the Secretary to be particularly hazardous for the employment of minors under 16 years of age (subpart E–1, 29 CFR 570.70, *et seq.*);

(3) 12 and 13 years of age in nonhazardous occupations outside of school hours if:

(i) Such employment is with the written consent of a parent or person standing in the place of a parent of such minor, or

(ii) Such employment is on the same farm where such parent or person is also employed;

(4) Under 12 years of age in nonhazardous occupations outside of school hours if such employment is with the written consent of a parent or person standing in place of a parent of such minor, on a farm where, because of the provisions of section 13(a)(6)(A) of the Act, none of the employees are required to be paid at the wage rate prescribed by section 6(a)(5) of the Act;

(5) 10 and 11 years of age in nonhazardous occupations outside of school hours employed to hand-harvest short season crop or crops under a waiver issued pursuant to section 13(c)(4) of the Act and this part:

(6) Minors of any age may be employed by their parents or persons standing in place of their parents at any time in any occupation on a farm owned or operated by their parents or persons standing in place of their parents.

(c) This part provides the procedures to be used under section 13(c)(4) of the Act. This part describes the information and defines the supporting data that the employer or group of employers must submit when applying for a waiver of the child labor provisions for the employment of 10 and 11 year old minors as hand-harvest laborers in an agricultural operation. It further explains the specific requirements imposed by the statute for employment under a waiver and specifies the conditions prescribed by the Secretary for employment under a waiver.

### § 575.2 Definitions.

As used in this part:

*Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*).

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes an authorized representative designated by the Administrator to perform any of the functions of the Administrator under this part.

*Agriculture* means agriculture as defined in section 3(f) of the Act and as interpreted in part 780 of this chapter.

*Commute daily* means the minors shall travel by foot, car, or other vehicle designed for transporting passengers from their permanent residences to the field or farm where they will work and return thereto at the end of each workday.

*Department* means the U.S. Department of Labor.

*Employer* means employer as defined in section 3(d) of the Act.

*Group of employers* means a number of employers who seek to be considered together for the purpose of applying for a waiver under section 13(c)(4) of the Act.

*Hand-harvest laborers* means agricultural workers engaged solely in harvesting by hand soil grown crops such as but not limited to berries, potatoes, and beans, and as interpreted in § 780.312 of this chapter.

*Outside school hours* means such periods as determined by the school district of the minor's permanent residence. These periods include before or after school hours, holidays, summer vacation, Saturdays, Sundays, or any other days on which the school for the school district does not assemble.

*Permanent residence* means the place where the minor and the minor's parent or person standing in place of a parent reside year-round.

*Secretary* means the Secretary of Labor, United States Department of Labor, or an authorized representative of the Secretary.

*Waiver* means a letter signed by the Administrator advising the named employer or group of employers that 10 and 11 year old minors may be employed in the hand-harvesting of the specified short season crop or crops for the period designated, in accordance with the terms and conditions set forth in section 13(c)(4) of the Act and this part.

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978]

### § 575.3 Application for waiver.

(a) An application for a waiver shall be filed with the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Washington, DC 20210. To permit adequate time for processing, it is recommended that such applications be filed 6 weeks prior to the period the waiver is to be in effect.

(b) No particular form is prescribed. The application, which may be in letter form, shall be typewritten or clearly written and shall include the following information:

(1) The general information as described in § 575.4 of this part:

(i) Name and address of employer or group of employers;

(ii) Telephone number;

(iii) Location of farm(s);

(iv) Crop or crops to be hand harvested;

(v) Whether payment is customarily paid on a piece rate basis;

(vi) Requested period of waiver;

(vii) Statement that such employment shall be outside school hours;

(2) The objective data as required in § 575.5 of this part to show that:

(i) The crops have a short harvesting season;

(ii) Without 10 and 11 year olds the industry would suffer severe economic disruption;

(iii) Employment will not be deleterious to the health and well-being of 10 and 11 year olds;

(iv) The level of pesticides will not adversely affect 10 and 11 year olds;

(v) Individuals 12 years and over are not available for employment;

(vi) Employer or group of employers has traditionally used minors under 12 years and this will not displace employees 16 years or older.

(c) The application shall be signed and dated by the employer or group of employers requesting the waiver or by the authorized representative of such employer or group.

(Approved by the Office of Management and Budget under control number 1215–0120)

[43 FR 26562, June 21, 1978, as amended at 47 FR 145, Jan. 5, 1982]

### § 575.4 Information to be included in application.

An application for a waiver pursuant to section 13(c)(4) of the Act shall contain the following information:

(a) The name, address, and zip code of the employer, or each employer of a group of employers, and the authorized representative, if any, of an employer or group.

(b) The telephone number and area code for any employer or authorized representative from whom additional information concerning the application may be obtained.

(c) The address, location, and/or area (State, county, and/or other geographic designation), clearly identifying each employer's farm(s) or field(s) where 10 and 11 year old hand-harvest laborers are to be employed.

(d) The specific crop or crops to be hand-harvested at each designated farm or field.

(e) Substantiation of the claim that such agricultural operation ''is customarily and generally recognized as being paid on a piece rate basis in the region in which such individuals would be employed.'' The Administrator will accept signed statements to that effect from agricultural employers and employees and others, such as agricultural extension agents, in the region of employment who are familiar with farming operations and practices in the region and with the method of compensation used in such operations and practices.

(f) Designated dates of not more than 8 weeks an any calendar year, between June 1 and October 15, during which it is anticipated that 10 and 11 year old minors will be employed in the hand-harvesting of the specified short season crop or crops.

(g) A statement that the 10- and 11-year old hand harvesters will be employed outside school hours.

### § 575.5 Supporting data to accompany application.

Objective data, as required by section 13(c)(4) of the Act, shall also be submitted by the employer or group of employers applying for a waiver, to show that:

(a) The crop to be harvested is one with a ''particularly short harvesting season.'' The variety of each crop to be harvested must ordinarily be harvested within 4 weeks in the region in which the waiver will be applicable. The Administrator will accept the written statement to that effect from the agricultural extension agent for the county.

(b) The 12-year minimum age prescribed by the Act for such employment would cause ''severe economic disruption in the industry of the employer or group of employers applying for the waiver.'' Severe economic disruption in the industry refers to the consequences of not meeting a compelling need for the employment of 10- and 11-year olds to avoid loss of a significant portion of the crop. Evidence of this need includes the projected number of laborers needed to harvest the acreage planted and evidence that recruitment requirements specified in paragraph (e) of this section have been complied with. Data concerning the number of hand harvest laborers used in previous years for given acreages will serve as a basis for evaluating needs for the current year. If the requisite number of workers cannot be recruited from the labor supply of 12 years and above, this would ordinarily demonstrate the compelling need for the employment of 10 and 11 year olds.

(c) The employment of minors under the waiver ''would not be deleterious to their health or well-being.'' This refers to the prospective effect on the health or well-being generally (i.e., other than the tolerance level of pesticides or other chemicals) of 10 and 11 year-old hand harvesters. The Administrator will accept signed statements to that effect from doctors, or nurses or public health officials in the region.

(d) The ''level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of'' minors employed under the waiver. The safe reentry standards established by the Environmental Protection Agency, and followed by other Federal and State agencies, were established for adult workers and have not been shown to be safe for 10 and 11 year olds. Therefore, the applicant, in order to satisfy this condition, will either have to submit a statement that no pesticides or other chemicals were used on the crop to be harvested or submit data which upon study by the Secretary or the Secretary's designee establishes a safe reentry times for 10 and 11 year olds. If such data, or additional studies conducted by the Secretary or the Secretary's designee, establish safe reentry standards for 10 and 11 year olds, this section will be amended to include such standards and

the applicant will then need only identify the type and level of pesticides or chemicals used and the date of last application of same prior to harvest.

(e) Individuals age 12 and above are not available for such employment. Evidence of such unavailability must be documented by the applicant by:

(1) Placement of intrastate and interstate job orders, in which the piece rate is specified, with the state employment service sufficiently in advance of the harvest to allow reasonable time for the recruitment of local and migrant workers. An interstate order need not be placed if the applicant can demonstrate that suitable housing is not available.

(2) Placement of at least two advertisements in local papers of general circulation or advertisements over local radio stations.

(3) Contact with farm labor contractors, migrant workers, and other potential workers.

(4) Contact with schools, business and labor organizations, non-profit organizations and public agencies to enlist their help. Data showing the responses received to these solicitations must be categorized by age and submitted with the waiver application to verify that older workers are not available to perform the work.

(f) The ''industry of such employer or groups of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.'' Documentation that the industry has traditionally and substantially employed individuals under 12 years of age may include newspaper reports, magazine articles, research organization reports, or other appropriate sources. Data to indicate that such employment did not displace substantial job opportunities for individuals over 16 years of age may include the signed statement of an appropriate official of the employment service agency of the State (or States, if region designated crosses State lines) certifying to that fact. This certification must be based on statistical documentation for at least the previous year.

(g) When supporting data required by this section are submitted by an employer or group of employers, the objective data required by paragraph (d) of this section shall be submitted on the basis of each individual employer. However, objective data required by paragraphs (a), (b), (c), (e), and (f) of this section may be submitted for the specific geographic area, e.g., an entire county, of the employer or group of employers.

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978, as amended at 44 FR 22061, Apr. 13, 1979; 44 FR 24059, Apr. 24, 1979; 44 FR 29049, May 18, 1979; 45 FR 55177, Aug. 19, 1980]

### § 575.6 Procedure for action on an application.

(a) Upon receipt of an application for a waiver, the Administrator shall review all of the information and supporting data. If sufficient, the Administrator shall grant a waiver; if insufficient, the Administrator may seek further information. If such information is not made available to the Administrator, the Administrator shall deny the waiver.

(b) The Administrator shall deny the application for a waiver from any employer against whom a final civil money penalty is outstanding under section 16(e) of the Act for violation of the child labor provisions of the Act.

(c) The waiver, in the form of a letter signed by the Administrator, shall set forth the terms and conditions for employment under the waiver as provided in §§ 575.7 and 575.8. The waiver shall be issued to the employer or group of employers applying for it.

(d) If a waiver is granted there will be published in the FEDERAL REGISTER a general notice to that effect setting forth for each waiver granted: the name of the employer or the name of each employer of a group of employers; the address of each such employer, including city, state, and zip code; and the dates of the period the waiver will be in effect.

(e) If a waiver is denied, the Administrator shall give written notice of such denial to the employer or group of employers applying for a waiver. Such denial will be without prejudice to the filing of any subsequent application.

**§ 575.7 Statutory conditions for employment under the waiver.**

Any waiver granted pursuant to section 13(c)(4) of the Act and this part shall require that:

(a) Employment of 10 and 11 year old minors pursuant to the waiver be outside school hours.

(b) Individuals employed commute daily from their permanent residence to the farms(s) or field(s) where employed.

(c) Such individuals be employed for not more than 8 weeks between June 1 and October 15 of any calendar year. When schools are in session, any employment under a waiver shall be confined to outside of school hours.

**§ 575.8 Secretary's conditions for employment under the waiver.**

The Secretary prescribes the following terms and conditions for the protection of minors employed pursuant to a waiver granted under section 13(c)(4) of the Act:

(a) An employer or group of employers granted such a waiver shall obtain and keep on file a signed statement of the parent or person standing in the place of the parent of each 10 and 11-year old minor employed consenting to the employment of such minor under the waiver.

(b) Any employment pursuant to a waiver shall be in compliance with applicable Federal and State laws, and any regulations issued under them.

(c) No employer or group of employers shall employ any 10 or 11 year old minor pursuant to a waiver for more than 5 hours in any one day or for more than 30 hours in any workweek with a meal break of at least 30 minutes and two rest breaks of at least 15 minutes each.

(d) An employer or group of employers granted such a waiver shall provide immediately adjacent to the field(s) to be hand harvested: (1) Adequate sanitary facilities, such as portable toilets; (2) adequate and clean drinking water in covered containers with spouts, and an adequate supply of paper or plastic cups for individual drinking use; and (3) a specified adult employee, who is appropriately equipped and is knowledgeable about first-aid treatment and readily available to give such treatment when needed.

(e) An employer or group of employers granted such a waiver shall provide emergency transportation either to the minor's permanent residence or to the nearest hospital for any 10 or 11 year old hand harvester who becomes ill or is injured during the normal hours of employment.

(f) No 10 or 11 year old employed under a waiver shall ride upon or be employed in the operation of or in the close proximity to any power driven machinery or equipment. Generally, a distance of fifty feet or more will be construed to meet the requirement that employment not be in ''close proximity'' to machinery or equipment.

(g) An employer or group of employers granted such a waiver who owns, operates, or causes to be operated any vehicle for the transportation of such minors shall be responsible for assuring that:

(1) Every such vehicle is in compliance with all applicable Federal and State safety and health standards and with the rules and regulations issued by the Bureau of Motor Carrier Safety, Federal Highway Administration of the U.S. Department of Transportation;

(2) Every such vehicle be designed for transporting passengers and be operated by a lawfully licensed driver; and

(3) A vehicle liability insurance policy provides insurance in an amount not less than the amounts applicable to vehicles used in the transportation of passengers under the Interstate Commerce Act and its regulations. These amounts currently are as follows:

INSURANCE REQUIRED FOR PASSENGER EQUIPMENT

| | 12 or less passengers | More than 12 passengers |
|---|---|---|
| Limit for bodily injuries to or death of 1 person | $100,000 | $100,000 |
| Limit for bodily injuries to or death of all persons injured or killed in any 1 accident (subject to a maximum of $100,000 for bodily injuries to or death of 1 person) | 300,000 | 500,000 |
| Limit for loss or damage in any 1 accident to property of others (excluding cargo) | 50,000 | 50,000 |

(h) A copy of the waiver shall be posted or readily available at the site

or sites of such employment of such minors during the entire period.

(i) The employer or group of employers shall maintain and preserve a record of the name, address, and occupation of each minor employed under the waiver in accordance with § 516.33(b) of this chapter. In addition, the record shall also include the date of birth, the name and address of the school in which the minor is enrolled, and the number of hours worked each day and each week of the designated period. Each employer required to maintain records under this part shall preserve them for a period of at least 2 years.

(j) A waiver shall be effective for the period designated therein with no provision for amendment

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978]

### § 575.9 Failure to comply with the terms and conditions of the waiver.

If the employer or group of employers granted a waiver pursuant to section 13(c)(4) of the Act and this part do not comply with the terms and conditions set forth in the waiver and this part, the waiver shall be null and void and the employer or group of employers will be subject to civil money penalties under section 16(e) of the Act.

## PART 578—MINIMUM WAGE AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

Sec.

578.1 What does this part cover?
578.2 Definitions.
578.3 What types of violations may result in a penalty being assessed?
578.4 Determination of penalty.

AUTHORITY: Sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29 (29 U.S.C. 216(e)), Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by Pub. L. 104–134, section 31001(s), 110 Stat. 1321–358, 1321–373.

SOURCE: 57 FR 49129, Oct. 29, 1992, unless otherwise noted.

### § 578.1 What does this part cover?

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act to provide that any person who repeatedly or willfully violates the minimum wage (section 6) or overtime provisions (section 7) of the Act shall be subject to a civil money penalty not to exceed $1,000 for each such violation. The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)), requires that inflationary adjustments be periodically made in these civil money penalties according to a specified cost-of-living formula. This part defines terms necessary for administration of the civil money penalty provisions, describes the violations for which a penalty may be imposed, and describes criteria for determining the amount of penalty to be assessed. The procedural requirements for assessing and contesting such penalties are contained in 29 CFR part 580.

[66 FR 63503, Dec. 7, 2001]

### § 578.2 Definitions.

(a) *Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060 (29 U.S.C. 201 et seq.));

(b) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division who is authorized by the Administrator to perform any of the functions of the Administrator under this part.

(c) *Person* includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

### § 578.3 What types of violations may result in a penalty being assessed?

(a) A penalty of up to $1,000 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act; Provided, however, that for any violation occurring on or after January 7, 2002 the civil money penalty amount will increase to up to $1,100. The amount of the penalty will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 6 or section 7 of the Act shall be deemed to be ''repeated'' for purposes of this section:

(1) Where the employer has previously violated section 6 or 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 6 or 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be ''willful'' for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section, an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

[57 FR 49129, Oct. 29, 1992; 57 FR 57280, Dec. 3, 1992, as amended at 66 FR 63503, Dec. 7, 2001]

### §578.4 Determination of penalty.

(a) In determining the amount of penalty to be assessed for any repeated or willful violation of section 6 or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business.

(b) Where appropriate, the Administrator may also consider other relevant factors in assessing the penalty, including but not limited to the following:

(1) Whether the employer has made efforts in good faith to comply with the provisions of the Act and this part;

(2) The employer's explanation for the violations, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(3) The previous history of violations, including whether the employer is subject to injunction against violations of the Act;

(4) The employer's commitment to future compliance;

(5) The interval between violations;

(6) The number of employees affected; and

(7) Whether there is any pattern to the violations.

## PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

Sec.
579.1 Purpose and scope.
579.2 Definitions.
579.3 Violations for which child labor civil money penalties may be assessed.
579.4 [Reserved]
579.5 Determining the amount of the penalty and assessing the penalty.

AUTHORITY: 29 U.S.C. 203(l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 4–2001, 66 FR 29656; 104 Stat. 890 (28 U.S.C. 2461 note), as amended by 110 Stat. 1321–373 and 112 Stat. 3293.

### §579.1 Purpose and scope.

(a) Section 16(e), added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1974, and as further amended by the Fair Labor Standards Amendments of 1989, the Omnibus Budget Reconciliation Act of 1990, and the Compactors and Balers Safety Standards Modernization Act of 1996, provides that—

(1) Any person who violates the provisions of section 12 relating to child labor, section 13(c)(5), or any regulation issued under those sections shall be subject to a civil penalty of not to exceed $11,000 for each employee who was the subject of such a violation.

(2) Any person who repeatedly or willfully violates section 6 or 7 shall be subject to a civil penalty of not to exceed $1,000 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered.

(4) The amount of any penalty under this subsection, when finally determined, may be—

(i) Deducted from any sums owing by the United States to the person charged;

(ii) Recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(iii) Ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary.

(5) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary.

(6) Except for civil money penalties collected for violations of sections 12 and 13(c)(5), sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties in accordance with the provision of section 2 of an Act entitled ''An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes'' (29 U.S.C. 9a).

(7) Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.

(b) The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)), requires that Federal agencies periodically adjust their civil money penalties for inflation according to a specified cost-of-living formula. This law requires each agency to make an initial inflationary adjustment for all covered civil money penalties, and to make further inflationary adjustments at least once every four years thereafter. Any increase in the civil money penalty amount will apply only to violations that occur after the date the increase takes effect.

(c) This part explains our procedures for issuing a notice of civil penalty to an employer that has violated section 12 or section 13(c)(5) of the Act, or any regulation issued under those sections; describes the types of violations for which we may impose a penalty and the factors we will consider in assessing the amount of the penalty; outlines the procedure for a person charged with violations to file an exception to the determination that the violations occurred; and summarizes the methods we will follow for collecting and recovering the penalty.

[40 FR 25792, June 18, 1975, as amended at 56 FR 8679, Feb. 28, 1991; 66 FR 63503, Dec. 7, 2001; 69 FR 75405, Dec. 16, 2004]

### § 579.2 Definitions.

As used in this part and part 580 of this chapter:

*Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*);

*Administrative law judge* means a person appointed as provided in 5 U.S.C. 3105 and subpart B of part 930 of title 5 of the CFR, and qualified to preside at hearings under 5 U.S.C. 554–557.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes an authorized representative designated by the Administrator to perform any of the functions of the Administrator under this part and part 580 of this chapter.

*Agency* has the meaning given it by 5 U.S.C. 551.

*Chief Administrative Law Judge* means the Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., Suite 400, Washington, DC 20001–8002.

*Department* means the U.S. Department of Labor.

*Person* includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

*Secretary* means the Secretary of Labor, U.S. Department of Labor, or an authorized representative of the Secretary.

*Solicitor of Labor* means the Solicitor, U.S. Department of Labor, and includes attorneys designated by the Solicitor to perform functions of the Solicitor under this part and part 780 of this chapter.

[40 FR 25792, June 18, 1975, as amended at 40 FR 53237, Nov. 17, 1975; 56 FR 54708, Oct. 22, 1991]

### § 579.3 Violations for which child labor civil money penalties may be assessed.

(a) *What constitutes the violation.* Each of the following constitutes a violation of the Act and/or the Secretary's regulations for which a penalty as provided by section 16(e) of the Act and this part may be imposed, unless employment of the minor or minors referred to is shown to come within a specific exemption or exception described in paragraph (c) of this section:

(1) Each shipment or delivery for shipment in commerce by a producer, manufacturer, or dealer of any goods produced in an establishment situated in the United States in or about which, within thirty days prior to the removal of such goods therefrom, there has been employed any minor as described in paragraph (b) of this section;

(2) Each employment by an employer of any minor as described in paragraph (b) of this section, for any period in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce;

(3)–(4) [Reserved]

(5) The failure by an employer employing any minor for whom records must be kept under any provision of part 516 of this title to maintain and preserve, as required by such provision, such records concerning the date of the minor's birth and concerning the proof of the minor's age as specified therein; and

(6) The failure by an employer employing any minor subject to any provision of 29 CFR part 570, to take or cause to be taken such action as is necessary to assure compliance with all requirements of such provision which, by the regulations in such part, are made conditions for lawful employment of such minor.

(b) *Minors whose employment may result in violation.* The violations described in paragraph (a) may result from employment of any of the following minors as described:

(1) Any minor under the age of 18 years in any occupation (other than in agriculture) in which employment, as set forth in subpart E of part 570 of this chapter, has been found and declared by the Secretary to be particularly hazardous for or detrimental to the health or well-being of minors below such age;

(2) Any minor under the age of 16 years:

(i) In agriculture during school hours for the school district where such minor is living while so employed; or

(ii) In agriculture in any occupation found and declared by the Secretary as set forth in subpart E–1 of part 570 of this chapter, to be particularly hazardous for the employment of minors below such age; or

(iii) In any manufacturing or mining occupation; or

(iv) In any other occupation other than in agriculture unless it is established that such minor is at least 14 years of age and the employment of such minor in such occupation is specifically permitted by and in accord with regulations of the Secretary as set forth in subpart C of part 570 of this chapter;

(3) Any minor under the age of 14 years:

(i) In any occupation other than in agriculture; or

(ii) In agriculture, outside of school hours for the school district where such minor is living while so employed, unless it is established either:

(A) That such minor is not less than 12 years of age *and* either (*1*) that such employment is with the written consent of a parent or person standing in place of a parent of such minor, or (*2*) that such employment is on the same farm where such parent or person is also employed; or

(B) That such minor, if less than 12 years of age, is employed as described in paragraph (b)(4)(i) or (b)(4)(ii) of this section; and

(4) Any minor under the age of 12 years, unless it is established that such

minor is employed in agriculture outside of school hours for the school district where such minor is living while so employed, and:

(i) Is employed by a parent or by a person standing in place of a parent of such minor, on a farm owned or operated by such parent or person; or

(ii) Is employed with the written consent of a parent or person standing in place of a parent of such minor, on a farm where, because of the provisions of section 13(a)(6) of the Act, none of the employees are required to be paid at the wage rate prescribed by section 6(a)(5) of the Act.

(c) *Exemptions and exceptions.* Conduct which otherwise might constitute a violation of the Act as described in paragraphs (a) and (b) of this section may be shown to be not violative of the child labor provisions by evidence that a specific exemption or exception provided in the Act makes such conduct permissible. Thus, the Act provides:

(1) That none of the child labor provisions of section 12 shall apply to: (i) Any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions; (ii) any employee engaged in the delivery of newspapers to the consumer; (iii) any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths); or (iv) any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the States, territories, and possessions listed in section 13(f) of the Act (see Act, sections 13(c)(3), 13(d), 13(f));

(2) That, with respect to the violations described in paragraph (a)(1) of this section, any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of section 12 of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited (see Act, section 12(a) and 29 CFR part 789);

(3) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors as described in paragraph (b)(2)(iv), a parent or person standing in place of a parent may lawfully employ his or her own child or a child in his or her custody under the age of 16 years in an occupation *other than:* (i) Manufacturing or (ii) mining or (iii) an occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being, and an employer may lawfully employ a young worker between 14 and 16 years of age in an occupation permitted and under conditions prescribed by 29 CFR part 570, subpart C;

(4) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(2)(iii), a parent or person standing in place of a parent may lawfully employ on a farm owned or operated by such parent or person, his or her own child or a child in his or her custody under the age of 16 years in an occupation in agriculture found and declared by the Secretary of Labor to be particularly hazardous for the employment of children below such age;

(5) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(3)(ii), employment of minors 12 or 13 years of age is lawful under the conditions prescribed in paragraph (b)(3)(ii)(A) of this section and employment of minors under 12 years of age is lawful under the conditions prescribed in paragraph (b)(3)(ii)(B) of this section; and

(6) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(4), employment of minors under 12 years of age is lawful under the conditions prescribed in

paragraph (b)(4)(i) or (ii) of this section.

[40 FR 25792, June 18, 1975, as amended at 41 FR 26836, June 29, 1976; 69 FR 75405, Dec. 16, 2004]

### § 579.4 [Reserved]

### § 579.5 Determining the amount of the penalty and assessing the penalty.

(a) The administrative determination of the amount of the civil penalty, of not to exceed $10,000 for each employee who was the subject of a violation of section 12 or section 13(c)(5) of the Act relating to child labor or of any regulation issued under that section, will be based on the available evidence of the violation or violations and will take into consideration the size of the business of the person charged and the gravity of the violation as provided in paragraphs (b) through (d) of this section; Provided, however, that for any violation occurring on or after January 7, 2002 the civil money penalty amount will increase to not to exceed $11,000 for each employee who was the subject of a violation.

(b) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm labor used in pertinent calendar quarters), dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.

(c) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

(d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate,

(1) Whether the evidence shows that the violation is ''de minimis'' and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or

(2) Whether the evidence shows that the person so charged had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act.

(e) An administrative determination of the amount of the civil money penalty for a particular violation or particular violations of section 12 relating to child labor or any regulation issued under that section shall become final 15 days after receipt of the notice of penalty by certified mail by the person so charged unless such person has, pursuant to § 580.6 filed with the Secretary an exception to the determination that the violation or violations for which the penalty is imposed occurred.

(f) A determination of the penalty made in an administrative proceeding after opportunity for hearing as provided in section 16(e) of the Act and pursuant to Part 580 of this chapter shall be final.

[40 FR 25792, June 18, 1975, as amended at 56 FR 8679, Feb. 28, 1991; 66 FR 63503, Dec. 7, 2001]

# PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

Sec.
580.1 Definitions.
580.2 Applicability of procedures and rules.
580.3 Written notice of determination required.
580.4 Contents of notice.
580.5 Finality of notice.
580.6 Exception to determination of penalty and request for hearing.

RULES OF PRACTICE

580.7 General.
580.8 Service and computation of time.
580.9 Commencement of proceeding.

REFERRAL FOR HEARING

580.10 Referral to Administrative Law Judge.
580.11 Appointment of Administrative Law Judge and notification of prehearing conference and hearing date.
580.12 Decision and Order of Administrative Law Judge.
580.13 Procedures for appeals to the Administrative Review Board.
580.14 [Reserved]
580.15 Responsibility of the Office of Administrative Law Judges for the administrative record.
580.16 Final decision of the Administrative Review Board.
580.17 Retention of official record.
580.18 Collection and recovery of penalty.

AUTHORITY: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 4–2001, 66 FR 29656; 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

SOURCE: 56 FR 24991, May 31, 1991, unless otherwise noted.

## § 580.1 Definitions.

As used in this part:

*Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060 as amended; 29 U.S.C. 201 *et seq.*).

*Administrative law judge* means a person appointed as provided in 5 U.S.C. 3105 and subpart B of part 930 of title 5 of the CFR, and qualified to preside at hearings under 5 U.S.C. 554–557.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized by the Administrator to perform any of the functions of the Administrator under this part and parts 578 and 579 of this chapter.

*Chief Administrative Law Judge* means the Chief Administrative Law Judge, Office of the Administrative Law Judges, U.S. Department of Labor, Washington, DC 20210.

*Department* means the U.S. Department of Labor.

*Person* includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

*Secretary* means the Secretary of Labor, U.S. Department of Labor, or a designated representative of the Secretary.

*Solicitor of Labor* means the Solicitor, U.S. Department of Labor, and includes attorneys of the Office of the Solicitor authorized by the Solicitor to perform functions of the Solicitor under this part.

## § 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579, and for assessment of civil money penalties for any repeated or willful violation of the minimum wage provisions of section 6 or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. The substantive requirements for assessment of civil money penalties are set forth at 29 CFR part 579 (child labor) and part 578 (minimum wage and overtime).

## § 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 6 or section 7 of the Act, and determines that imposition of a civil money penalty for such violation

is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. Where service by certified mail is not accepted by the party, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the Administrator may exercise discretion to serve the notice by regular mail.

### § 580.4 Contents of notice.

The notice required by § 580.3 of this part shall:

(a) Set forth the determination of the Administrator as to the amount of the penalty and the reason or reasons therefor;

(b) Set forth the right to take exception to the assessment of penalties and set forth the right to request a hearing on such determination;

(c) Inform any affected person or persons that in the absence of a timely exception to a determination of penalty and a request for a hearing received within 15 days of the date of receipt of the notice, the determination of the Administrator shall become final and unappealable; and

(d) Set forth the time and method for taking exception to the determination and requesting a hearing, and the procedures relating thereto, as set forth in § 580.6 of this part.

### § 580.5 Finality of notice.

If the person charged with violations does not, within 15 days after receipt of the notice, take exception to the determination that the violation or violations for which the penalty is imposed occurred, the administrative determination by the Administrator of the amount of such penalty shall be deemed final and not subject to administrative or judicial review. Upon the determination becoming final in such a manner, collection and recovery of the penalty shall be instituted pursuant to § 580.18.

[69 FR 75405, Dec. 16, 2004]

### § 580.6 Exception to determination of penalty and request for hearing.

(a) Any person desiring to take exception to the determination of penalty, or to seek judicial review, shall request an administrative hearing pursuant to this part. The exception shall be in writing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, and must be received no later than 15 days after the date of receipt of the notice referred to in § 580.3. No additional time shall be added where service of the determination of penalties or of the exception thereto is made by mail. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues a decision affirming the determination.

(b) No particular form is prescribed for any exception to determination of penalty and request for hearing permitted by this part. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue(s) stated in the notice of determination giving rise to such request;

(4) State the specific reason(s) why the person requesting the hearing believes such determination is in error;

(5) Be signed by the person making the request or by an authorized representative of such person; and

(6) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

[56 FR 24991, May 31, 1991, as amended at 60 FR 17222, Apr. 5, 1995; 69 FR 75405, Dec. 16, 2004]

## RULES OF PRACTICE

### § 580.7 General.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) Subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall apply except as follows: Notwithstanding the provisions

of subpart B, including the hearsay rule (§ 18.802), testimony of current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon, as well as any documents contained in Department of Labor files (other than the investigation file concerning the violation(s) as to which the penalty in litigation has been assessed), shall be admissible in proceedings under this subpart. Nothing in this paragraph is intended to limit the admissibility of any evidence which is otherwise admissible under 29 CFR part 18, subpart B.

### § 580.8 Service and computation of time.

(a) Service of documents under this subpart shall be made by delivery to the individual, an officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by mail, service is complete upon mailing. If done in person, service is complete upon handing it to the attorney, officer or party; by leaving it at the office with a clerk or person in charge, or leaving it at a conspicuous place in the office if no one is in charge; or by leaving it at the attorney's or party's residence.

(b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this subpart shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Department in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

### § 580.9 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 580.6 of this subpart.

REFERRAL FOR HEARING

### § 580.10 Referral to Administrative Law Judge.

(a) Upon receipt of a timely exception to a determination of penalties and request for a hearing filed pursuant to and in accordance with § 580.6 of this subpart, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, refer the matter to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. A copy of the notice of administrative determination and of the request for hearing shall be attached to the Order of Reference and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this subpart and 29 CFR part 18.

(b) A copy of the Order of Reference and attachments thereto, together with a copy of this part, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in § 580.8 of this subpart.

### § 580.11 Appointment of Administrative Law Judge and notification of prehearing conference and hearing date.

Upon receipt from the Administrator of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall notify all interested parties of the time and place of a prehearing conference and of the hearing.

### § 580.12 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall render a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of

section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

(d) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(e) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless, pursuant to § 580.13 of this part, there is an appeal to the Secretary.

### § 580.13 Procedures for appeals to the Administrative Review Board.

(a) Any party desiring review of a decision of the Administrative Law Judge, including judicial review, must file a petition for review with the Department's Administrative Review Board (Board). To be effective, such petition must be received by the Board within 30 days of the date of the decision of the Administrative Law Judge. Copies of the appeal shall be served on all parties and on the Chief Administrative Law Judge. If such a petition for review is timely filed, the decision of the Administrative Law Judge shall be inoperative unless and until the Board dismisses the appeal or issues a decision affirming the decision of the Administrative Law Judge.

(b) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S–4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents must be filed.

(c) Documents are not deemed filed with the Board until actually received by the Board, either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time was made by mail.

(d) A copy of each document filed with the Board shall be served upon all other parties involved in the proceeding. Such service shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address of the party.

[69 FR 75405, Dec. 16, 2004]

### § 580.14 [Reserved]

### § 580.15 Responsibility of the Office of Administrative Law Judges for the administrative record.

Upon receipt of a petition seeking review of the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall promptly forward a copy of the complete hearing record to the Secretary.

### § 580.16 Final decision of the Administrative Review Board.

The Board's final decision shall be served upon all parties and the Chief Administrative Law Judge, in person or by mail to the last known address.

[69 FR 75405, Dec. 16, 2004]

### § 580.17 Retention of official record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

### § 580.18 Collection and recovery of penalty.

(a) When the determination of the amount of any civil money penalty provided for in this part becomes final under § 580.5 in accordance with the administrative assessment thereof, or pursuant to the decision and order of an Administrative Law Judge in an administrative proceeding as provided in § 580.12, or the decision of the Board pursuant to § 580.16, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor. The person against whom such penalty has been assessed or imposed shall promptly remit the amount thereof, as finally determined. The payment shall be by certified check or by money order, made payable to the order of the Wage and Hour Division, and shall be delivered or mailed

to the District Office of the Wage and Hour Division which issued and served the original notice of the penalty.

(b) Pursuant to section 16(e) of the Act, the amount of the penalty, finally determined as provided in § 580.5, § 580.12 or § 580.16, may be:

(1) Deducted from any sums owing by the United States to the person charged. To effect this, any agency having sums owing from the United States to such person shall, on the request of the Secretary, withhold the specific amount of the penalty from the sums owed to the person so charged and remit the amount to the Secretary to satisfy the amount of the penalty assessed;

(2) Recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor. When the person against whom a final determination assessing a civil money penalty has been made does not voluntarily remit the amount of such penalty to the Secretary within a reasonable time after notification to do so, the Solicitor of Labor may institute such an action to recover the amount of the penalty; or

(3) Ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary. Any such unlawful act or practice may be enjoined by the United States district courts under section 17 upon court action, filed by the Secretary; and failure of the person so enjoined to comply with the court order may subject such person to contempt proceedings. A willful violation of section 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. In any of the foregoing civil or criminal proceedings, the court may order the payment to the Secretary of the civil penalty finally assessed by the Secretary.

[56 FR 24991, May 31, 1991, as amended at 69 FR 75406, Dec. 16, 2004]

# PART 697—INDUSTRIES IN AMERICAN SAMOA

Sec.
697.1 Wage rates and industry definitions.
697.2 Industry wage rates and effective dates.
697.3 Notices.
697.4 Effective dates.

AUTHORITY: 29 U.S.C. 205, 206, 208.

## § 697.1 Industry definitions.

(a) *Government employees*. This industry includes all activities of employees of the Government of American Samoa. This industry does not include any employees of the United States or its agencies.

(b) *Fish canning and processing*. This industry shall include the canning, freezing, preserving, and other processing of any kind of fish, shellfish, and other aquatic forms of animal life, the manufacture of any by-product thereof, and the manufacture of cans and related activities.

(c) *Petroleum marketing*. This industry shall include the wholesale marketing and distribution of gasoline, kerosene, lubricating oils, diesel and marine fuels, and other petroleum products, bunkering operations in connection therewith, and repair and maintenance of petroleum storage facilities.

(d) *Shipping and transportation*. This industry shall include the transportation of passengers and cargo by water or by air, and all activities in connection therewith, including storage and lighterage operations: *Provided, however*, that this industry shall not include the operation of tourist bureaus and of travel and ticket agencies. *Provided, further*, that this industry shall not include bunkering of petroleum products or activities engaged in by seamen on American vessels which are documented or numbered under the laws of the United States, which operate exclusively between points in the Samoan Islands, and which are not in excess of 350 tons net capacity. Within this industry there shall be three classifications:

(1) *Classification A: Stevedoring, lighterage and maritime shipping agency activities*. This classification shall include all employees of employers who engage in each of the following three services:

stevedoring, lighterage and maritime shipping agency activities.

(2) *Classification B: Unloading of fish.* This classification shall include the unloading of raw and/or frozen fish from vessels.

(3) *Classification C: All other activities.* This classification shall include all other activities in the shipping and transportation industry.

(e) *Construction.* This industry shall include all construction, reconstruction, structural renovation and demolition, on public or private account, of buildings, housing, highways and streets, catchments, dams, and any other structure.

(f) *Retailing, wholesaling and warehousing.* This industry includes all activities in connection with the selling of goods or services at retail, including the operation of retail stores and other retail establishments, the wholesaling and warehousing and other distribution of commodities including but without limitation the wholesaling, warehousing and other distribution activities of jobbers, importers and exporters, manufacturers' sales branches and sales offices engaged in the distribution of products manufactured outside of American Samoa, industrial distributors, mail order establishments, brokers and agents, and public warehouses: *Provided, however,* that this industry shall not include retailing and wholesaling activities included within other industry wage orders which are applicable in American Samoa.

(g) *Bottling, brewing and dairy products.* The bottling, brewing and dairy products industry includes the bottling, sale and distribution of malt beverages and soft drinks in bottles and other containers and the processing or recombining of fluid milk and cream for wholesale and retail distribution and the manufacture of malt beverages, butter, natural and processed cheese, condensed and evaporated milk, malted milk, ice cream and frozen desserts; including also any warehousing operation incidental to the above activities of firms engaged in these activities.

(h) *Printing.* The printing industry is that industry which is engaged in printing, job printing, and duplicating. This industry shall not include printing performed by an employer who publishes a newspaper, magazine, or similar publications.

(i) *Publishing.* This industry is that industry which is engaged in the publishing of newspapers, magazines, or similar publications other than the publishing of a weekly, semiweekly or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county or counties contiguous thereto.

(j) *Finance and insurance.* The finance and insurance industry includes all banks (whether privately or government owned in whole or in part) and trust companies, credit agencies other than banks, holding companies, other investment companies, collection agencies, brokers and dealers in securities and commodity contracts, as well as carriers of all types of insurance, and insurance agents and brokers.

(k) *Ship maintenance.* This industry is defined as all work activity associated with ship repair and maintenance, including marine, railway, and dry dock operation.

(l) *Hotel.* This industry shall include all activities in connection with the operation of hotels (whether privately or government owned in whole or in part), motels, apartment hotels, and tourist courts engaged in providing lodging, with or without meals, for the general public, including such laundry and cleaning and other activities as are engaged in by a hotel or motel or other lodging facility on its own linens or on garments of its guests.

(m) *Tour and travel services.* This industry shall include the operation of tourist bureaus and of travel and passenger ticket services and agencies: *Provided, however,* that this industry shall not include the operation of a freight-shipping agency.

(n) *Private hospitals and educational institutions.* This industry shall include all activities performed in connection with the operation of private hospitals, nursing homes, and related institutions primarily engaged in the care of the sick, the aged or the mentally or physically disabled or for gifted children, preschools, elementary or secondary

schools, or institutions of higher education: *Provided, however,* that this industry shall not include employees of the Government of American Samoa or employees of any agency or corporation of the Government of American Samoa.

(o) *Garment manufacturing.* This industry is defined as the manufacture from any material of articles of apparel and clothing made by knitting, spinning, crocheting, cutting, sewing, embroidering, dyeing, or any other processes and includes but is not limited to all the following clothing: men's, women's, and children's suits, clothing and other products; hosiery; gloves and mittens; sweaters and other outerwear; swimwear; leather, leather goods, and related products; handkerchief, scarf, and art linen products; shirts; blouses; and underwear; uniforms and work clothing; and includes assembling, tagging, ironing, and packing apparel for shipping. This industry does not include manufacturing, processing or mending of apparel in retail or service establishments, including clothing stores, laundries, and other stores.

(p) *Miscellaneous activities.* This industry shall include every activity not included in any other industry defined herein.

[66 FR 44968, Aug. 27, 2001]

## § 697.2 Industry wage rates and effective dates.

Every employer shall pay to each employee in American Samoa, who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in any enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Fair Labor Standards Act of 1938, wages at a rate not less than the minimum rate prescribed in this section for the industries and classifications in which such employee is engaged.

| Industry | Minimum wage | | |
|---|---|---|---|
| | Effective October 3, 2005 | Effective October 18, 2005 | Effective October 1, 2006 |
| (a) Government Employees | $2.77 | $2.84 | $2.91 |
| (b) Fish Canning and Processing | 3.26 | 3.26 | 3.26 |
| (c) Petroleum Marketing | 3.85 | 3.85 | 3.85 |
| (d) Shipping and Transportation: | | | |
| (1) Classification A | 4.09 | 4.09 | 4.09 |
| (2) Classification B | 3.92 | 3.92 | 3.92 |
| (3) Classification C | 3.88 | 3.88 | 3.88 |
| (e) Construction | 3.60 | 3.60 | 3.60 |
| (f) Retailing, Wholesaling, and Warehousing | 3.10 | 3.10 | 3.10 |
| (g) Bottling, Brewing, and Dairy Products | 3.19 | 3.19 | 3.19 |
| (h) Printing | 3.50 | 3.50 | 3.50 |
| (i) Publishing | 3.63 | 3.63 | 3.63 |
| (j) Finance and Insurance | 3.99 | 3.99 | 3.99 |
| (k) Ship Maintenance | 3.34 | 3.42 | 3.51 |
| (l) Hotel | 2.86 | 2.93 | 3.00 |
| (m) Tour and Travel Services | 3.31 | 3.39 | 3.48 |
| (n) Private Hospitals and Educational Institutions | 3.33 | 3.33 | 3.33 |
| (o) Garment Manufacturing | 2.68 | 2.68 | 2.68 |
| (p) Miscellaneous Activities | 2.57 | 2.63 | 2.70 |

[70 FR 57723, Oct. 3, 2005]

## § 697.3 Notices.

Every employer subject to the provisions of § 697.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 697.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor, and shall give such other notice as the Administrator may prescribe.

[41 FR 24121, June 15, 1976. Redesignated and amended at 66 FR 44969, Aug. 27, 2001]

**§ 697.4 Effective dates.**

The wage rates specified in § 697.2 shall be effective on October 18, 2005, except as otherwise specified.

[70 FR 57724, Oct. 3, 2005]

# SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

## PART 775—GENERAL

Sec.
775.0 General enforcement policy.
775.1 Advisory interpretations announced by the Administrator.

AUTHORITY: 52 Stat. 1060, 29 U.S.C. 201 *et seq.*, 61 Stat. 84, 29 U.S.C. 251 *et seq.*, 49 Stat. 2036, 41 U.S.C. 35 *et seq.*

### § 775.0 General enforcement policy.

(a) In order to clarify at this time the practices and policies which will guide the administration and enforcement of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201–219), and the Walsh-Healey Act as amended (49 Stat. 2036, 41 U.S.C. 35–45), as affected by the Portal-to-Portal Act of 1947 (61 Stat. 84; 29 U.S.C. Sup. 251 *et seq.*), the following policy is announced effective June 30, 1947.

(b) The investigation, inspection and enforcement activities of all officers and agencies of the Department of Labor as they relate to the Fair Labor Standards Act and the Walsh-Healey Act will be carried out on the basis that all employers in all industries whose activities are subject to the provisions of the Fair Labor Standards Act or the Walsh-Healey Act are responsible for strict compliance with the provisions thereof and the regulations issued pursuant thereto.

(c) Any statements, orders, or instructions inconsistent herewith are rescinded.

[12 FR 3915, June 17, 1947]

### § 775.1 Advisory interpretations announced by the Administrator.

Advisory interpretations announced by the Administrator serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.

[11 FR 14099, Dec. 5, 1946]

## PART 776—INTERPRETATIVE BULLETIN ON THE GENERAL COVERAGE OF THE WAGE AND HOURS PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938

### Subpart A—General

Sec.
776.0 Subpart limited to individual employee coverage.

INDIVIDUAL EMPLOYEE COVERAGE

776.0a Introductory statement.

HOW COVERAGE IS DETERMINED

776.1 General interpretative guides.
776.2 Employee basis of coverage.
776.3 Persons engaging in both covered and noncovered activities.
776.4 Workweek standard.
776.5 Coverage not dependent on method of compensation.
776.6 Coverage not dependent on place of work.
776.7 Geographical scope of coverage.

ENGAGING ''IN COMMERCE''

776.8 The statutory provisions.
776.9 General scope of ''in commerce'' coverage.
776.10 Employees participating in the actual movement of commerce.
776.11 Employees doing work related to instrumentalities of commerce.
776.12 Employees traveling across State lines.
776.13 Commerce crossing international boundaries.

ENGAGING IN ''THE PRODUCTION OF GOODS FOR COMMERCE''

776.14 Elements of ''production'' coverage.
776.15 ''Production.''
776.16 Employment in ''producing, . . . or in any other manner working on'' goods.
776.17 Employment in a ''closely related process or occupation directly essential to'' production of goods.
776.18 Employees of producers for commerce.
776.19 Employees of independent employers meeting needs of producers for commerce.
776.20 ''Goods.''
776.21 ''For'' commerce.

### Subpart B—Construction Industry

776.22 Subpart limited to individual employee coverage.

ENTERPRISE COVERAGE

776.22a Extension of coverage to employment in certain enterprises.

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

776.22b Guiding principles.
776.23 Employment in the construction industry.
776.24 Travel in connection with construction projects.
776.25 Regular and recurring activities as basis of coverage.
776.26 Relationship of the construction work to the covered facility.
776.27 Construction which is related to covered production.
776.28 Covered preparatory activities.
776.29 Instrumentalities and channels of interstate commerce.
776.30 Construction performed on temporarily idle facilities.

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

## Subpart A—General

SOURCE: 15 FR 2925, May 17, 1950, unless otherwise noted.

### § 776.0 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of general coverage of the Act on the traditional basis of engagement by individual employees ''in commerce or in the production of goods for commerce''. The 1961 and 1966 amendments broadened coverage by extending it to other employees on an ''enterprise'' basis, when ''employed in an enterprise engaged in commerce or in the production of goods for commerce'' as defined in section 3 (r), (s), of the present Act. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in a covered enterprise as defined in the amendments. Questions of ''enterprise coverage'' not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210 or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE

### § 776.0a Introductory statement.

(a) *Scope and significance of this part.* (1) The Fair Labor Standards Act of 1938[1] (hereinafter referred to as the Act), brings within the general coverage of its wage and hours provisions every employee who is ''engaged in commerce or in the production of goods for commerce.''[2] What employees are so engaged must be ascertained in the light of the definitions of ''commerce'', ''goods'', and ''produced'' which are set forth in the Act as amended by the Fair Labor Standards Amendments of

[1] Pub. L. 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the Act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); and by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (Pub. L. 393, 81st Cong., 1st sess., 63 Stat. 910); by Reorganization Plan No. 6 of 1950 (15 FR 3174), effective May 24, 1950; and by the Fair Labor Standards Amendments of 1955, approved August 12, 1955 (Pub. L. 381, 84th Cong., 1st sess., C. 867, 69 Stat. 711).

[2] The requirement of section 6 as to minimum wages is: ''Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—'' (not less than $1.00 an hour, except in Puerto Rico and the Virgin Islands to which special provisions apply).

The requirement of section 7 as to maximum hours which an employee may work without receiving extra pay for overtime is: ''no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.''

1949,[3] giving due regard to authoritative interpretations by the courts and to the legislative history of the Act, as amended. Interpretations of the Administrator of the Wage and Hour Division with respect to this general coverage are set forth in this part to 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.''[4] These interpretations with respect to the general coverage of the wage and hours provisions of the Act, indicate the construction of the law which the Administrator believes to be correct and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon reexamination of an interpretation, that it is incorrect.

(2) Under the Portal-to-Portal Act of 1947,[5] interpretations of the Administrator may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations contained in this bulletin are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act, so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. However, 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 Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

(b) *Exemptions and child labor provisions not discussed.* This part does not deal with the various specific exemptions provided in the statute, under which certain employees engaged in commerce or in the production of goods for commerce and thus within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the Act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to specific exemptions may be found in other parts of this chapter. Coverage and exemptions under the child labor provisions of the Act are discussed in a separate interpretative bulletin (§§ 570.101 to 570.121 of this chapter) issued by the Secretary of Labor.

(c) *Earlier interpretations superseded.* All general and specific interpretations issued prior to July 11, 1947, with respect to the general coverage of the wage and hours provisions of the Act were rescinded and withdrawn by § 776.0(b) of the general statement on this subject, published in the FEDERAL REGISTER on that date as part 776 of this chapter (12 FR 4583). To the extent that interpretations contained in such general statement or in releases, opinion letters, and other statements issued on or after July 11, 1947, are inconsistent with the provisions of the Fair Labor Standards Amendments of 1949, they do not continue in effect after January 24, 1950.[6] Effective on the date of its publication in the FEDERAL

[3] Pub. L. 393, 81st Cong., 1st sess. (63 Stat. 910). These amendments, effective January 25, 1950, leave the existing law unchanged except as to provisions specifically amended and the addition of certain new provisions. Section 3(b) of the Act, defining ''commerce'', and section 3(j), defining ''produced'', were specifically amended as explained in §§ 776.13 and 776.17(a) herein.

[4] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138.

[5] Pub. L. 49, 80th Cong., 1st sess. (61 Stat. 84), discussed in part 790 of this chapter.

[6] Section 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. 910) provides:

''Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.''

REGISTER, subpart A of this interpretative bulletin replaces and supersedes the general statement previously published as part 776 of this chapter, which statement is withdrawn. All other administrative rulings, interpretations, practices and enforcement policies relating to the general coverage of the wages and hours provisions of the Act and not withdrawn prior to such date are, to the extent that they are inconsistent with or in conflict with the principles stated in this interpretative bulletin, hereby rescinded and withdrawn.

[15 FR 2925, May 17, 1950, as amended at 21 FR 1448, Mar. 6, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

HOW COVERAGE IS DETERMINED

### § 776.1 General interpretative guides.

The congressional policy under which employees ''engaged in commerce or in the production of goods for commerce'' are brought within the general coverage of the Act's wage and hours provisions is stated in section 2 of the Act. This section makes it clear that the congressional power to regulate interstate and foreign commerce is exercised in this Act in order to remedy certain evils, namely, ''labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well being of workers'' which Congress found ''(a) causes commerce and the channels and instrumentalities of commerce to be used to perpetuate such labor conditions among the workers of the several States; (b) burdens commerce and the free flow of goods in commerce; (c) constitutes an unfair method of competition in commerce; (d) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce and (e) interferes with the orderly and fair marketing of goods in commerce.'' In carrying out these broad remedial purposes, however, the Congress did not choose to make the scope of the Act coextensive in all respects with the limits of its power over commerce or to apply it to all activities affecting commerce.[7] Congress delimited the area in which the Act operates by providing for certain exceptions and exemptions, and by making wage-hour coverage applicable only to employees who are ''engaged in'' either ''commerce'', as defined in the Act, or ''production'' of ''goods'' for such commerce, within the meaning of the Act's definitions of these terms. The Fair Labor Standards Amendments of 1949 indicate an intention to restrict somewhat the category of employees within the reach of the Act under the former definition of ''produced'' and to expand to some extent the group covered under the former definition of ''commerce.'' In his interpretations, the Administrator will endeavor to give effect to both the broad remedial purposes of the Act and the limitations on its application, seeking guidance in his task from the terms of the statute, from authoritative court decisions, and from the legislative history of the Act, as amended.[8]

### § 776.2 Employee basis of coverage.

(a) The coverage of the Act's wage and hours provisions as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory

[7] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *10 East 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578; *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52 (C.A. 8); *Armstrong* v. *Walling*, 161 F. 2d 515 (C.A. 1); *Bowie* v. *Gonzalez*, 117 F. 2d 11 (C.A. 1).

[8] Footnote references to some of the relevant court decisions are made for the assistance of readers who may be interested in such decisions.

Footnote reference to the legislative history of the 1949 amendments are made at points in this part where it is believed they may be helpful. References to the *Statement of the Managers on the part of the House*, appended to the Conference Report on the amendments (H. Rept. No. 1453, 81st Cong., 1st sess.) are abbreviated: H. Mgrs. St. 1949, p. ____. References to the *Statement of a majority of the Senate Conferees*, 95 Cong. Rec., October 19, 1949 at 15372–15377 are abbreviated: Sen. St., 1949 Cong. Rec. References to the Congressional Record are to the 1949 daily issues, the permanent volumes being unavailable at the time this part was prepared.

minimum wage to ''each of his employees who is engaged in commerce or in the production of goods for commerce.'' It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act's coverage. If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that he is not ''engaged in commerce or in the production of goods for commerce.'' To the extent that his employees are so engaged, he is himself so engaged.[9]

(b) In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer's business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee's work.[10] It is apparent, too, from the 1949 amendment to the definition of ''produced'' and its legislative history that an examination of the character of the employer's business will in some borderline situations be necessary in determining whether the employees' occupation bears the requisite close relationship to production for commerce.[11]

### § 776.3 Persons engaging in both covered and noncovered activities.

The Act applies to employees ''engaged in commerce or in the production of goods for commerce'' without regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the Act. The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to ''each'' and ''any'' employee so engaged, and section 15(a)(1) prohibits the introduction into the channels of interstate or foreign commerce of ''any'' goods in the production of which ''any'' employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act.[12] This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the Act is, by reason of that fact, thereafter indefinitely entitled to its benefits.

### § 776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the Act.[13] Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours

[9] *Kirschbaum* v. *Walling*, 316 U.S. 517. See also *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178.

[10] *Borden Co.* v. *Borella*, 325 U.S. 679; *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Donovan* v. *Shell Oil Co.*, 168 F. 2d 229 (C.A. 4); *Hertz Driveurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Horton* v. *Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437.

[11] H. Mgrs. St., 1949, pp. 14, 15; Sen. St. 1949 Cong. Rec. 15372.

[12] *United States* v. *Darby*, 312 U.S. 100; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Schmidt* v. *Peoples Telephone Union of Maryville, Missouri*, 138 F. 2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728; *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4).

[13] See *Gordon's Transports* v. *Walling*, 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; *Walling* v. *Black Diamond Coal Mining Co.*, 59 F. Supp. 348 (W.D. Ky.); *Fleming* v. *Knox*, 42 F. Supp. 948 (S.D. Ga.); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see § 778.2(c) of this chapter.

benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

(b) It is thus recognized that an employee may be subject to the Act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the Act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly essential to production of goods for commerce.[14] The Division's experience has indicated that much so-called ''segregation'' does not satisfy these tests and that many so-called ''segregated'' employees are in fact engaged in commerce or in the production of goods for commerce.

[14] See *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4).

### § 776.5 Coverage not dependent on method of compensation.

The Act's individual employee coverage is not limited to employees working on an hourly wage. The requirements of section 6 as to minimum wages are that ''each'' employee described therein shall be paid wages at a rate not less than a specified rate ''an hour''.[15] This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. ''Each'' and ''any'' employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement.[16] Regulations prescribed by the Administrator (part 516 of this chapter) provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate.[17]

[35 FR 5543, Apr. 3, 1970]

### § 776.6 Coverage not dependent on place of work.

Except for the general geographical limitations discussed in § 776.7, the Act contains no prescription as to the place where the employee must work in order to come within its coverage. It follows that employees otherwise coming within the terms of the Act are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere.[18] The specific provisions of the Act relative to regulation of homework serve to emphasize this fact.[19]

[15] Special exceptions are made for Puerto Rico, the Virgin Islands, and American Samoa.

[16] *United States* v. *Rosenwasser*, 323 U.S. 360.

[17] For methods of translating other forms of compensation into an hourly rate for purposes of sections 6 and 7, see parts 531 and 778 of this chapter.

[18] *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C.A. 6); *Walling* v. *Twyeffort Inc.*, 158 F. 2d 944 (C.A. 2); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4).

[19] See 6(a)(2); Sec. 11(d).

**§ 776.7 Geographical scope of coverage.**

(a) The geographical areas within which the employees are to be deemed ''engaged in commerce or in the production of goods for commerce'' within the meaning of the Act, and thus within its coverage are governed by definitions in section 3 (b), (c), and (j). In the definition of ''produced'' in section 3(j), ''production'' is expressly confined to described employments ''in any State.'' (See § 776.15 (a).) ''Commerce'' is defined to mean described activities ''among the several States or between any State and any place outside thereof.'' (See § 776.8.) ''State'' is defined in section 3(c) to mean ''any State of the United States or the District of Columbia or any Territory or possession of the United States.''

(b) Under the definitions in paragraph (a) of this section, employees within the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462, 43 U.S.C. 1331); American Samoa; Guam; Wake Island; Enewetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone are dealt with on the same basis as employees working in any of the 50 States.[20] Congress did not exercise the national legislative power over the District of Columbia or the Territories or possessions referred to by extending the Act to purely local commerce within them.

[15 FR 2925, May 17, 1950, as amended at 35 FR 5543, Apr. 3, 1970]

ENGAGING ''IN COMMERCE''

**§ 776.8 The statutory provisions.**

(a) The activities constituting ''commerce'' within the meaning of the phrase ''engaged in commerce'' in sections 6 and 7 of the Act are defined in section 3(b) as follows:

> *Commerce* means trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof.[21]

As has been noted in § 776.7, the word ''State'' in this definition refers not only to any of the fifty States but also to the District of Columbia and to any Territory or possession of the United States.

(b) It should be observed that the term *commerce* is very broadly defined. The definition does not limit the term to transportation, or to the ''commercial'' transactions involved in ''trade,'' although these are expressly included. Neither is the term confined to commerce in ''goods.'' Obviously, ''transportation'' or ''commerce'' between any State and any place outside its boundaries includes a movement of persons as well as a movement of goods. And ''transmission'' or ''communication'' across State lines constitutes ''commerce'' under the definition, without reference to whether anything so transmitted or communicated is ''goods.''[22]

The inclusion of the term ''commerce'' in the definition of the same term as used in the Act implies that no special or limited meaning is intended; rather, that the scope of the term for purposes of the Act is at least as broad as it

[20] An amendment to the Fair Labor Standards Act of 1938, 71 Stat. 514 (approved Aug. 30, 1957) provides that no employer shall be subject to any liability or punishment under the Act with respect to work performed at any time in work places excluded from the Act's coverage by this law or for work performed prior to Nov. 29, 1957, on Guam, Wake Island, or the Canal Zone; or for work performed prior to the establishment, by the Secretary, of a minimum wage rate applicable to such work in American Samoa. Work performed by employees in ''a work place within a foreign country or within territory under the jurisdiction of the United States'' other than those enumerated in this paragraph is exempt by this amendment from coverage under the Act. When part of the work performed by an employee for an employer in any workweek is covered work performed in any State, it makes no difference where the remainder of such work is performed; the employee is entitled to the benefits of the Act for the entire workweek unless he comes within some specific exemption. The reference in 71 Stat. 514 to liability for work performed in American Samoa is an extension of the relief granted by the American Samoa Labor Standards Amendments of 1956 (29 U.S.C. Supp. IV, secs. 206, 213, and 216).

[21] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

[22] ''Goods'' is, however, broadly defined in the Act. See § 776.20(a).

would be under concepts of ''commerce'' established without reference to this definition.

### § 776.9 General scope of "in commerce" coverage.

Under the definitions quoted above, it is clear that the employees who are covered by the wage and hours provisions of the Act as employees ''engaged in commerce'' are employees doing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) ''among the several States or between any State and any place outside thereof.''[23] Although this does not include employees engaged in activities which merely ''affect'' such interstate or foreign commerce, the courts have made it clear that coverage of the Act based on engaging in commerce extends to every employee employed ''in the channels of'' such commerce or in activities so closely related to such commerce, as a practical matter, that they should be considered a part of it.[24] The courts have indicated that the words ''in commerce'' should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. One practical question to be asked is whether, without the particular service, interstate or foreign commerce would be impeded, impaired, or abated;[25] others are whether the service contributes materially to the consummation of transactions in interstate or foreign commerce[26] or makes it possible for existing instrumentalities of commerce[27] to accomplish the movement of such commerce effectively and to free it from burdens or obstructions.[28]

### § 776.10 Employees participating in the actual movement of commerce.

(a) Under the principles stated in § 776.9, the wage and hours provisions of the Act apply typically, but not exclusively, to employees such, as those in the telephone,[29] telegraph,[30] television, radio,[31] transportation and shipping[32] industries, since these industries serve as the actual instrumentalities and channels of interstate and

[23] ''Any place outside thereof'' is not limited in meaning to another State or country. Any movement between a State and a place ''outside thereof'' is ''commerce'' for purposes of the Act, such as ship-to-shore communication, or transportation out of a State by ship of food, fuel, or ice to be consumed at sea before arrival at another port.

[24] *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Boutell* v. *Walling*, 327 U.S. 463; *Pedersen* v. *J. F. Fitzgerald Constr. Co.*, 318 U.S. 740 and 324 U.S. 720.

[25] *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (C.A. 8), affirmed 327 U.S. 757; *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10).

[26] *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5), certiorari denied 318 U.S. 772. See also *Horton* v. *Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437, in which the court stated that an employee is engaged ''in commerce'' if his services—not too remotely but substantially and directly—aid in such commerce as defined in the Act.

[27] For a list of such instrumentalities, see § 776.11.

[28] *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *J. F. Fitzgerald Constr. Co.* v. *Pedersen*, 324 U.S. 720; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C.A. 9); *Walling* v. *McCrady Constr. Co.*, 156 F. 2d 932 (C.A. 3); *Bennett* v. *V. P. Loftis*, 167 F. 2d 286 (C.A. 4); *Walling* v. *Patton-Tully Transp. Co.*, 134 F. 2d 945 (C.A. 6).

[29] *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C.A. 8); *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C.A. 5); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.).

[30] *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490; *Western Union Telegraph Co.* v. *McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied 333 U.S. 862; *Moss* v. *Postal Telegraph Cable Co.*, 42 F. Supp. 807 (M.D. Ga.).

[31] *Wilson* v. *Shuman*, 140 F. 2d 644 (C.A. 8); *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (C.A. 6).

[32] *Overnight Motor Co.* v. *Missel*, 316 U.S. 572; *Hargis* v. *Wabash R. Co.*, *163 F. 2d 607 (C.A. 7); Rockton & Rion R.R.* v. *Walling* 146 F. 2d 111 (C.A. 4), certiorari denied 334 U.S. 880; *Walling* v. *Keansburg Steamboat Co.*, 162 F. 2d 405 (C.A. 3); *Knudsen* v. *Lee & Simmons*, 163 F. 2d 95 (C.A. 2); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W.D. Mo.); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D. S.C.).

foreign commerce. Similarly, employees of such businesses as banking, insurance, newspaper publishing,[33] and others which regularly utilize the channels of interstate and foreign commerce in the course of their operations, are generally covered by the Act.

(b) Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the Act's coverage. This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across State lines.[34] Also, since ''commerce'' as used in the Act includes not only ''transmission'' of communications but ''communication'' itself, employees whose work involves the continued use of the interstate mails, telegraph, telephone or similar instrumentalities for communication across State lines are covered by the Act.[35] This does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage. But if the employee, as a regular and recurrent part of his duties, uses such instrumentalities in obtaining or communicating information or in sending or receiving written reports or messages, or orders for goods or services, or plans or other documents across State lines, he comes within the scope of the Act as an employee directly engaged in the work of ''communication'' between the State and places outside the State.

[15 FR 2925, May 17, 1950, as amended at 22 FR 5684, July 18, 1957]

[33] *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728. See also *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, and *McComb* v. *Dessau*, 9 W.H. Cases 332 (S.D. Calif.) 17 Labor Cases, 65, 643.

[34] *Phillips Co.* v. *Walling*, 324 U.S. 490; *Clyde* v. *Broderick*, 144 F. 2d 348 (C.A. 10).

[35] *McComb* v. *Weller*, 9 W.H. Cases 53 (W.D. Tenn.); *Yunker* v. *Abbye Employment Agency*, 32 N.Y.S. 2d 715; (Munic. Ct. N.Y.C.); *Phillips* v. *Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733 (D. Minn.); *Anderson Bros. Corp.* v. *Flynn*, 218 S.W. 2d 653 (C.A. Ky.).

## § 776.11 Employees doing work related to instrumentalities of commerce.

(a) Another large category of employees covered as ''engaged in commerce'' is comprised of employees performing the work involved in the maintenance, repair, or improvement of existing instrumentalities of commerce. (See the cases cited in footnote 28 to § 776.9. See also the discussion of coverage of employees engaged in building and construction work, in subpart B of this part.) Typical illustrations of instrumentalities of commerce include railroads, highways, city streets, pipe lines, telephone lines, electrical transmission lines, rivers, streams, or other waterways over which interstate or foreign commerce more or less regularly moves; airports; railroad, bus, truck, or steamship terminals; telephone exchanges, radio and television stations, post offices and express offices; bridges and ferries carrying traffic moving in interstate or foreign commerce (even though within a single State); bays, harbors, piers, wharves and docks used for shipping between a State and points outside; dams, dikes, revetments and levees which directly facilitate the uninterrupted movement of commerce by enhancing or improving the usefulness of waterways, railways, and highways through control of water depth, channels or flow in streams or through control of flood waters; warehouses or distribution depots devoted to the receipt and shipment of goods in interstate or foreign commerce; ships, vehicles, and aircraft regularly used in transportation of persons or goods in commerce; and similar fixed or movable facilities on which the flow of interstate and foreign commerce depends.

(b) It is well settled that the work of employees involved in the maintenance, repair, or improvement of such existing instrumentalities of commerce is so closely related to interstate or foreign commerce as to be in practice and in legal contemplation a part of it. Included among the employees who are thus ''engaged in commerce'' within the meaning of the Act are employees of railroads, telephone companies, and

similar instrumentalities who are engaged in maintenance-of-way work;[36] employees (including office workers, guards, watchmen, etc.) engaged in work on contracts or projects for the maintenance, repair, reconstruction or other improvement of such instrumentalities of commerce as the transportation facilities of interstate railroads, highways, waterways, or other interstate transportation facilities, or interstate telegraph, telephone, or electrical transmission facilities (see subpart B of this part); and employees engaged in the maintenance or alteration and repair of ships[37] or trucks[38] used as instrumentalities of interstate or foreign commerce. Also, employees have been held covered as engaged in commerce where they perform such work as watching or guarding ships or vehicles which are regularly used in commerce[39] or maintaining, watching, or guarding warehouses, railroad or equipment yards, etc., where goods moving in interstate commerce are temporarily held,[40] or acting as porters, janitors, or in other maintenance capacities in bus stations, railroad stations, airports, or other transportation terminals.[41]

(c) On the other hand, work which is less immediately related to the functioning of instrumentalities of commerce than is the case in the foregoing examples may be too remote from interstate or foreign commerce to establish coverage on the ground that the employee performing it is ''engaged in commerce.'' This has been held true, for example, of a cook preparing meals for workmen who are repairing tracks over which interstate trains operate,[42] and of a porter caring for washrooms and lockers in a garage which is not an instrumentality of commerce, where trucks used both in intrastate and interstate commerce are serviced.[43]

(d) There are other situations in which employees are engaged ''in commerce'' and therefore within the coverage of the Act because they contribute directly to the movement of commerce by providing goods or facilities to be used or consumed by instrumentalities of commerce in the direct furtherance of their activities of transportation, communication, transmission, or other movement in interstate or foreign commerce. Thus, for example, employees are considered engaged ''in commerce'' where they provide to railroads, radio stations, airports, telephone exchanges, or other similar instrumentalities of commerce such things as electric energy,[44] steam, fuel, or water, which are required for the movement of the commerce carried

[36] *Davis* v. *Rockton & Rion R.R.*, 65 F. Supp. 67 affirmed in 159 F. 2d 291 (C.A. 4); *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C.A. 5); *Palmer* v. *Howard*, 12 Lab. Cas. (CCH) par. 63, 756 (W.D. Tenn.); *Williams* v. *Atlantic Coast Lines R.R. Co.*, 1 W.M. Cases 289 (E.D. N.C. 1940), 2 Labor Cases (CCH) par. 18, 564.

[37] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4); *Walling* v. *Keansburg Steamboat Co.*, 162 F. 2d 405 (C.A. 3).

[38] *Boutell* v. *Walling*, 327 U.S. 463; *Morris* v. *McComb*, 332 U.S. 422; *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527 (C.A. 2), certiorari denied 331 U.S. 812; *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Walling* v. *Sturm & Sons, Inc.*, 6 W.H. Cases 131 (D.N.J.) 10 Labor Cases (CCH) par. 62, 980.

As to exemptions from the overtime requirements for mechanics employed by motor carriers, see part 782 of this chapter. For exemptions applicable to retail or service establishments, see part 779 of this chapter.

[39] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4); *Agosto* v. *Rocafort*, 5 W.H. Cases 176 (D.P.R.), 9 Labor Cases (CCH) par. 62, 610; *Cannon* v. *Miller*, 155 F. 2d 500 (S. Ct. Wash.).

[40] *Engebretson* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C.A. 7); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5); certiorari denied 318 U.S. 772; *Reliance Storage & Insp. Co.* v. *Hubbard*, 50 F. Supp. 1012 (W.D. Va.); *Walling* v. *Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn. 1944); 8 Labor Cases (CCH) par. 62, 219; *McComb* v. *Russell Co.*, 9 W.H. Cases 258 (D. Miss. 1949), 17 Labor Cases (CCH) par. 65, 519.

[41] *Mornford* v. *Andrews*, 151 F. 2d 511 (C.A. 5); *Hargis* v. *Wabash R. Co.* 163 F. 2d 607 (C.A. 7); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D. S.C.); *Rouch* v. *Continental Oil Co.*, 55 F. Supp. 315 (D. Kans.); see also *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386.

[42] *McLeod* v. *Threlkeld*, 319 U.S. 491.

[43] *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, certiorari denied 331 U.S. 812 (use in interstate commerce of trucks serviced was from 10 to 25 percent of total use).

[44] *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2).

by such instrumentalities.[45] Such work is ''so related to the actual movement of commerce as to be considered an essential and indispensable part thereof, and without which it would be impeded or impaired.''[46]

### § 776.12 Employees traveling across State lines.

Questions are frequently asked as to whether the fact that an employee crosses State lines in connection with his employment brings him within the Act's coverage as an employee ''engaged in commerce.'' Typical of the employments in which such questions arise are those of traveling service men, traveling buyers, traveling construction crews, collectors, and employees of such organizations as circuses, carnivals, road shows, and orchestras. The area of coverage in such situations cannot be delimited by any exact formula, since questions of degree are necessarily involved. If the employee transports material or equipment or other persons across State lines or within a particular State as a part of an interstate movement, it is clear of course, that he is engaging in commerce.[47] And as a general rule, employees who are regularly engaged in traveling across State lines in the performance of their duties (as distinguished from merely going to and from their homes or lodgings in commuting to a work place) are engaged in commerce and covered by the Act.[48] On the other hand, it is equally plain that an employee who, in isolated or sporadic instances, happens to cross a State line in the course of his employment, which is otherwise intrastate in character, is not, for that sole reason, covered by the Act. Nor would a man who occasionally moves to another State in order to pursue an essentially local trade or occupation there become an employee ''engaged in commerce'' by virtue of that fact alone. Doubtful questions arising in the area between the two extremes must be resolved on the basis of the facts in each individual case.

### § 776.13 Commerce crossing international boundaries.

Under the Act, as amended, an employee engaged in ''trade commerce, transportation, transmission, or communication'' between any State and any place outside thereof is covered by the Act regardless of whether the ''place outside'' is another State or is a foreign country or is some other place. Before the amendment to section 3(b) which became effective January 25, 1950, employees whose work related solely to the flow of commerce into a State from places outside it which were not ''States'' as defined in the Act were not employees engaged in ''commerce'' for purposes of the Act, although employees whose work was concerned with the flow of commerce out of the State to such places were so engaged.[49] This placed employees of importers in a less favorable position under the Act than the employees of exporters. This inequality was removed by the amendment to section 3(b).[50] Accordingly, employees performing work in connection with the importation of goods from foreign countries are engaged ''in commerce'' and covered by the Act, as amended. The coverage of such employees, as of those performing work in connection with the exportation of goods to foreign countries, is determined by the same principles as in the case of employees whose work is connected with goods procured from or sent to other States.

[45] Such employees would also be covered as engaged in the production of goods for commerce. See *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2); also § 776.21(b).

[46] *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636, 640 (C.A. 10).

[47] The employee may, however, be exempt from the overtime provisions of the Act under section 13(b)(1). See part 792 of this chapter.

[48] *Reck* v. *Zarmocay*, 264 App. Div. 520, 36 N.Y.S. 2d 394; *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. 2d 262 (S. Ct. S.D.).

[49] The definition of ''commerce'' previously referred to commerce ''from any State to any place outside thereof.'' The amendment substituted ''between'' for ''from'' and ''and'' for ''to'' in this clause.

[50] H. Mgrs. St., 1949, pp. 13, 14.

ENGAGING IN ''THE PRODUCTION OF GOODS FOR COMMERCE''

### § 776.14 Elements of "production" coverage.

Sections 6 and 7 of the Act, as has been noted, cover not only employees who are engaged ''in commerce'' as explained above, but also ''each'' and ''any'' employee who is engaged in the ''production'' of ''goods'' for ''commerce''. What employees are so engaged can be determined only by references to the very comprehensive definitions which Congress has supplied to make clear what is meant by ''production'', by ''goods,'' and by ''commerce'' as those words are used in sections 6 and 7. In the light of these definitions, there are three interrelated elements of coverage to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be ''production''; (b) such production must be of ''goods''; (c) such production of goods must be ''for commerce''; all within the meaning of the Act.[51] The three elements of ''production'' coverage are discussed in order in the sections following.

### § 776.15 "Production."

(a) *The statutory provisions.* The activities constituting ''production'' within the meaning of the phrase ''engaged in * * * production of goods for commerce'' are defined in the Act[52] as follows:

> *Produced* 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.

The Act bars from interstate commerce ''any'' goods in the production of which ''any'' employee was employed in violation of the minimum-wage or overtime-pay provisions,[53] and provides that in determining, for purposes of this provision, whether an employee was employed in the production of such goods:

> * * * proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.[54]

(b) *General scope of ''production'' coverage.* The statutory provisions quoted in paragraph (a) of this section, show that for purposes of the Act, wherever goods are being produced for interstate or foreign commerce, the employees who are covered as ''engaged in the production'' of such goods, include, in

[51] These elements need not be considered if the employee would be covered in any event because engaged ''in commerce'' under the principles discussed in preceding sections of this part.

[52] Act, section 3(j). This definition is also applicable in determining coverage of the child labor provisions of the Act. See part 4 of this title.

[53] Act, section 15(a)(1). The only exceptions are stated in the section itself, which provides that ''it shall be unlawful for any person—(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;''

[54] Act, sec. 15(b).

general, all those whose work may fairly be said to be a part of their employer's production of such goods,[55] and include those whose work is closely related and directly essential thereto,[56] whether employed by the same or a different employee. (See §§ 776.17 to 776.19.) Typically, but not exclusively, this includes that large group of employees engaged in mines, oil fields, quarries, and manufacturing, processing, or distributing plants where goods are produced for commerce. The employees covered as engaged in ''production'' are not limited, however, to those engaged in actual physical work on the product itself or to those in the factories, mines, warehouses, or other place of employment where goods intended for commerce are being produced. If the requisite relationship to production of such goods is present, an employee is covered, regardless of whether his work brings him into actual contact with such goods or into the establishments where they are produced, and even though his employer may be someone other than the producer of the goods for commerce.[57] As explained more fully in the sections following, the Act's ''production'' coverage embraces many employees who serve productive enterprises in capacities which do not involve working directly on goods produced but which are nevertheless closely related and directly essential to successful operations in producing goods for interstate or foreign commerce. And as a general rule, in conformity with the provisions of the Act quoted in paragraph (a) of this section, an employee will be considered to be within the general coverage of the wage and hours provisions if he is working in a place of employment where goods sold or shipped in interstate commerce or foreign commerce are being produced, unless the employer maintains the burden of establishing that the employee's functions are so definitely segregated from such production that they should not be regarded as closely related and directly essential thereto.[58]

### § 776.16 Employment in "producing, * * * or in any other manner working on" goods.

(a) *Coverage in general.* Employees employed in ''producing, manufacturing, mining, handling, or in any other manner working on'' goods (as defined in the Act, including parts or ingredients thereof) for interstate or foreign commerce are considered actually engaged in the ''production'' of such goods, within the meaning of the Act. Such employees have been within the general coverage of the wage and hours provisions since enactment of the Act in 1938, and remain so under the Fair Labor Standards Amendments of 1949.[59]

(b) *Activities constituting actual ''production'' under statutory definition.* It will be noted that the actual productive work described in this portion of the definition of ''produced'' includes not only the work involved in making the products of mining, manufacturing, or processing operations, but also includes ''handling, transporting, or in any other manner working on'' goods. This is so, regardless of whether the goods are to be further processed or are so-called ''finished goods.'' The Supreme Court has stated that this language of the definition brings within the scope of the term ''production,'' as used in the Act, ''every step in putting the subject to commerce in a state to enter commerce,'' including ''all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce,'' and ''every kind of incidental operation preparatory to putting goods into the stream of commerce.''[60]

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[55] *Borden Co.* v. *Borella,* 325 U.S. 679; *Armour & Co.* v. *Wantock,* 323 U.S. 126. See also paragraph (c) of this section.

[56] *Kirschbaum* v. *Walling,* 316 U.S. 517; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372.

[57] *Borden Co.* v. *Borella,* 325 U.S. 679; *Roland Electrical Co.* v. *Walling.* 326 U.S. 657; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Walton* v. *Southern Package Corp. 320 U.S. 540.*

[58] *Guess* v. *Montague,* 140 F. 2d 500 (C.A. 4). *Cf. Armour & Co.* v. *Wantock,* 323 U.S. 126.

[59] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[60] *Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490. See, to the same effect, *Walling* v. *Friend,* 156 F. 2d 429 (C.A. 8); *Walling* v. *Commet Carriers,* 151 F. 2d 107 (C.A. 2); *Phillips* v. *Star Overall Dry Cleaning Laundry Co.,* 149 F. 2d 416 (C.A. 2); certiorari denied 327 U.S. 780;

However, where employees of a common carrier, by handling or working on goods, accomplish the interstate transit or movement in commerce itself, such handling or working on the goods is not ''production.'' The employees in that event are covered only under the phrase ''engaged in commerce.''[61]

(c) *Physical labor*. It is clear from the principles stated in paragraphs (a) and (b) of this section, that employees in shipping rooms, warehouses, distribution yards, grain elevators, etc., who sort, screen, grade, store, pack, label, address or otherwise handle or work on goods in preparation for shipment of the goods out of the State are engaged in the production of goods for commerce within the meaning of the Act.[62] The same has been held to be true of employees doing such work as handling ingredients (scrap iron) of steel used in building ships which will move in commerce;[63] handling and caring for livestock at stockyards where the livestock are destined for interstate shipment as such[64] or as meat products;[65] handling or transporting containers to be used in shipping products interstate;[66] transporting, within a single State, oil to a refinery[67] or lumber to a mill,[68] where products of the refinery or mill will be sent out of the State; transporting parts or ingredients of other types of goods or the finished goods themselves between processors, manufacturers, and storage places located in a single State, where goods so transported will leave the State in the same or an altered form;[69] and repairing or otherwise working on ships,[70] vehicles,[71] machinery,[72] clothing,[73] or other goods which may be expected to move in interstate commerce.

These examples are, of course, illustrative rather than exhaustive. Some of them relate to situations in which the handling or working on goods for interstate or foreign commerce may constitute not only ''production for commerce'' but also engaging ''in commerce'' because the activities are so closely related to commerce as to be for all practical purposes a part of it.[74] However, as noted in paragraph (b) of this section, handling or working on goods constitutes engagement in ''commerce'' only and not engagement in ''production'' of the goods when it is done by employees of a common carrier and is itself the means whereby interstate transit or movement of the goods by the carrier is accomplished. Thus,

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*Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6). For examples, see paragraphs (c) and (d) of this section. Employees who are not engaged in the actual production Activities described in section 3(j) of the Act are not engaged in ''production'' unless their work is ''closely related'' and ''directly essential'' to such production. See §§ 776.17–776.19.

[61] *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490. For examples, see paragraph (c) of this section.

[62] *McComb* v. *Wyandotte Furn. Co.*, 169 F. 2d 766 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6); *Walling* v. *Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E.D. Ky.); *Walling* v. *Yeakley*, 3 W.H. Cases 27, modified and affirmed in 140 F. 2d 830 (C.A. 10); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W.D. Ky.); *Walling* v. *McCracken County Peach Growers Assn.*, 50 F. Supp. 900 (W.D. Ky). See also *Clyde* v. *Broderick*, 144 F. 2d 348 (C.A. 10).

[63] *Bracey* v. *Luray*, 138 F. 2d 8 (C.A. 4).

[64] *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8).

[65] *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, affirmed in 131 F. 2d 249 (C.A. 7); *McComb* v. *Benz Co.*, 9 W.H. Cases 277 (S.D. Ind.).

[66] *Walling* v. *Villaume Box & Lbr. Co.*, 58 F. Supp. 150 (D. Minn.).

[67] *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Boling* v. *R. J. Allison Co., Inc.*, 4 W.H. Cases 500 (N.D. Okla.).

[68] *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8).

[69] *Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 696, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2).

[70] *Slover* v. *Walthen*, 140 F. 2d 258 (C.A. 4).

[71] *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Walling* v. *Armbruster*, 51 F. Supp. 166 (W.D. Ark.); *McComb* v. *Weller*, 9. W.H. Cases 53 (W.D. Tenn.), 17 Labor Cases (CCH) par. 65, 332; *Walling* v. *Strum & Sons*, 6 W.H. Cases 131 (D. N.J.), 11 Labor Cases (CCH) par. 63, 249.

[72] *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4).

[73] *Walling* v. *Belikoff*, 147 F. 2d 1008 (C.A. 2); *Campbell* v. *Zavelo*, 243 Ala. 361, 10 So. 2d 29; *Phillips* v. *Star Overall Dry Cleaning Laundry Co.*, 149 F. 2d 416 (C.A. 2), certiorari denied 327 U.S. 780.

[74] *Slover* v. *Walthen*, 140 F. 2d 258 (C.A. 4); *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Walling* v. *Strum & Sons*, 6 W.H. Cases 131 (D. N.J.).

employees of a telegraph company preparing messages for interstate transmission, television cameramen photographing sports or news events for simultaneous viewing at television receiving sets in other State, and railroad train crews or truck drivers hauling goods from one State to another are not engaged in the ''production'' of goods by virtue of such activities, but are covered by the Act only as employees ''engaged in commerce.''

(d) *Nonmanual work.* The ''production'' described by the phrase ''producing * * * or in any other manner working on'' goods includes not only the manual, physical labor involved in processing and working on the tangible products of a producing enterprise, but equally the administration, planning, management, and control of the various physical processes together with the accompanying accounting and clerical activities.[75] An enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Other employees may be equally important in actually producing the goods, such as employees who conceive and direct policies of the enterprise; employees who dictate, control, and coordinate the steps involved in the physical production of goods; employees who maintain detailed and meticulous supervision of productive activities; and employees who direct the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the labor policies, and the maintenance of the plants and equipment. (For regulations governing exemption from the wage and hours provisions of employees employed in a bona fide executive, administrative, or professional capacity, see part 541 of this chapter.) Employees who perform these and similar activities are an integral part of the coordinated productive pattern of a modern industrial organization. The Supreme Court of the United States has held that from a productive standpoint and for purposes of the Act the employees who perform such activities ''are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products'' in the manufacturing plant or other producing facilities of the enterprise.[76]

### § 776.17 Employment in a "closely related process or occupation directly essential to" production of goods.

(a) *Coverage in general.* Employees who are not actually ''producing * * * or in any other manner working on'' goods for commerce are, nevertheless, engaged in the ''production'' of such goods within the meaning of the Act and therefore within its general coverage if they are employed ''in any closely related process or occupation directly essential to the production thereof, in any State.''[77] Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged ''in any process or occupation necessary to the production'' of goods for commerce. The amendments deleted the word ''necessary'' and substituted the words ''closely related'' and ''directly essential'' contained in the present law. The words ''directly essential'' were adopted by the Conference Committee in lieu of the word ''indispensable'' contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both ''closely related'' and ''directly essential'' to the production of goods for interstate or foreign commerce.

The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither

[75] *Borden Co.* v. *Borella,* 325 U.S. 679; *Hertz Drivurself Stations.* v. *United States,* 150 F. 2d 923 (C.A. 8); *Callus* v. *10 E. 40th St. Bldg.,* 146 F. 2d 438 (C.A. 2), reversed on other grounds in 325 U.S. 578.

[76] *Borden Co.* v. *Borella,* 325 U.S. 679, 683.

[77] If coverage of an employee is determined to exist on either basis, it is, of course, not necessary to determine whether the employee would also be covered on the other ground. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42 (C.A. 5), affirmed in 317 U.S. 88.

''in commerce'' nor in actually ''producing or in any other manner working on'' goods for commerce) whose coverage under the Act formerly depended on whether their work was ''necessary'' to the production of goods for commerce. Some employees whose work might meet the ''necessary'' test are now outside the coverage of the Act because their work is not ''closely related'' and ''directly essential'' to such production; others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.[78]

The scope of coverage under the ''closely related'' and ''directly essential'' language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress[78] including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language,[79] this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier ''necessary'' test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

(b) *Meaning of ''closely related'' and ''directly essential''.* The terms ''closely related'' and ''directly essential'' are not susceptible of precise definition; as used in the Act they together describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce: (1) Which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.[80]

Not all activities that are ''closely related'' to production will be ''directly essential'' to it, nor will all activities ''directly essential'' to production meet the ''closely related'' test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work ''closely related'' to such production, but some such employees may be outside the coverage of the Act because their work is not ''directly essential'' to production of the goods. (For a discussion of this point and specific illustration, see § 776.18(b).) Similarly, there are some situations in which an employee performing work ''directly essential'' to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them ''closely related'' to the productive activities of another. (For a more detailed discussion and specific illustrations see § 776.19.)

(c) *Determining whether activities are ''closely related'' and ''directly essential''.* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or

[78] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec. p. 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; colloquy between Representatives McConnell and Javits, 1949 Cong. Rec., p. 15129; of statements of Representative Barden (1949 Cong. Rec. p. 15131), Representative Brehm (1949 Cong. Rec. p. 15132), and Senator Taft (1950 Cong. Rec., p. A–1162).

[79] *See Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

[80] See H. Mgrs. St. 1949, pp. 14, 15; Sen. St., 1949 Cong. Rec., p. 15372; cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

function of the activity in the productive enterprise. The words ''directly essential'' refer only to the relationship of the employee's work to production. Work ''directly essential'' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is ''closely related'' to production cannot be limited to those which show its closeness in terms of need or function.[81] It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in §§ 776.18 and 776.19.)

(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business.[82] Moreover, in some cases where particular work ''directly essential'' to production is performed by an employer other than the producer the degree of such essentiality may be a significant factor in determining whether the work is also ''closely related'' to such production. (See § 776.19.) No one of the factors listed in this paragraph is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite ''close and immediate tie''[83] to the production of goods for interstate or foreign commerce. It is the sum of the factors relevant to each case that determines whether the particular activity is ''closely related'' to such production. The application of the principles in this paragraph is further explained and illustrated in §§ 776.18 and 776.19.

(3) In determining whether an activity is ''directly essential'' to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is ''essential'' and ''directly'' so to such operations. These are questions of degree; even ''directly'' essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see §§ 776.18(a) and 776.19) will vary in the degree of their essentiality and in the directness of the aid which they provide to production. An activity may be ''directly essential'' without being indispensable in the sense that it cannot be done without; yet some activities which, in a long chain of causation, might be indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new

[81] Of course, if the need of function of the activity in production is such that the tie between them is both close and immediate (cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517), as for example, where an employee is employed to repair electric motors which are used in factories in the production of goods for commerce, this fact may be sufficient to show both the direct essentiality and the close relationship of the employee's work to production. See *Roland Electrical Co.* v. *Walling,* 326 U.S. 657. See also § 776.19 and H. Mgrs. St., 1949, pp. 14, 15.

[82] Cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *10 E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Borden Co.* v. *Borella,* 325 U.S. 679; *Armour & Co.* v. *Wantock,* 323 U.S. 126.

[83] See *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

factory itself, are not ''directly'' essential.[84] An activity which provides something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in the production of goods for commerce (see § 776.19(b)) will, however, be no less ''directly'' essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.[85] The application of the principles in this paragraph is further explained and illustrated in §§ 776.18 and 776.19.

### § 776.18 Employees of producers for commerce.

(a) *Covered employments illustrated.* Some illustrative examples of the employees employed by a producer of goods for interstate or foreign commerce who are or are not engaged in the ''production'' of such goods within the meaning of the Act have already been given. Among the other employees of such a producer, doing work in connection with his production of goods for commerce, who are covered because their work, if not actually a part of such production, is ''closely related'' and ''directly essential'' to it,[86] are such employees as bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining, servicing, repairing or improving the buildings,[87] machinery, equipment, vehicles, or other facilities used in the production of goods for commerce,[88] and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are ''engaged in the production'' of goods for commerce, within the meaning of the Act, and who are therefore entitled to its wage and hours benefits unless specifically exempted by some provision of the Act.

(b) *Employments not directly essential to production distinguished.* Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production. It is clear, for example, that an employee would not be covered merely because he works as a domestic servant in the home of an employer whose factory produces goods for commerce, even though he is carried on the factory payroll. To illustrate further, a producer may engage in essentially local activities as a landlord, restauranteur, or merchant in order to utilize the opportunity for separate and additional profit from such ventures or to provide a convenient means

[84] Cf. 10 *E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; Sen. St. 95 Cong. Rec., October 19, 1949, at 15372.

[85] See *Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.).

[86] See H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372. See also *Borden Co.* v. *Borella,* 325 U.S. 679.

[87] No distinction of economic or statutory significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is administered, managed, and controlled. *Borden Co.* v. *Borella,* 324 U.S. 679.

[88] Such mechanics and laborers as machinists, carpenters, electricians, plumbers, steamfitters, plasters, glaziers, painters, metal workers, bricklayers, hod carriers, roofers, stationary engineers, their apprentices and helpers, elevator starters and operators, messengers, janitors, charwomen, porters, handy men, and other maintenance workers would come within this category.

of meeting personal needs of his employees. Employees exclusively employed in such activities of the producer are not engaged in work ''closely related'' and ''directly essential'' to his production of goods for commerce merely because they provide residential, eating, or other living facilities for his employees who are engaged in the production of such goods.[89] Such employees are to be distinguished from employees like cooks, cookees, and bull cooks in isolated lumber camps or mining camps, where the operation of a cookhouse may in fact be ''closely related'' and ''directly essential'' or, indeed, indispensable to the production of goods for commerce.[90]

Some specific examples of the application of these principles may be helpful. Such services as watching, guarding, maintaining or repairing the buildings, facilities, and equipment used in the production of goods for commerce are ''directly essential'' as well as ''closely related'' to such production as it is carried on in modern industry.[91] But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be ''directly essential'' to production merely because the dwellings were owned by the producer and leased to his employees.[92] Similarly, employees of the producer or of an independent employer who are engaged only in maintaining company facilities for entertaining the employer's customers, or in providing food, refreshments, or recreational facilities, including restaurants, cafeterias, and snack bars, for the producer's employees in a factory, or in operating a children's nursery for the convenience of employees who leave young children there during working hours, would not be doing work ''directly essential'' to the production of goods for commerce.[93]

### § 776.19 Employees of independent employers meeting needs of producers for commerce.

(a) *General statement.* (1) If an employee of a producer of goods for commerce would not, while performing particular work, be ''engaged in the production'' of such goods for purposes of the Act under the principles heretofore stated, an employee of an independent employer performing the same work on behalf of the producer would not be so engaged. Conversely, as shown in the paragraphs following, the fact that employees doing particular work on behalf of such a producer are employed by an independent employer rather than by the producer will not take them outside the coverage of the Act if their work otherwise qualifies as the ''production'' of ''goods'' for ''commerce.''

(2) Of course, in view of the Act's definition of ''goods'' as including ''any part or ingredient'' of goods (see § 776.20 (a), (c)), employees of an independent employer providing other employers with materials or articles which become parts or ingredients of goods produced by such other employers for commerce are actually employed by a producer of goods for commerce and their coverage under the Act must be considered in the light of this fact. For example, an employee of such an independent employer who handles or in any manner works on the goods which become parts or ingredients of such other producer's goods is engaged in actual production of goods (parts of ingredients) for commerce, and the question of his coverage is determined by this fact without reference to whether his work is ''closely related'' and ''directly essential'' to the production by the other employer of the goods in

[89] H. Mgrs. St., 1949, pp. 14, 15; see also *Brogan* v. *National Surety Co.,* 246 U.S. 257. Cf. Sen. St., 1949 Cong. Rec., p. 15372.

[90] See *Brogan* v. *National Surety Co.,* 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8); cf. H. Mgrs. St., 1949, pp. 14, 15 and Sen. St., 1949 Cong. Rec., p. 15372.

[91] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Borden Co.* v. *Borella,* 325 U.S. 679; *Walton* v. *Southern Package Corp.* 320 U.S. 540; *Armour & Co.* v. *Wantock,* 325 U.S. 126.

[92] H. Mgrs. St., 1949, pp. 14, 15; *Morris* v. *Beaumont Mfg. Co.,* 84 F. Supp. 909 (W.D. S.C.); cf. *Wilson* v. *Reconstruction Finance Corp.,* 158 F. 2d 564 (C.A. 5), certiorari denied, 331 U.S. 810. Cf. *Brogan* v. *National Surety Co.,* 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8).

[93] Cf. H. Mgrs. St., 1949, pp. 14, 15.

which such parts or ingredients are incorporated. So also, if the employee is not engaged in the actual production of such parts or ingredients, his coverage will depend on whether as an employee of a producer of goods for commerce, his work is ''closely related'' and ''directly essential'' to the production of the parts or ingredients, rather than on the principles applicable in determining the coverage of employees of an independent employer who does not himself produce the goods for commerce.[94]

(3) Where the work of an employee would be ''closely related'' and ''directly essential'' to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer.[95] This does not necessarily mean that such work in every case will remain ''closely related'' to production when performed by employees of an independent employer. It will, of course, be as ''directly essential'' to production in the one case as in the other. (See § 776.17(c)). But in determining whether an employee's work is ''closely'' or only remotely related to the production of goods for commerce by an employer other than his own, the nature and purpose of the business in which he is employed and in the course of which he performs the work may sometimes become important.

Such factors may prove decisive in particular situations where the employee's work, although ''directly essential'' to the production of goods by someone other than his employer, is not far from the borderline between those activities which are ''directly essential'' and those which are not. In such a situation, it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any intent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered ''closely related'' to such production.[96] In other situations, however, where the degree to which the work is directly essential to production by the producer is greater the fact that the independent employer is engaged in a business having local aspects may not be sufficient to negate a close relationship between his employees' work and such production.[97] And it seems clear that where the independent employer operates a business which, unlike that of the ordinary local merchant, is directed to providing producers with materials or services directly essential to the production of their goods for commerce, the activities of such a business may be found to be ''closely related'' to such production.[98] In such event, all the employees of the independent employer whose work is part of his integrated effort to meet such needs of producers are covered as engaged in work closely related and directly essential to production of goods for commerce.[99]

[94] *Bracey* v. *Luray*, 138 F. 2d 8 (C.A. 4); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774; *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Walling* v. *W. D. Haden Co.*, 153 F. 2d 196 (C.A. 5).

[95] See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; H. Mgrs. St., 1949, p. 14. See also Sen. St., 1949 Cong. Rec., p. 15372.

[96] M. Mgrs. St., 1949, pp. 14, 15, *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[97] H. Mgrs. St., 1949, p. 14; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88.

[98] See H. Mgrs. St., p. 14, and *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[99] *Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (Stationary engineers and firemen, watchmen, elevator operators, electricians, carpenters, carpenters' helper, engaged in maintaining and servicing loft building for producers); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657 (foremen, trouble shooters, mechanics, helpers, and office employees of company selling and servicing electric motors, generators, and equipment for commercial and industrial firms); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8) (outside employees and office employees of light and power company serving producers); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La.) (guards, watchmen, and office employees of company providing patrol service for producers); *Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Cal.) (installation and service men, shopmen, bookkeeper, salesman, dispatcher of company supplying burglar alarm service to producers).

*Continued*

(b) *Extent of coverage under ''closely related'' and ''directly essential'' clause illustrated.* In paragraphs (b)(1) to (5) of this section, the principles discussed above are illustrated by reference to a number of typical situations in which goods or services are provided to producers of goods for commerce by the employees of independent employers. These examples are intended not only to answer questions as to coverage in the particular situations discussed, but to provide added guideposts for determining whether employees in other situations are doing work closely related and directly essential to such production.

(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient (as to parts or ingredients, see § 776.20(c)) of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce, such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.

Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of other goods for commerce by such customers, the local merchant's employees are not doing work both ''closely related'' and ''directly essential'' to production, so as to bring them within the reach of the Act, merely ''because some of the customers * * * are producing goods for interstate [or foreign] commerce.''[1] Therefore, if they do not otherwise engage ''in commerce'' (see §§ 776.8 to 776.13) or in the ''production'' of goods for commerce, they are not covered by the Act.

In such a situation, moreover, even where the work done by the employees is ''directly essential'' to such production by their employer's customers, it may not meet the ''closely related'' test. But the more directly essential to the production of goods for commerce such work is, the more likely it is that a close and immediate tie between it and such production exists which will be sufficient, notwithstanding the local aspect of the employer's business, to bring the employees within the coverage of the Act on the ground that their work is ''closely related'' as well as ''directly essential'' to production by the employer's customers.

Such a close and immediate tie with production exists, for example, where the independent employer, through his employees, supplies producers of goods for commerce with things as directly essential to production as electric motors or machinery or machinery parts for use in producing the goods of a manufacturer, for mining operations, or for production of oil, or for other production operations or the power, water, or fuel required in such production operations, to mention a few typical examples.[2] The fact that these needs of producers are supplied through the agency of businesses having certain local aspects cannot alter the obvious fact that the employees of such businesses who supply these needs are doing work both ''closely related'' and ''directly essential'' to production by the employer's customers. As the United States Supreme Court has stated: ''Such sales and services must be immediately available to * * * [the

In H. Mgrs. St., 1949, p. 14 it is said, ''Employees engaged in such maintenance, custodial and clerical work will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.''

[1] H. Mgrs. St., 1949, pp. 14, 15.

[2] See H. Mgrs. St., 1949, p. 14; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); *Walling* v. *Hammer*, 64 F. Supp. 690 (W.D. Va.); *Holland* v. *Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N.H.); *Princeton Mining Co.* v. *Veach*, 63 N.E. 2d 306 (Ind. App.).

customers] or their production will stop.''[3]

It should be noted that employees of independent employers providing such essential goods and services to producers will not be removed from coverage because an unsegregated portion of their work is performed for customers other than producers of goods for commerce. For example, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, mining, or otherwise producing goods for commerce, are subject to the Act notwithstanding such gas, electricity or water is also furnished to consumers who do not produce goods for commerce.[4]

(2) On similar principles, employees of independent employers providing to manufacturers, mining companies, or other producers such goods used in their production of goods for commerce as tools and dies, patterns, designs, or blueprints are engaged in work ''closely related'' as well as ''directly essential'' to the production of the goods for commerce;[5] the same is true of employees of an independent employer engaged in such work as producing and supplying to a steel mill, sand meeting the mill's specifications for cast shed, core, and molding sands used in the production by the mill of steel for commerce.[6] Another illustration of such covered work, according to managers of the bill in Congress, is that of employees of industrial laundry and linen supply companies serving the needs of customers engaged in manufacturing or mining goods for commerce.[7]

On the other hand, the legislative history makes it clear that employees of a ''local architectural firm'' are not brought within the coverage of the Act by reason of the fact that their activities ''include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce.'' Such activities are not ''directly essential'' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a ''local'' firm.[8] Of course, this result is even more apparent where the activities of the employees of such a ''local'' business may not be viewed as ''directly essential'' to production. It is clear, for example, that Congress did not believe ''employees of an independently owned and operated restaurant'' should be brought under the coverage of the Act because the restaurant is ''located in a factory.'' To establish coverage on ''production'' grounds, an employee must be ''shown to have a closer and more direct relationship to the producing * * * activity'' than this.[9]

(3) Some further examples may help to clarify the line to be drawn in such cases. The work of employees constructing a dike to prevent the flooding of an oil field producing oil for commerce would clearly be work not only ''directly essential'' but also ''closely related'' to the production of the oil. However, employees of a materialman quarrying, processing, and transporting stone to the construction site for use in the dike would be doing work too far removed from production of the oil to be considered ''closely related'' thereto.[10] Similarly, the sale of sawmill equipment to a producer of mine props which are in turn sold to mines within the same State producing coal for commerce is too remote from production of the coal to be considered

[3] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 664.

[4] *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); H. Mgrs. St., 1949, p. 14. For another illustration see H. Mgrs. St., 1949, p. 26, with reference to industrial laundries.

[5] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[6] *Walling* v. *Amidon*, 153 F. 2d 159 (C.A. 10); Sen. St., 95 Cong. Rec., October 19, 1949, at 15372.

[7] H. Mgrs. St., 1949, p. 26; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372. See also *Koerner* v. *Associated Linen Laundry Suppliers*, 270 App. Div. 986, 62 N.Y.S. 2d 774.

[8] H. Mgrs. St., 1949, p. 15. See also *McComb* v. *Turpin*, 81 F. Supp. 86, 1948 (D. Md.).

[9] H. Mgrs. St., 1949, p. 14. Cf. *Bayer* v. *Courtemanche*, 76 F. Supp. 193 (D. Conn.). See also § 776.18(b).

[10] See *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C.A. 10) (opinion of Judge Phillips) and H. Mgrs. St., 1949, p. 15.

''closely related'' thereto, but production of the mine props, like the manufacture of tools, dies, or machinery for use in producing goods for commerce, has such a close and immediate tie with production of the goods for commerce that it meets the ''closely related'' (as well as the ''directly essential'') test.[11]

(4) A further illustration of the distinction between work that is, and work that is not, ''closely related'' to the production of goods for commerce may be found in situations involving activities which are directly essential to the production by farmers of farm products which are shipped in commerce. Employees of an employer furnishing to such farmers, within the same State, water for the irrigation of their crops, power for use in their agricultural production for commerce, or seed from which the crops grow, are engaged in work ''closely related'' as well as ''directly essential'' to the production of goods for commerce.[12] On the other hand, it is apparent from the legislative history that Congress did not regard, as ''closely related'' to the production of farm products for commerce, the activities of employees in a local fertilizer plant producing fertilizer for use by farmers within the same State to improve the productivity of the land used in growing such products.[13] Fertilizer is ordinarily thought to be assimilated by the soil rather than by the crop and, in the ordinary case, may be considered less directly essential to production of farm products than the water or seed, without which such production would not be possible. Probably the withdrawal from coverage of such employees (who were held ''necessary'' to production of goods for commerce under the Act prior to the 1949 amendments[14]) rests wholly or in part on the principles stated in paragraph (a)(3) of this section and paragraph (b)(1) of this section. Heretofore the Department has taken the position that producing or supplying feed for poultry and livestock to be used by farmers within the State in the production of poultry or cattle for commerce was covered. The case of Mitchell v. Garrard Mills[15] has reached a contrary conclusion as to a local producer of such feed in a situation where all of the feed was sold to farmers and dealers for use exclusively within the State. For the time being, and until further clarification from the courts, the Divisions will not assert the position that coverage exists under the factual situation which existed in this case.

(5) Managers of the legislation in Congress stated that all maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce perform activities that are both ''closely related'' and ''directly essential'' to the production of goods for commerce, and that the same is true of employees of an independent employer performing such maintenance, custodial, and clerical work ''on behalf of'' such producers.

Typical of the employees in this covered group are those repairing or maintaining the machinery or buildings used by the producer in his production of goods for commerce and employees of a watchman or guard or patrol or burglar alarm service protecting the producer's premises.[16] On the other hand, the House managers of the bill made it clear that employees engaged in cleaning windows or cutting grass at the plant of a producer of goods for

[11] See *Wailing* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.), and statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135.

[12] See *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips,* 158 F. 2d 698 (C.A. 8).

Reference should be made to section 13 (a)(6) of the Act providing an exemption from the wage and hours provisions for employees employed in agriculture and for certain employees of nonprofit and sharecrop irrigation companies.

[13] H. Mgrs. St. 1949, p. 15.

[14] *McComb* v. *Super-A Fertilizer Works,* 165 F. 2d 824 (C.A. 1).

[15] 241 F. 2d 249 (C.A. 6).

[16] See H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5); *Holland* v. *Amoskeag Machine Co.,* 44 F. Supp. 884 (D.N.H.).

commerce were not intended to be included as employees doing work ''closely related'' to production on ''on behalf of'' the producer where they were employed by a ''local window-cleaning company'' or a ''local independent nursery concern,'' merely because the customers of the employer happen to include producers of goods for commerce.[17] A similar view was expressed with respect to employees of a ''local exterminator service firm'' working wholly within the State exterminating pests in private homes, in a variety of local establishments, ''and also in buildings within the State used to produce goods for interstate commerce.''[17]

[15 FR 2925, May 17, 1950, as amended at 22 FR 9692, Dec. 4, 1957]

### § 776.20 "Goods."

(a) *The statutory provision.* An employee is covered by the wage and hours provisions of the Act if he is engaged in the ''production'' (as explained in §§ 776.15 through 776.19) ''for commerce'' (as explained in § 776.21) of anything defined as ''goods'' in section 3(i) of the Act. This definition is:

*Goods* 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.

(b) *''Articles or subjects of commerce of any character.''* It will be observed that ''goods'' as defined in the Act are not limited to commercial goods or articles of trade, or, indeed, to tangible property, but include ''articles or subjects of commerce of *any character* (emphasis supplied).[18] It is well settled that things such as ''ideas, * * * orders, and intelligence'' are ''subjects of commerce.'' Telegraphic messages have, accordingly, been held to be ''goods'' within the meaning of the Act.[19] Other articles or subjects of commerce which fall within the definition of ''goods'' include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements;[20] written reports, fiscal and other statements and accounts, correspondence, lawyers' briefs and other documents;[21] advertising, motion picture, newspaper and radio copy, artwork and manuscripts for publication;[22] sample books;[23] letterheads, envelopes, shipping tags, labels, check books, blank books, book covers, advertising circulars and candy wrappers.[24] Insurance policies are ''goods''

[17] H. Mgrs. St., 1949, page 15.

[18] As pointed out in *Lenroot* v. *Western Union Tel. Co.*, 141 F. 2d 400 (C.A. 2), the legislative history shows that the definition was originally narrower, and that subjects of commerce were added by a Senate amendment.

[19] *Western Union Tel. Co.* v. *Lenroot* 323 U.S. 490.

[20] *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Yunker* v. *Abbye Employment Agency*, 32 N.Y.S. 2d 715; *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875 (S.D. N.Y.); *Ullo* v. *Smith*, 62 F. Supp. 757, affirmed in 177 F. 2d 101 (C.A. 2); see also opinion of the four dissenting justices in *10 E. 40th St. Bldg.* v. *Callus*, 325 U.S. at p. 586.

Waste paper collected for shipment in commerce is goods. See *Fleming* v. *Schiff*, 1 W.H. Cases 893 (D. Colo.), 15 Labor Cases (CCH) par. 60,864.

[21] *Phillips* v. *Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733, affirmed in 158 F. 2d 698 (C.A. 8); *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692 (N.D. Ill.) See also *Rausch* v. *Wolf*, 72 F. Supp. 658 (N.D. Ill). There are other cases (e.g., *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3) and *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2) which suggest that such things are ''goods'' only when they are articles of trade. Although the Supreme Court has not settled the question, such a view appears contrary to the express statutory definitions of ''goods'' and ''commerce''.

[22] *Robert* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2); *Baldwin* v. *Emigrant Industrial Sav. Bank*, 150 F. 2d 524 (C.A. 2), certiorari denied 326 U.S. 757; *Bittner* v. *Chicago Daily News Ptg. Co.*, 4 W.H. Cases 837 (N.D. Ill.), 29 Labor Cases (CCH) par. 62,479; *Schinck* v. *386 Fourth Ave. Corp.*, 49 N.Y.S. 2d 872.

[23] *Walling* v. *Higgins*, 47 F. Supp. 856 (E.D. Pa.).

[24] *McAdams* v. *Connelly*, 8 W.H. Cases 498 (W.D. Ark.), 16 Labor Cases (CCH) par. 64,963; *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo.); *Tobin* v. *Grant* 8 W.H. Cases 361 (N.D. Calif.). See also *Walling* v. *Sieving*, 5 W.H. Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) par. 63,098.

within the meaning of the Act;[25] so are bonds, stocks, bills of exchange, bills of lading, checks, drafts, negotiable notes and other commercial paper.[26] ''Goods'' includes gold;[27] livestock;[28] poultry and eggs;[29] vessels;[30] vehicles;[31] aircraft;[32] garments being laundered or rented;[33] ice;[34] containers, as, for example, cigar boxes or wrapping paper and packing materials for other goods shipped in commerce;[35] electrical energy or power, gas, etc.;[36] and by-products,[37] to mention only a few illustrations of the articles or subjects of ''trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof'' which the Act refers to as ''goods.'' The Act's definitions do not, however, include as ''goods'' such things as dams, river improvements, highways and viaducts, or railroad lines.[38]

(c) *''Any part or ingredient.''* Section 3(i) draws no distinction between goods and their ingredients and in fact defines goods to mean ''goods'' * * * or any part or ingredient thereof.'' The fact that goods are processed or changed in form by several employers before going into interstate or foreign commerce does not affect the character of the original product as ''goods'' produced for commerce. Thus, if a garment manufacturer sends goods to an independent contractor within the State to have them sewn, after which he further processes and ships them in interstate commerce, the division of the production functions between the two employees does not alter the fact that the employees of the independent contractor are actually producing (''working on'') the ''goods'' (parts or ingredients of goods) which enter the channels of commerce.[39]

Similarly, if a manufacturer of buttons sells his products within the State to a manufacturer of shirts, who ships the shirts in interstate commerce, the employees of the button manufacturer would be engaged in the production of goods for commerce; or, if a lumber manufacturer sells his lumber locally to a furniture manufacturer who sells furniture in interstate commerce, the employees of the lumber manufacturer would likewise come within the scope of the Act. Any employee who is engaged in the ''production'' (as explained in § 776.15) of any part or ingredient of goods produced for trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof is engaged in the production of ''goods'' for commerce within the meaning of the Act.[40]

(d) *Effect of the exclusionary clause.* The exclusionary clause in the definition that excepts ''goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof,'' is intended to protect ultimate consumers other than

[25] *Darr* v. *Mutual Life Ins. Co.*, 169 F. 2d 262 (C.A. 2), certiorari denied 335 U.S. 871.

[26] *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2).

[27] *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C.A. 4); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C.A. 9).

[28] *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8).

[29] *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn).

[30] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4).

[31] *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8).

[32] *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D. Minn.).

[33] *Phillips* v. *Star Overall Dry Cleaning Laundry Co.*, 149 F. 2d 416 (C.A. 2).

[34] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4); *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5).

[35] *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (C.A. 5), certiorari denied, 316 U.S. 704; *Fleming* v. *Schiff*, 1 W.H. Cases 883 (D. Colo.), 5 Labor Cases (CCH) par. 60,864.

[36] *Walling* v. *Connecticut Co.;* 62 F. Supp. 733 (D. Conn.), affirmed 154 F. 2d 552 (C.A. 2).

[37] *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774.

[38] *Engebretsen* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Kenny* v. *Wigton-Abbott Corp.*, 80 F. Supp. 489 (D. N.J.).

[39] *Schulte Co.* v. *Gangi*, 328 U.S. 108.

[40] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Bracy* v. *Luray*, 138 F. 2d 8 (C.A. 4); *Walling* v. *W. J. Haden Co.*, 153 F. 2d 196 (C.A. 5); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Boiling* v. *Allison*, 4 W. H. Cases 500 (N.D. Okla.); *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8); *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2); *Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Kerr*, 47 F. Supp. 852 (E.D. Pa.).

producers, manufacturers, or processors of the goods in question[41] from the ''hot goods'' provisions of section 15(a)(1) of the Act.[42] Section 15(a)(1) makes it unlawful for any person ''to transport * * * (or * * * ship * * * in commerce * * * any goods'' produced in violation of the wage and hours standards established by the Act. (Exceptions are made subject to specified conditions for common carriers and for certain purchasers acting in good faith reliance on written statements of compliance. See footnote 53 to § 776.15(a).) By defining ''goods'' in section 3(i) so as to exclude goods after their delivery into the actual physical possession of the ultimate consumer (other than a producer, manufacturer, or processor thereof) Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15(a)(1) if he should transport ''hot goods'' across a State line.[43] Thus, if a person purchases a pair of shoes for himself from a retail store[44] and carries the shoes across a State line, the purchaser is not guilty of a violation of section 15(a)(1) if the shoes were produced in violation of the wage or hours provisions of the statute. But the fact that goods produced for commerce lose their character as ''goods'' after they come into the actual physical possession of an ultimate consumer who does not further process or work on them, does not affect their character as ''goods'' while they are still in the actual physical possession of the producer, manufacturer or processor who is handling or working on them with the intent or expectation that they will subsequently enter interstate or foreign commerce.[45] Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the Act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside of the State. Thus, employees engaged in building a boat for delivery to the purchaser at the boatyard are considered within the coverage of the Act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchase will sail it outside the State.[46]

### § 776.21 "For" commerce.

(a) *General principles.* As has been made clear previously, where ''goods'' (as defined in the Act) are produced ''for commerce,'' every employee engaged in the ''production'' (as explained in §§ 776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the Act. Goods are produced for ''commerce'' if they are produced for ''trade, commerce, transporation, transmission, or communication among the several States or between any State and any place outside thereof.''[47] Goods are produced ''for'' such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.[48] If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the Act as ''production'' of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in interstate or foreign

[41] *Southern Advance Bag & Paper Co.* v. *United States*, 183 F. 2d 449 (C.A. 5); *Phillips* v. *Star Overall Dry Cleaning Laundry Co*, 149 F. 2d 485 (C.A. 2), certiorari denied 327 U.S. 780.

[42] *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501.

[43] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634.

[44] Note that the retail or service establishment exemption in section 13(a)(2) does not protect the retail store from a violation of the ''hot goods'' provision if it sells in interstate commerce goods produced in violation of section 6 or 7.

[45] See cases cited above in footnotes 41, 42, 43, this section.

[46] *Walling* v. *Lowe*, 5 W.H. Cases (S.D. Fla.), 10 Labor Cases (CCH) 63,033. See also *Walling* v. *Armbruster*, 51 F. Supp. 166 (W.D. Ark.); *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C.A. 9); *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012 S. (C.A. 5).

[47] Fair Labor Standards Act, section 3(b).

[48] *United States* v. *Darby*, 312 U.S. 100; *Warren-Bradshaw Drilling Co.* v. *Hall*, 371 U.S. 88; *Schulte Co.* v. *Gangi*, 328 U.S. 108.

commerce.[49] The fact that goods do move in interstate or foreign commerce is strong evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

Although it is generally well understood that goods are produced ''for'' commerce if they are produced for movement in commerce to points outside the State, questions have been raised as to whether work done on goods may constitute production ''for'' commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced ''for'' commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State or interstate or foreign commerce. (See paragraph (b) of this section).

(b) *Goods produced for direct furtherance of interstate movement.* (1) The Act's definition of ''commerce,'' as has been seen, describes a movement, among the several States or between any State and any outside place, of trade, commerce, transportation, transmission, or communication.'' Whenever goods are produced ''for'' such movement, such goods are produced ''for commerce,'' whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.[50]

(2) The courts have held that particular goods are produced ''for'' commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced ''for'' commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the equipment in which it is placed leaves the State.[51] The goods (ice) produced for such use ''enter into the very means of transportation by which the burdens of traffic are borne.''[52] The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.[53] Similar principles would apply to the production of fuel or water for use in the operation of railroads with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods ''for

[49] *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall,* 417 U.S. 88. See paragraph (d) of this section.

[50] *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C.A. 5).

[51] *Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C.A. 5); *Chapman* v. *Home Ice Co.*; 136 F. 2d 353 (C.A. 6) certiorari denied 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix,* 153 F. 2d 689 (C.A. 6); *Hansen* v. *Salinas Valley Ice Co.,* 62 Cal. App. 357, 144 F. 2d 896.

[52] *Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4).

[53] *Lewis* v. *Florida Power & Light Co.,* 154 F. 2d 751 (C.A. 5); see also *Walling* v. *Connecticut Co.,* 154 F. 2d 552 (C.A. 2).

commerce.'' The production of materials[54] for use in the necessary maintenance, repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel, and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced ''for'' commerce even though they do not leave the State.

(3) This does not, however, necessarily mean that the production of such materials within a State is always production ''for'' commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually ''for'' commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced ''for'' commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in the substantial part with the intent or purpose of filling highway contracts. (The fact that a substantial portion of the employer's gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.)

On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced ''for'' commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods ''for'' commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods ''for'' commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced ''for'' use in the direct furtherance of the movement of interstate or foreign commerce, and thus ''for'' commerce.

(c) *Controlling effect of facts at time ''production'' occurs.* (1) Whether employees are engaged in the production of goods ''for'' commerce depends upon circumstances as they exist at the time the goods are being produced, not upon

[54] *Walling* v. *Staffen*, 5 W.H. Cases 1002 (W.D. N.Y.), 11 Labor Cases (CCH) par. 63, 102; *McCombs* v. *Carter*, 8 W.H. Cases 498 (E.D. Va.), 16 Labor Cases (CCH) par. 64, 964. *Contra*, *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N.J.). Cf. *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7).

some subsequent event. Thus, if a lumber manufacturer produces lumber to fill an out-of-State order, the employees working on the lumber are engaged in the production of goods for commerce and within the coverage of the Act's wage and hours provisions, even though the lumber does not ultimately leave the State because it is destroyed by fire before it can be shipped. Similarly, employees drilling for oil which the employer expects to leave the State either as crude oil or refined products are engaged in the production of goods for commerce while the drilling operations are going on and are entitled to be paid on that basis notwithstanding some of the wells drilled may eventually prove to be dry holes.[55]

(2) On the other hand, if the lumber manufacturer first mentioned produces lumber to fill the order of a local contractor in the expectation that it will be used to build a schoolhouse within the State, the employees producing the lumber are not engaged in the production of goods ''for'' commerce and are not covered by the Act. This would remain true notwithstanding the contractor subsequently goes bankrupt and the lumber is sold to a purchaser who moves it to another State; the status of the employees for purposes of coverage cannot in this situation, any more than in the others, be retroactively changed by the subsequent event.

(d) *Goods disposed of locally to persons who place them in commerce.* It is important to remember that if, at the time when employees engage in activities which constitute ''production of goods'' within the meaning of the Act, their employer intends, hopes, expects, or has reason to believe that such goods will be taken or sent out of the State by a subsequent purchaser or other person into whose possession the goods will come, this is sufficient to establish that such employees are engaged in the production of such goods ''for'' commerce and covered by the Act. Whether the producer passes title to the goods to another within the State is immaterial.[56] The goods are produced ''for'' commerce in such a situation whether they are purchased f.o.b. the factory and are taken out of the State by the purchaser, or whether they are sold within the State to a wholesaler or retailer or manufacturer or processor who in turn sells them, either in the same form or after further processing, in interstate or foreign commerce. The same is true where the goods worked on by the producer's employees are not owned by the producer and are returned, after the work is done, to the possession of the owner who takes or sends them out of the State.[57] Similarly, employees are engaged in the production of goods ''for'' commerce when they are manufacturing, handling, working on, or otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same State and that the containers are sold and delivered to them there.[58]

## Subpart B—Construction Industry

SOURCE: 21 FR 5439, July 20, 1956, unless otherwise noted.

[55] *Culver* v. *Bell & Loffland,* 146 F. 2d 29 (C.A. 9); see also *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88.

[56] *Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4). certiorari denied 317 U.S. 634; *Bracey* v. *Luray,* 138 F. 2d 8 (C.A. 4).

[57] *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88; *Walling* v. *Kerr,* 47 F. Supp. 852 (E.D. Pa.).

[58] *Enterprise Box Co.* v. *Fleming,* 125 F. 2d 897 (C.A. 5), certiorari denied 316 U.S. 704; *Dize* v. *Maddrix,* 144 F. 2d 584 (C.A. 4), affirmed 324 U.S. 697; *Walling* v. *Burch,* 5 W. H. Cases 323 (S.D. Ga.); 9 Labor Cases (CCH) par. 62, 613; *Fleming* v. *Schiff,* 1 W.H. Cases 893 (D. Colo.), 5 Labor Cases (CCH) par. 60, 864.

It should be noted that where empty containers are purchased, loaded, or transported within a single State as a part of their movement, as empty containers, out of the State, an employee engaged in such purchasing, loading, or transporting operations is covered by the Act as engaged ''in commerce.'' *Atlantic Co.* v. *Weaver,* 150 F. 2d 843 (C.A. 4); *Klotz* v. *Ippolito,* 40 F. Supp. 422 (S.D. Tex.); *Orange Crush Bottling Co.* v. *Tuggle,* 70 Ga. App. 144, 27 S.E. 2d 769.

### § 776.22 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of the traditional general coverage of employees employed in activities of the character performed in the construction industry, which depends on whether such employees are, individually, ''engaged in commerce or in the production of goods for commerce'' within the meaning of the Act. The 1961 and 1966 amendments broadened coverage by extending it to other employees of the construction industry on an ''enterprise'' basis, as explained in § 776.22a. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in an enterprise engaged in covered construction as defined in the amendments.

[35 FR 5543, Apr. 3, 1970]

ENTERPRISE COVERAGE

### § 776.22a Extension of coverage to employment in certain enterprises.

Whether or not individually covered on the traditional basis, an employee is covered on an ''enterprise'' basis by the Act as amended in 1961 and 1966 if he is ''employed in an enterprise engaged in commerce or in the production of goods for commerce'' as defined in section 3 (r), (s), of the Act. ''Enterprise'' is defined generally by section 3(r) to mean ''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.'' If an ''enterprise'' as thus defined is an ''enterprise engaged in commerce or in the production of goods for commerce'' as defined and described in section 3(s) of the Act as amended, any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged ''in commerce or in the production of goods for commerce'', unless specifically exempt, section 3(s), insofar as pertinent to the construction industry, reads as follows:

> Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which:
>
> * * * * *
>
> (3) Is engaged in the business of construction or reconstruction, or both.

Questions of ''enterprise coverage'' in the construction industry which are not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210, or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

### § 776.22b Guiding principles.

(a) *Scope of bulletin and general coverage statement.* This subpart contains the opinions of the Administrator of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to employees engaged in the building and construction industry. The provisions of the Act expressly make its application dependent on the character of an employee's activities, that is, on whether he is engaged ''in commerce'' or in the ''production of goods for commerce including any closely related process or occupation directly essential to such production.'' Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula. The United States Supreme Court has said of both phases that coverage must be given ''a liberal construction'' determined ''by practical considerations, not by technical

conceptions.''[1] The Court has specifically rejected the technical ''new construction'' concept, as a reliable test for determining coverage under this Act.[2]

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of ''in commerce'' coverage in substantially similar language as they have used in construing the ''production'' phase of coverage. Thus the Act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.[3]

(b) *Engagement in commerce.* The United States Supreme Court has held that the ''in commerce'' phase of coverage extends ''throughout the farthest reaches of the channels of interstate commerce,'' and covers not only construction work physically in or on a channel or instrumentality of interstate commerce but also construction work ''so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.''[4]

(c) *Production of goods for commerce.* The ''production'' phase of coverage includes ''any closely related process or occupation directly essential'' to production of goods for commerce. An employee need not be engaged in activities indispensable to production in order to be covered. Conversely, even indispensable or essential activities, in the sense of being included in the long line of causation which ultimately results in production of finished goods, may not be covered. The work must be both closely related and directly essential to the covered production.[5]

(d) *State and national authority.* Consideration must also be given to the relationship between state and national authority because Congress intended ''to leave local business to the protection of the State.''[6] Activities which superficially appear to be local in character, when isolated, may in fact have the required close or intimate relationship with the area of commerce to which the Act applies. The courts have stated that a project should be viewed as a whole in a realistic way and not broken down into its various phases so as to defeat the purposes of the Act.[7]

(e) *Interpretations.* In his task of distinguishing covered from non-covered employees the Administrator will be guided by authoritative court decisions. To the extent that prior administrative rulings, interpretations, practices and enforcement policies relating to employees in the construction industry are inconsistent or in conflict with the principles stated in this subpart, they are hereby rescinded and withdrawn.

[21 FR 5439, July 20, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

### § 776.23 Employment in the construction industry.

(a) *In general.* The same principles for determining coverage under the Fair Labor Standards Act generally apply to employees in the building and construction industry. As in other situations, it is the employee's activities rather than the employer's business which is the important consideration, and it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in

[1] *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[2] *Mitchell* v. *Vollmer & Co.*, ante.

[3] *Mitchell* v. *Vollmer & Co.*, ante; Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126.

[4] *Mitchell* v. *Vollmer & Co.*, ante; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125.

[5] *Armour & Co.* v. *Wantock*, ante; *Kirschbaum* v. *Walling*, 316 U.S. 417; Cf. *10 E. 40th St. Co.* v. *Callus*, 325 U.S. 578.

[6] *Walling* v. *Jacksonville Paper Co.*, ante; *Kirschbaum* v. *Walling*, ante; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497.

[7] *Walling* v. *Jacksonville Paper Co.*, ante; *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286 (C.A.4); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A.10), certiorari denied 345 U.S. 915; See General Coverage Bulletin, §§ 776.19 (a), (b), and 776.21(b).

interstate commerce or in the production of goods for such commerce.[8]

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the Act for the entire week regardless of the amount of covered activities which are involved. The covered activities must, however, be regular or recurring rather than isolated, sporadic or occasional.[9]

(c) *On covered construction projects.* All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the Act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, enlargement or extension of a covered facility.[10] If the construction project is subject to the Act, all employees who participate in the integrated effort are covered, including not only those who are engaged in work at the site of the construction such as mechanics, laborers, handymen, truckdrivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repair men, but also office, clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial and stock room employees.[11]

(d) *On non-covered construction projects.* (1) A construction project maybe purely local and, therefore, not covered, but some individual employees may nonetheless be covered on independent ground by reason of their interstate activities. Under the principle that coverage depends upon the particular activities of the employee and not on the nature of the business of the employer, individual employees engaged in interstate activities are covered even though their activities may be performed in connection with a non-covered construction project. Thus, the Act is applicable to employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watching or guarding such goods while they are still in transit. For example, laborers on a non-covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work.[12]

(2) Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication are within the scope of the Act, as are employees who are regularly engaged in preparing, handling, or otherwise working on goods which will be sent to other States. This includes the preparation of plans, orders, estimates, accounts, reports and letters for interstate transmittal.

### § 776.24 Travel in connection with construction projects.

The Act also applies to employees who regularly travel across State lines in the performance of their duties, even though the construction project itself

[8] *Mitchell* v. *Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming* v. *Sondeck*, 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum* v. *Walling*, ante; *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932. certiorari denied 329 U.S. 785; *Mitchell* v. *Brown Engineering Co.*, 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1965 (C.A. 8).

[9] See General Coverage Bulletin, §§ 776.2 and 776.4

[10] *Walling* v. *McCrady Const. Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1956 (C.A. 8); *Tobin* v. *Pennington-Winter Const. Co.* ante; *Mitchell* v. *Vollmer & Co.*, ante.

[11] *Mitchell* v. *Brown Engineering Co.*, ante; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, ante; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C.A. 9).

[12] *Clyde* v. *Broderick*, 144 F. (2d) 348 (C.A. 10); *Durnil* v. *J. E. Dunn Construction Co.* 186 F (2d) 27 (C.A. 8), *Donahue* v. *George A. Fuller Co.*, 104 F. Supp. 145; Cf. *Mitchell* v. *Royal Baking Co.*, 219 F. (2d) 532 (C.A. 5).

is not covered.[13] If an employee regularly transports persons, materials, or equipment between jobs across State lines, or to a covered project, even within the State, as part of his duties for the contractor, he would be covered. As in other situations, the Act would not apply if crossing State lines or transporting persons, materials or equipment by the employee was isolated or sporadic rather than regular and recurring. Also, ordinary home-to-work travel, even across State lines, is not covered.

### § 776.25 Regular and recurring activities as basis of coverage.

Regular and recurring may mean a very small amount and is not to be determined by volume or percentages. Coverage depends on the character rather than the volume of the employee's activities. For example, if an employee in the course of his duties regularly engages in covered work even though the covered work constitutes only a small part of his duties, he would be covered in any week when he performs such covered work.[14]

### § 776.26 Relationship of the construction work to the covered facility.

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects.[15] Similarly the construction of a separate, wholly new, factory building, not constructed as an integral part or as an improvement of an existing covered production plant, is not covered (Cf. § 776.27(c)). Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is ''new construction'' nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that the construction project itself need not be actually employed in commerce or in the production of goods for commerce during the time of its construction in order to be covered.[16] Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive.

### § 776.27 Construction which is related to covered production.

(a) *Existing production establishments.* (1) Covered production facilities within the concept of the Act include mines, oil wells, banks, manufacturing, packing and processing plants, filtration, sewage treatment, electric power and water plants, shipyards, warehouses in which goods are broken down, packed or handled preparatory to being sent in interstate commerce, and similar establishments.

(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce.[17] The Act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, enlargement, reconstruction, extension or other improvement of the premises, the buildings, the machinery, tools and dies and other equipment. Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. Thus the construction of new appurtenances of a covered production establishment such as parking aprons, access roads, railroad spurs, drainage ditches, storm,

[13] *Reck v. Zarmacay*, 264 App. Div. 520, 36 N.Y.S. (2d) 394; *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. (2d) 262 (S. Ct. S.D.).

[14] *Walling* v. *Jacksonville Paper Co.*, ante; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178.

[15] Cf. § 776.18(b).

[16] *Mitchell* v. *Vollmer*, ante; *Bennett* v. *V. P. Loftis Co.*, ante; *Mitchell* v. *Chambers Const. Co.*, 214 F. (2d) 515 (C.A. 10); *Walling* v. *McCrady Const. Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A. 5), certiorari denied, 345 U.S. 915.

[17] *Kirschbaum Co.* v. *Walling*, ante; *Walling* v. *McCrady Const. Co.*, ante.

waste and sanitary sewers or adjacent integrated buildings is subject to the Act. Similarly, the Act applies to the installation of telephone, electric, gas and water lines, machinery and other equipment on the premises of such a facility.

(3) On the other hand, the production and furnishings, within the State, of construction materials, such as sand, gravel, brick and other construction materials produced for general local use, is not covered even if the producer also supplies such materials to construction companies which use them within the State in the repair, maintenance or improvement of facilities for the production of goods for commerce. Employees of the materialman in such a situation would not have such a close and immediate tie to the production of goods for commerce as to be considered ''closely related'' and ''directly essential'' to such production.[18]

(b) *Utilities which serve production establishments.* The Act applies to employees of public utilities which furnish gas, electricity, water or fuel to firms engaged within the same State in manufacturing, processing, producing, or mining goods for commerce.[19] Construction work performed upon the plant and facilities of such a utility is covered as in the case of any other covered production establishment.[20] The extension of the lines or other facilities of a covered utility for the first time to the premises of an establishment which produces goods for commerce would be subject to the Act, because such extension is simply an improvement or enlargement of an existing covered utility.[21] Furthermore, the maintenance or repair of the wires, pipes, or other conduits of a covered utility which serves business and manufacturing as well as residential areas would also be within the Act. On the other hand, extension or repair of lines or other facilities serving only residential areas would not be covered unless the electricity, gas, fuel, or water comes from out of the State.

(c) *New construction which is not integrated with existing production facilities.* (1) Construction of a new factory building, even though its use for interstate production upon completion may be contemplated, will not ordinarily be considered covered. However, if the new building is designed as a replacement of or an addition or an improvement to, an existing interstate production facility, its construction will be considered subject to the Act.

(2) If the new building, though not physically attached to an existing plant which produces goods for commerce, is designed to be an integral part of the improved, expanded or enlarged plant, the construction, like maintenance and repair, it would be subject to the Act.[22]

(d) *Production of materials for use in construction work on interstate instrumentalities.* (1) The Act applies to employees who are engaged, at the job site or away from it, in the production of goods to be used within the State for the maintenance, repair, extension, enlargement, improvement, replacement or reconstruction of an instrumentality of interstate commerce. The goods need not go out of the State since the Act applies to the production of goods ''for'' commerce, including for use in commerce, and is not limited to ''production of goods for transportation in commerce,'' that is, to be sent across State lines.[23]

(2) The Act would also apply to the production of such items as electricity, fuel or water, for use in the operation of railroads or other instrumentalities

[18] See General Coverage Bulletin, § 776.19(b)(3); but see § 776.19 (b) (1), (2) and (3); on coverage of furnishing materials ''specially designed'', or meeting particular specifications, for use in production of particular kinds of goods for commerce; and paragraph (d) of this section, on coverage of producing and furnishing materials for use in construction work on instrumentalities of commerce.

[19] House Manager's Statement, 1949 Amendments.

[20] See decisions cited in footnotes 10 and 11, of this subpart.

[21] *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F. (2d) 698 (C.A. 8); Cf. *New Mexico Public Service Co.* v. *Engel*, 145 F. (2d) 636 (C.A. 10); *Lewis* v. *Florida Power & Light Co.*, 154 F. (2d) 75 (C.A. 5).

[22] *Walling* v. *McCrady Const. Co.*, ante.

[23] *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13; *Tobin* v. *Johnson*, 198 F. (2d) 130 (C.A. 8); *Mitchell* v. *Emulsified Asphalt Products Co.*, 222 F. (2) 913 (C.A. 6).

of commerce.[24] Therefore, as in the case of other production units, the maintenance, repair or other improvement of the premises or buildings or the appurtenances, including the machinery, tools and dies and equipment, of the facilities which are used to produce such goods, are subject to the Act.

(3) Coverage also extends to employees who produce sand, gravel, asphalt, cement, crushed rock, railroad ties, pipes, conduits, wires, concrete pilings and other materials which are to be used in the construction of instrumentalities which serve as the means for the interstate movement of goods or persons.

(4) This does not mean, however, that in every case where employees produce such materials which are used within the State in the maintenance, repair, or reconstruction of an instrumentality of commerce, the production of such materials is necessarily considered as production ''for'' commerce. A material supply company may be engaged in an independent business which is essentially local in nature, selling its materials to the usual miscellany of local customers without any particular intent or purpose of supplying materials for the maintenance, repair, or reconstruction of instrumentalities of commerce, and without any substantial portion of its business being directed to such specific uses. Employees of such an ''essentially local business'' are not covered by the Act merely because as an incident to its essentially local business, the company, on occasion, happens to produce or supply some materials which are used within the State to meet the needs of instrumentalities of commerce.[25]

### § 776.28 Covered preparatory activities.

(a) *Before production begins.* (1) The United States Supreme Court has held that the Act is applicable to employees of a company which was engaged in preliminary oil well drilling, even though the holes were drilled to a specified depth which was short of where the oil was expected to be found.[26] The Act would also apply to drilling operations even though no oil was discovered.[27] Laborers employed in erecting drilling rigs would also be covered.[28] Other preparatory work before drilling begins in an oil field, such as staking oil claims, surveying, clearing the land, assembling materials and equipment, erecting sheds, derricks or dikes would also be within the scope of the Act.[29] Preliminary work such as the foregoing has the requisite close and immediate tie with the production of goods for commerce to be within the coverage of the Act.

(2) Similarly, coverage extends to employees engaged in the installation of machinery to be used in covered production in a new factory building, even though the construction of the building itself may not have been subject to the Act. Such installation is considered to be a preliminary production activity rather than simply part of the construction of the building.

(3) If the construction project is subject to the Act, preliminary activities, such as surveying, clearing, draining and leveling the land, erecting necessary buildings to house materials and equipment, or the demolition of structures in order to begin building the covered facility, are subject to the Act.[30]

(b) *Facilities used in aid of the covered construction.* The installation of facilities, and the repair and maintenance of trucks, tools, machinery and other equipment to be used by a contractor in the furtherance of his covered construction work, are activities subject to the Act.

### § 776.29 Instrumentalities and channels of interstate commerce.

(a) *Typical examples.* Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for

[24] Sections 776.19(b)(2) and 776.21. See also paragraph (b) of this section.

[25] See §§ 776.19 (a) and (b) and 776.21(b)(3). See also cases cited in footnote 22 of this subpart.

[26] *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 8.

[27] *Culver* v. *Bell & Loffland*, 146 F. (2d) 20.

[28] *Devine* v. *Levy*, 39 F. Supp. 44.

[29] *Straughn* v. *Schlumberger Well Surveying Corp.*, 72 F. Supp. 511.

[30] Coverage of preparation of plans and designs is discussed in § 776.19(b) (2).

interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.[31]

(b) *General character of an instrumentality of interstate commerce.* (1) An instrumentality of interstate commerce need not stretch across State lines but may operate within a particular State as a link in a chain or system of conduits through which interstate commerce moves.[32] Obvious examples of such facilities are railroad terminals, airports which are components of a system of air transportation, bridges and canals. A facility may be used for both interstate and intrastate commerce but when it is so used it is nonetheless an interstate instrumentality. Such double use does not exclude construction employees from being engaged in commerce.

(2) The term instrumentality of interstate commerce may refer to one unit or the entire chain of facilities. An instrumentality such as a railroad constitutes a system or network of facilities by which the interstate movement of goods and persons is accomplished. Each segment of the network is integrally connected with the whole and must be viewed as part of the system as a whole, not as an isolated local unit.

(3) A construction project which changes the interstate system as a whole, or any of its units, would have a direct bearing on the flow of interstate commerce throughout the network. Thus, the new construction of an alternate route or an additional unit which alters the system or any segment of it, would have such a direct and vital relationship to the functioning of the instrumentality of interstate commerce as to be, in practical effect, a part of such commerce rather than isolated local activity. For example, such construction as the maintenance, repair, replacement, expansion, enlargement, extension, reconstruction, redesigning, or other improvement, of a railroad system as a whole, or of any part of it, would have a close and intimate relationship with the movement of goods and persons across State lines. All such construction, therefore, is subject to the Act.

(4) The same would be true with respect to other systems of interstate transportation or communication such as roads, waterways, airports, pipe, gas and electric lines, and ship, bus, truck, telephone and broadcasting facilities. Consequently, construction projects for lengthening, widening, deepening, relocating, redesigning, replacing and adding new, substitute or alternate facilities; shortening or straightening routes or lines; providing cutoffs, tunnels, trestles, causeways, overpasses, underpasses and bypasses are subject to the Act. Furthermore, the fact that such construction serves another purpose as well as the improvement of the interstate facility, or that the improvement to the interstate facility was incidental to other non-covered work, would not exclude it from the Act's coverage.[33]

(c) *Examples of construction projects which are subject to the Act.* Coverage extends to employees who are engaged on such work as repairing or replacing abutments and superstructures on a washed out railroad bridge;[34] replacing an old highway bridge with a new one at a different location;[35] removing an old railroad bridge and partially rebuilding a new one; repairing a railroad roundhouse, signal tower, and storage building; relocating portions of a county road; erecting new bridges with new approaches in different locations from

[31] General coverage bulletin, § 776.11.

[32] *Mitchell* v. *Vollmer*, ante; *Bennett*. v. *V. P. Loftis*, 167 F. (2d) 286 (C.A. 4); *Overstreet* v. *North Shore Corp.*, ante; *Rockton & Rion R. R.* v. *Walling*, 146 F. (2d) 111, certiorari denied 324 U.S. 880; *National Labor Relations Board* v. *Central Missouri Tel. Co.*, 115 F. (2d) 563 (C.A. 8).

[33] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508; *Cuascut* v. *Standard Dredging Corp.*, 94 F. Supp. 197.

[34] *Pedersen* v. *J. F. Fitzgerald*, 318 U.S. 740.

[35] *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286 (C.A. 4).

the old ones; widening a city street; relocating, improving or extending interstate telephone facilities including the addition of new conduits and new trunk lines.[36] Also within the scope of the Act are employees who are engaged in the construction, maintenance and repair of ships, barges and other vessels used for interstate commerce, including those belonging to the Government,[37] and facilities used in the production and transmission of electric, fuel, water, steam and other powers to instrumentalities of interstate commerce.[38]

(d) *Construction of new facilities.* (1) In a case before the United States Supreme Court, the question was presented whether the Act applied to the construction of a new canal at some distance from the one then in use. The new canal was to be an alternate route for entering the Mississippi River and would relieve traffic congestion in the existing canal. The latter would continue in operation but could not be widened because of its location in a highly developed industrial section of New Orleans. The Court in holding the construction of the new canal to be within the coverage of the Act stated that the new construction was as intimately related to the improvement of navigation on the Gulf Intercoastal Waterway as dredging in the existing canal would be and that the project was ''part of the redesigning of an existing facility of interstate commerce.''[39] Thus the construction of a new facility in a network of instrumentalities of interstate commerce, in order to serve the system, or to function as an alternate route, or to relieve traffic congestion in another unit, or to replace an outmoded facility, is subject to the Act.

(2) Similarly, the construction of a new unit, such as a new airport which is an addition to the entire interstate system of air transportation although not physically attached to any other unit, would, as a practical matter, necessarily expand, promote and facilitate the movement of interstate commerce over the airway system, and consequently, would be subject to the Act. In such a situation the interstate system, although composed of physically separate local units, is, as a whole, the instrumentality of commerce which is improved. In most cases such an addition would also directly enhance, improve or replace some particular nearby unit in the interstate network. The new addition would thus relieve traffic congestion and facilitate the interstate movement of commerce over the existing instrumentality as a whole, as well as at the particular nearby units. The same principle would apply to highways, turnpikes and similar systems of interstate facilities.

(3) In like manner, the reconstruction, extension or expansion of a small unit in a system of interstate facilities, such as the enlargement of a small airport which is regularly used for interstate travel or transportation, is covered, regardless of the relative sizes of the original unit and the new one. The construction in such situations facilitates and improves the interstate commerce served by, and is directly related to the continued, efficient and effective operation of, both the particular original unit and the interstate system as a whole. Also, the construction of facilities such as hangars, repair shops and the like at a covered airport, which are ''directly and vitally related to the functioning'' of the instrumentality of commerce, would be subject to the Act.[40]

(e) *Construction on waterways.* Courts have consistently held that the engagement in interstate commerce includes the maintenance, repair or improvement of navigable waterways even when the construction work is performed on the non-navigable parts of the instrumentality such as at the

[36] *Walling* v. *McCrady Const. Co.*, ante.

[37] *Divins* v. *Hazeltine Electronics Corp.*, 163 F. (2d) 100 (C.A. 2); Cf. *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2d) 102 (C.A. 4).

[38] *New Mexico Public Service Co.* v. *Engel*, ante; *Lewis* v. *Florida Light & Power Co.*, ante; *Mitchell* v. *Mercer Water Co.*, 208 F. (2d) 900 (C.A. 3); *Mitchell* v. *Brown Engineering Co.*, ante.

[39] *Mitchell* v. *Vollmer & Co.*, ante; see also *Bennett* v. *V. P. Loftis*, ante.

[40] *Mitchell* v. *Vollmer & Co.*, ante.

headwaters and watersheds or in tributary streams.[41]

Construction which improves rivers and waterways serving as instrumentalities of interstate commerce includes dredging; the building, maintenance, repair, replacement, reconstruction, improvement, or enlargement of dikes, revetments, levees, harbor facilities, retaining walls, channels, berths, piers, wharves, canals, dams, reservoirs and similar projects; also the removal of debris and other impediments in the waterway and flood control work in general.[42]

The Act applies to construction work which increases the navigability of a waterway, protects it from floods or otherwise improves or maintains its use as an instrumentality of interstate commerce. The courts have held that a program for controlling floods is inseparably related to the stabilization and maintenance of the navigable channel of the river, since levees, dams, dikes and like structures, which hold back the waters in time of flood, at the same time confine a more efficient body of water during other periods by increasing its velocity and scouring and deepening its channels.[43]

(1) *Flood control work in non-navigable parts of a waterway*. Both Congress and the courts have considered that watersheds and headwaters are keys to the control of floods on navigable streams and that the control over the non-navigable parts of a river is essential for the prevention of overflows on the navigable portions. It is also well settled that in order to control floods on a navigable stream it is necessary to take flood control measures on its tributaries.

(2) *Basis of coverage*. (i) The construction of a levee, dam or other improvement in any part of a river or its tributaries for the purpose of preventing floods or aiding navigation must be considered as an integral part of a single comprehensive project for improvement of the river system. Even though a particular levee or dike, by itself, may not effect an improvement, the courts have made it clear that the combined effect of a chain of such structures serves as the basis for determining coverage. The construction of a particular river structure may, therefore, be subject to the Act simply because it is part of a comprehensive system of structures, whose combined effect will achieve the improvement of the navigable channel. Thus, it has been held that site clearance work in the construction of a multiple-purpose dam on a non-navigable stream is covered by the Act where the work is an integral part of a comprehensive system for the control of floods and the betterment of navigation on the Arkansas and Mississippi Rivers.[44] Similarly, the enlargement of a set-back levee, located from two to six miles from the banks of the Mississippi, was held to be covered because it was part of the Mississippi leveee system even though the set-back levee, when viewed separately, was not directly related to the functioning of the Mississippi as an instrumentality of commerce.[45]

(ii) The principle involved applies also to other instrumentalities of interstate commerce. As in the case of covered waterway projects, individual additions or improvements to other instrumentalities of interstate commerce may for coverage purposes be considered as part of a whole program rather than separately. The Act will apply to the construction in such situations if the unit, considered by itself or as part of a larger program, promotes the efficient or effective operation of the instrumentality of interstate commerce.

(3) *Construction of wharves, piers and docks*. The Act also applies to the construction of new piers, wharves, docks and other facilities if they are integrated with the interstate commerce

[41] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, ante; *United States* v. *Appalachian Power Co.*, 311 U.S. 426.

[42] *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. (2d) 945 (C.A. 6); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334.

[43] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Tobin* v. *Ramey*, 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925; *Jackson* v. *U.S.*, 230 U.S. 1.

[44] *Tobin* v. *Pennington-Winter Const. Co.*, ante.

[45] *Tobin* v. *Ramey*, 205 F. (2d) 606, rehearing denied 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925.

functions of an existing harbor. Similarly, the new construction of such facilities in other locations along the waterway is subject to the Act if they are regularly used by vessels carrying goods or persons in interstate commerce.

(f) *Highways, county roads and city streets*—(1) *Typical examples.* As a generic term highways includes bridges, underpasses, overpasses, bypasses, county roads, access roads, city streets and alternate roads, draw bridges, toll bridges, toll roads and turnpikes, but does not include roads or parking facilities on privately owned land and which are not for use by the general public for interstate traffic.

(2) *Basis of coverage.* The general rules for determining the coverage of employees engaged in the construction of other instrumentalities of interstate commerce apply to highway construction work. The United States Supreme Court has stated that in applying the Act to highway construction as to other coverage problems, practical rather than technical constructions are decisive.[46] After the Court remanded the Overstreet case to the district court, the latter held that the employees engaged in maintaining and repairing the facilities regularly used and available for interstate commerce were engaged in commerce, regardless of the extent of the interstate traffic.[47] The court recognized that although the amount of the interstate commerce in the Overstreet case was very small it was regular and recurring and not occasional nor incidental. Thus, under the authoritative decision a percentage test is not regarded as a practical guide for ascertaining whether a particular facility is an instrumentality of interstate commerce.[48] Employees who are engaged in the repair, maintenance, extension, enlargement, replacement, reconstruction, redesigning or other improvement of such a road are subject to the Act. The fact that the road is owned or controlled by the State or Federal Government or by any subdivision thereof would not affect the applicability of the Act. The same would be true if State or Federal funds were used to finance the construction. It should be noted, however, that if the employees are actually employees of a State, or a political subdivision thereof, they are excepted from coverage of the Act under section 3(d).

(3) *City streets.* The construction, reconstruction or repair of a city street, whether residential or not, which is part of an interstate highway or which directly connects with any interstate highway is so closely related to the interstate commerce moving on the existing highway as to be a part of it. Construction of other streets, which are not a part of a public road building program and are constructed on private property as a part of a new residential development, will not be considered covered until further clarification from the courts.

(4) *New highway construction.* Although a number of appellate court decisions have held that the construction of new highways is not within the coverage of the Act, these decisions relied upon the technical ''new construction'' concept which the United States Supreme Court has subsequently held to be inapplicable as the basis for determining coverage under this Act.[49] Under the principles now established by that Court's decision, which require determination of coverage on the basis of realistic, practical considerations, the construction of new expressways and highways that will connect with an interstate highway system is so ''related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.''[50] Such highways and expressways not only are so designed as

[46] *Overstreet* v. *North Shore Corp.*, ante.

[47] 52 F. Supp. 503.

[48] *North Shore Corp.* v. *Barnett,* 143 F. (2d) 172 (C.A. 5); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.,* 138 F. (2d) 13 (C.A. 8).

[49] Compare *Mitchell* v. *Vollmer,* ante, with *Koepfie* v. *Garavaglia,* 200 F. (2d) 191 (C.A. 6); *Moss* v. *Gillioz Const. Co.,* 206 F. (2d) 819 (C.A. 10); and *Van Klaveren* v. *Killian House,* 210 F. (2d) 510 (C.A. 5). The Vollmer decision specifically rejected the applicability of the decision construing the Federal Employer's Liability Act, on which the cited appellate court decision relied.

[50] *Mitchell* v. *Vollmer,* ante; *Walling* v. *Jacksonville Paper Co.,* ante; and *Overstreet* v. *North Shore Corp.,* ante.

necessarily to become a part of or additions to an existing interstate highway system, but their construction is plainly of a national rather than a local character, as evidenced by the Federal financial contribution to their construction. And neither the fact that they are not dedicated to interstate use during their construction, nor the fact that they will constitute alternate routes rather than replacement of existing road, constitute sufficient basis, under the controlling court decisions, for excluding them from the coverage of the Act.[51] Accordingly, unless and until authoritative court decision in the future hold otherwise, the construction of such new highways and expressways will be regarded as covered.

### § 776.30 Construction performed on temporarily idle facilities.

The Act applies to work on a covered interstate instrumentality or production facility even though performed during periods of temporary non-use or idleness.[52] The courts have held the Act applicable to performance of construction work upon a covered facility even though the use of the facility was temporarily interrupted or discontinued.[53] It is equally clear that the repair or maintenance of a covered facility (including its machinery, tools, dies, and other equipment) though performed during the inactive or dead season, is subject to the Acts.[54]

[51] *Mitchell* v. *Vollmer & Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334, certiorari denied 345 U.S. 915; and *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286.

[52] *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Slover* v. *Wathen & Co.*, 140 F. (2d) 258 (C.A. 4); *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733; and *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C.A. 5).

[53] *Pedersen* v. *J. F. Fitzgerald Construction Co.*, ante; *Bennett* v. *V. P. Loftis*, ante; *Walling* v. *McCrady Const. Co.*, ante; and *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733.

[54] *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Bowie* v. *Gonzalez*, 117 F. (2d) 11; *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. (2d) 597, certiorari denied 328 U.S. 858; *Walling* v. *Keensburg Steamship Co.*, 462 F. (2d) 405.

# PART 778—OVERTIME COMPENSATION

## Subpart A—General Considerations

Sec.
778.0 Introductory statement.
778.1 Purpose of interpretative bulletin.
778.2 Coverage and exemptions not discussed.
778.3 Interpretations made, continued, and superseded by this part.
778.4 Reliance on interpretations.
778.5 Relation to other laws generally.
778.6 Effect of Davis-Bacon Act.
778.7 Effect of Service Contract Act of 1965.

## Subpart B—The Overtime Pay Requirements

INTRODUCTORY

778.100 The maximum-hours provisions.
778.101 Maximum nonovertime hours.
778.102 Application of overtime provisions generally.
778.103 The workweek as the basis for applying section 7(a).
778.104 Each workweek stands alone.
778.105 Determining the workweek.
778.106 Time of payment.

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE ''REGULAR RATE''

778.107 General standard for overtime pay.
778.108 The ''regular rate''.
778.109 The regular rate is an hourly rate.
778.110 Hourly rate employee.
778.111 Pieceworker.
778.112 Day rates and job rates.
778.113 Salaried employees—general.
778.114 Fixed salary for fluctuating hours.
778.115 Employees working at two or more rates.
778.116 Payments other than cash.
778.117 Commission payments—general.
778.118 Commission paid on a workweek basis.
778.119 Deferred commission payments—general rules.
778.120 Deferred commission payments not identifiable as earned in particular workweeks.
778.121 Commission payments—delayed credits and debits.
778.122 Computation of overtime for commission employees on established basic rate.

## Subpart C—Payments That May Be Excluded From the ''Regular Rate''

THE STATUTORY PROVISIONS

778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

EXTRA COMPENSATION PAID FOR OVERTIME

778.201 Overtime premiums—general.
778.202 Premium pay for hours in excess of a daily or weekly standard.
778.203 Premium pay for work on Saturdays, Sundays, and other ''special days''.
778.204 ''Clock pattern'' premium pay.
778.205 Premiums for weekend and holiday work—example.
778.206 Premiums for work outside basic workday or workweek—examples.
778.207 Other types of contract premium pay distinguished.

BONUSES

778.208 Inclusion and exclusion of bonuses in computing the ''regular rate''.
778.209 Method of inclusion of bonus in regular rate.
778.210 Percentage of total earnings as bonus.
778.211 Discretionary bonuses.
778.212 Gifts, Christmas and special occasion bonuses.
778.213 Profit-sharing, thrift, and savings plans.
778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.
778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

PAYMENTS NOT FOR HOURS WORKED

778.216 The provisions of section 7(e)(2) of the Act.
778.217 Reimbursement for expenses.
778.218 Pay for certain idle hours.
778.219 Pay for foregoing holidays and vacations.
778.220 ''Show-up'' or ''reporting'' pay.
778.221 ''Call-back'' pay.
778.222 Other payments similar to ''call-back'' pay.
778.223 Pay for non-productive hours distinguished.
778.224 ''Other similar payments''.

TALENT FEES IN THE RADIO AND TELEVISION INDUSTRY

778.225 Talent fees excludable under regulations.

## Subpart D—Special Problems

INTRODUCTORY

778.300 Scope of subpart.

CHANGE IN THE BEGINNING OF THE WORKWEEK

778.301 Overlapping when change of workweek is made.
778.302 Computation of overtime due for overlapping workweeks.

ADDITIONAL PAY FOR PAST PERIOD

778.303 Retroactive pay increases.

HOW DEDUCTIONS AFFECT THE REGULAR RATE

778.304 Amounts deducted from cash wages—general.
778.305 Computation where particular types of deductions are made.
778.306 Salary reductions in short workweeks.
778.307 Disciplinary deductions.

LUMP SUM ATTRIBUTED TO OVERTIME

778.308 The overtime rate is an hourly rate.
778.309 Fixed sum for constant amount of overtime.
778.310 Fixed sum for varying amounts of overtime.
778.311 Flat rate for special job performed in overtime hours.

''TASK'' BASIS OF PAYMENT

778.312 Pay for task without regard to actual hours.
778.313 Computing overtime pay under the Act for employees compensated on task basis.
778.314 Special situations.

EFFECT OF FAILURE TO COUNT OR PAY FOR CERTAIN WORKING HOURS

778.315 Payment for all hours worked in overtime workweek is required.
778.316 Agreements or practices in conflict with statutory requirements are ineffective.
778.317 Agreements not to pay for certain nonovertime hours.
778.318 Productive and nonproductive hours of work.

EFFECT OF PAYING FOR BUT NOT COUNTING CERTAIN HOURS

778.319 Paying for but not counting hours worked.
778.320 Hours that would not be hours worked if not paid for.

REDUCTION IN WORKWEEK SCHEDULE WITH NO CHANGE IN PAY

778.321 Decrease in hours without decrease in pay—general.
778.322 Reducing the fixed workweek for which a salary is paid.
778.323 Effect if salary is for variable workweek.
778.324 Effect on hourly rate employees.
778.325 Effect on salary covering more than 40 hours' pay.
778.326 Reduction of regular overtime workweek without reduction of take-home pay.
778.327 Temporary or sporadic reduction in schedule.
778.328 Plan for gradual permanent reduction in schedule.
778.329 Alternating workweeks of different fixed lengths.

PRIZES AS BONUSES

778.330 Prizes or contest awards generally.
778.331 Awards for performance on the job.
778.332 Awards for activities not normally part of employee's job.
778.333 Suggestion system awards.

Subpart E—Exceptions From the Regular Rate Principles

COMPUTING OVERTIME PAY ON AN ''ESTABLISHED'' RATE

778.400 The provisions of section 7(g)(3) of the Act.
778.401 Regulations issued under section 7(g)(3).

GUARANTEED COMPENSATION WHICH INCLUDES OVERTIME PAY

778.402 The statutory exception provided by section 7(f) of the Act.
778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).
778.404 Purposes of exemption.
778.405 What types of employees are affected.
778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.
778.407 The nature of the section 7(f) contract.
778.408 The specified regular rate.
778.409 Provision for overtime pay.
778.410 The guaranty under section 7(f).
778.411 Sixty-hour limit on pay guaranteed by contract.
778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.
778.413 Guaranty must be based on rates specified in contract.
778.414 ''Approval'' of contracts under section 7(f).

COMPUTING OVERTIME PAY ON THE RATE APPLICABLE TO THE TYPE OF WORK PERFORMED IN OVERTIME HOURS (SECS. 7(G)(1) AND (2))

778.415 The statutory provisions.
778.416 Purpose of provisions.
778.417 General requirements of section 7(g).
778.418 Pieceworkers.
778.419 Hourly workers employed at two or more jobs.
778.420 Combined hourly rates and piece rates.
778.421 Offset hour for hour.

Subpart F—Pay Plans Which Circumvent the Act

DEVICES TO EVADE THE OVERTIME REQUIREMENTS

778.500 Artificial regular rates.
778.501 The ''split-day'' plan.

PSEUDO-BONUSES

778.502 Artificially labeling part of the regular wages a ''bonus''.
778.503 Pseudo ''percentage bonuses''.

Subpart G—Miscellaneous

778.600 Veterans' subsistence allowances.
778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).
778.602 Special overtime provisions under section 7(b).
778.603 Special overtime provisions for certain employees receiving remedial education under section 7(q).

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*

SOURCE: 33 FR 986, Jan. 26, 1968, unless otherwise noted.

## Subpart A—General Considerations

### § 778.0 Introductory statement.

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, child labor, and equal pay 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.

### § 778.1 Purpose of interpretative bulletin.

This part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained

in section 7 of the Act. It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator 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 reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290).

### § 778.2 Coverage and exemptions not discussed.

This part 778 does not deal with the general coverage of the Act or various specific exemptions provided in the statute, under which certain employees within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the Act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to general coverage and specific exemptions may be found in other parts of this chapter.

### § 778.3 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. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as part 778 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. 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 Office of the Division.

[46 FR 7309, Jan. 23, 1981]

### § 778.4 Reliance on interpretations.

The interpretations of the law contained in this part 778 are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84).

### § 778.5 Relation to other laws generally.

Various Federal, State, and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standards Act, and the payment of overtime compensation computed on bases different from those set forth in the Fair Labor Standards Act. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws. Compliance with other applicable legislation does not excuse noncompliance with the Fair Labor Standards Act. Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum, for the words ''regular rate at which he is employed'' as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.

### § 778.6 Effect of Davis-Bacon Act.

Section 1 of the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a) provides for the inclusion of certain fringe benefits in the prevailing wages that are predetermined by the Secretary of Labor, under that Act and related statutes, as minimum wages for laborers and mechanics employed by

contractors and subcontractors performing construction activity on Federal and federally assisted projects. Laborers and mechanics performing work subject to such predetermined minimum wages may, if they work overtime, be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. In view of this fact, specific provision was made in the Davis-Bacon Act for the treatment of such predetermined fringe benefits in the computation of overtime compensation under other applicable statutes including the Fair Labor Standards Act. The application of this provision is discussed in § 5.32 of this title, which should be considered together with the interpretations in this part 778 in determining any overtime compensation payable under the Fair Labor Standards Act to such laborers and mechanics in any workweek when they are subject to fringe benefit wage determinations under the Davis-Bacon and related acts.

### § 778.7 Effect of Service Contract Act of 1965.

The McNamara-O'Hara Service Contract Act of 1965, which provides for the predetermination and the specification in service contracts entered into by the Federal Government or the District of Columbia, of the minimum wages and fringe benefits to be received by employees of contractors and subcontractors employed in work on such contracts, contains the following provision:

> SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e)* thereof. (*Subsection designation changed in text from section 7(d) to 7(e) to conform with the relettering enacted by the Fair Labor Standards Amendments of 1966.)

Where the fringe benefits specified in such a service contract are furnished to an employee, the above provision permits exclusion of such fringe benefits from the employee's regular rate of pay under the Fair Labor Standards Act pursuant to the rules and principles set forth in subpart C of this part 778. However, the McNamara-O'Hara Act permits an employer to discharge his obligation to provide the specified fringe benefits by furnishing any equivalent combinations of bona fide fringe benefits or by making equivalent or differential payments in cash. Permissible methods of doing this are set forth in part 4 of this title, subpart B. If the employer furnishes equivalent benefits or makes cash payments, or both, to an employee as therein authorized, the amounts thereof, to the extent that they operate to discharge the employer's obligation under the McNamara-O'Hara Act to furnish such specified fringe benefits, may be excluded pursuant to such Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under the Fair Labor Standards Act, pursuant to the rule provided in § 4.55 of this title. This means that such equivalent fringe benefits or cash payments which are authorized under the McNamara-O'Hara Act to be provided in lieu of the fringe benefits specified in determinations issued under such Act are excludable from the regular rate in applying the overtime provisions of the Fair Labor Standards Act if the fringe benefits specified under the McNamara-O'Hara Act would be so excludable if actually furnished. This is true regardless of whether the equivalent benefits or payments themselves meet the requirements of section 7(e) of the Fair Labor Standards Act and subpart C of this part 778.

## Subpart B—The Overtime Pay Requirements

INTRODUCTORY

### § 778.100 The maximum-hours provisions.

Section 7(a) of the Act deals with maximum hours and overtime compensation for employees who are within the general coverage of the Act and are not specifically exempt from its overtime pay requirements. It prescribes the maximum weekly hours of work permitted for the employment of such employees in any workweek without extra compensation for overtime,

and a general overtime rate of pay not less than one and one-half times the employee's regular rate which the employee must receive for all hours worked in any workweek in excess of the applicable maximum hours. The employment by an employer of an employee in any work subject to the Act in any workweek brings these provisions into operation. The employer is prohibited from employing the employee in excess of the prescribed maximum hours in such workweek without paying him the required extra compensation for the overtime hours worked at a rate meeting the statutory requirement.

### § 778.101 Maximum nonovertime hours.

As a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Act, to which the pay requirements of section 6 (minimum wage and equal pay) but not those of section 7(a) are applicable.

[46 FR 7309, Jan. 23, 1981]

### § 778.102 Application of overtime provisions generally.

Since there is no absolute limitation in the Act (apart from the child labor provisions and regulations thereunder) on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a). The Act does not generally require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the Act are actually worked in the workweek, overtime compensation pursuant to section 7(a) need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday. (The effect of making such payments is discussed in §§ 778.201 through 778.207 and 778.219.)

[46 FR 7309, Jan. 23, 1981]

### § 778.103 The workweek as the basis for applying section 7(a).

If in any workweek an employee is covered by the Act and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed), and pay overtime compensation for each hour worked in excess of the maximum hours applicable under section 7(a) of the Act. In the case of an employee employed jointly by two or more employers (see part 791 of this chapter), all hours worked by the employee for such employers during the workweek must be totaled in determining the number of hours to be compensated in accordance with section 7(a). The principles for determining what hours are hours worked within the meaning of the Act are discussed in part 785 of this chapter.

### § 778.104 Each workweek stands alone.

The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers

and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

**§ 778.105 Determining the workweek.**

An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in §§ 778.301 and 778.302.

**§ 778.106 Time of payment.**

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, see § 778.209.

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE ''REGULAR RATE''

**§ 778.107 General standard for overtime pay.**

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate. Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§ 778.400 through 778.421 and 778.601 and part 548 of this chapter. The Act also provides, in section 7(b), (i), (k) and (m) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this part 778 and reference should be made to other applicable parts of this chapter.

[46 FR 7309, Jan. 23, 1981]

**§ 778.108 The "regular rate".**

The ''regular rate'' of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co.* v. *Aaron,* 334 U.S.

446). The Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed—an ''actual fact'' (*Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419). Section 7(e) of the Act requires inclusion in the ''regular rate'' of ''all remuneration for employment paid to, or on behalf of, the employee'' except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as ''statutory exclusions.'') As stated by the Supreme Court in the Youngerman-Reynolds case cited above: ''Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.''

### § 778.109 The regular rate is an hourly rate.

The ''regular rate'' under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

### § 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his ''regular rate.'' For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $6 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $294 (46 hours at $6 plus 6 at $3). In other words, the employee is entitled to be paid an amount equal to $6 an hour for 40 hours and $9 an hour for the 6 hours of overtime, or a total of $294.

(b) *Hourly rate and bonus.* If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $9.20, the regular hourly rate of pay is $6.20 an hour (46 hours at $6 yields $276; the addition of the $9.20 bonus makes a total of $285.20; this total divided by 46 hours yields a rate of $6.20). The employee is then entitled to be paid a total wage of $303.80 for 46 hours (46 hours at $6.20 plus 6 hours at $3.10, or 40 hours at $6.20 plus 6 hours at $9.30).

[46 FR 7309, Jan. 23, 1981]

### § 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, his regular hourly rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions): This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's ''regular rate'' for that week. For his overtime work the piece-worker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers

are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $245.50 at piece rates for 46 hours of productive work and in addition has been compensated at $5.00 an hour for 4 hours of waiting time, his total compensation, $265.50 must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay—$5.31. For the 10 hours of overtime the employee is entitled to additional compensation of $26.55 (10 hours at $2.655). For the week's work he is thus entitled to a total of $292.05 (which is equivalent to 40 hours at $5.31 plus 10 overtime hours at $7.965).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty which he was paid is his regular rate in that week. In the example just given, if the employee was guaranteed $5.50 an hour for productive working time, he would be paid $253 (46×$5.50) for the 46 hours of productive work (instead of the $245.50 earned at piece rates). In a week in which no waiting time was involved, he would be owed an additional $2.75 (half time) for each of the 6 overtime hours worked, to bring his total compensation up to $269.50 (46 hours at $5.50 plus 6 hours at $2.75 or 40 hours at $5.50 plus 6 hours at $8.25). If he is paid at a different rate for waiting time, his regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

[46 FR 7309, Jan. 23, 1981]

### § 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

### § 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,040, or a regular semimonthly salary of $520 for 40 hours a week, is thus found to be $6 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

[46 FR 7310, Jan. 23, 1981]

**§ 778.114 Fixed salary for fluctuating hours.**

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The ''fluctuating workweek'' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the ''fluctuating workweek'' method of overtime payment are present, the Act, in requiring that ''not less than'' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

### § 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

### § 778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See part 531 of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

[46 FR 7310, Jan. 23, 1981]

### § 778.117 Commission payments—general.

Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

[36 FR 4981, Mar. 16, 1971]

### § 778.118 Commission paid on a workweek basis.

When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

### § 778.119 Deferred commission payments—general rules.

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to

the commission for that week multipled by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

**§ 778.120 Deferred commission payments not identifiable as earned in particular workweeks.**

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

(a) *Allocation of equal amounts to each week.* Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows:

(1) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(2) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction

$$\frac{\text{Overtime hours}}{\text{Total hours} \times 2}$$

A coefficient table (WH–134) has been prepared which contains the appropriate decimals for computing the extra half-time due.

*Examples:* (i) If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416×12=$4,992÷52=$96). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $96 by 48 gives the increase to the regular rate of $2. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay due of $8.

(ii) An employee received $384 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $96. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $4.36 for the first and third week ($96÷44=$2.18÷2=$1.09×4 overtime hours=$4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) *Allocation of equal amounts to each hour worked.* Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission

computation period, to get the amount of additional overtime compensation due for this period.

*Example:* An employee received commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (*i.e.*, two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

### § 778.121 Commission payments—delayed credits and debits.

If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs.

### § 778.122 Computation of overtime for commission employees on established basic rate.

Overtime pay for employees paid wholly or partly on a commission basis may be computed on an established basic rate, in lieu of the method described above. See § 778.400 and part 548 of this chapter.

## Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

### § 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e)*. This subsection of the Act provides as follows:

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; [discussed in § 778.212].

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; [discussed in §§ 778.216 through 778.224].

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs; [discussed in §§ 778.208 through 778.215 and 778.225].

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees; [discussed in §§ 778.214 and 778.215].

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be; [discussed in §§ 778.201 and 778.202].

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the

rate established in good faith for like work performed in nonovertime hours on other days; or [discussed in §§ 778.203, 778.205, and 778.206].

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; [discussed in §§ 778.201 and 778.206].

(b) *Section 7(h).* This subsection of the Act provides as follows:

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined.

EXTRA COMPENSATION PAID FOR OVERTIME

### § 778.201 Overtime premiums—general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due under section 7(a) of the Act. Moreover, under section 7(h) this extra compensation may be credited toward the overtime payments required by the Act.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Act are outlined in section 7(e) (5), (6), and (7) of the Act as set forth in § 778.200(a). These are discussed in detail in the sections following.

(c) Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

### § 778.202 Premium pay for hours in excess of a daily or weekly standard.

(a) *Hours in excess of 8 per day or statutory weekly standard.* Many employment contracts provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. Under some contracts such overtime compensation is fixed at one and one-half times the base rate; under others the overtime rate may be greater or less than one and one-half times the base rate. If the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216 to 778.224, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee's normal or regular daily or weekly working hours are greater or less than 8 hours and 40 hours respectively and his contract provides for the

payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week) the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited toward overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of $5.75 an hour and receives, as overtime compensation under his contract, $6.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $6.75 for hours in excess of 12 per day, the extra $1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5), the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided into a ''straight time'' period to which one rate is assigned, followed by a so-called ''overtime'' period for which a higher ''rate'' is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

(d) *Hours in excess of other statutory standard.* Where payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.

(e) *Premium pay for sixth or seventh day worked.* Under section 7(e)(6) and 7(h), extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7311, Jan. 23, 1981)

### § 778.203 Premium pay for work on Saturdays, Sundays, and other "special days".

Under section 7(e)(6) and 7(h) of the Act, extra compensation provided by a Premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as ''special days'') may be treated as an overtime premium for the purposes of the Act. If the premium rate is less than time and one-half, the extra compensation provided by such rate must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium under section 7(e)(5).

(a) ''Special days'' rate must be at least time and one-half to qualify as overtime premium: The premium rate must be at least ''one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days.'' Where an employee is hired on the basis of a salary for a fixed workweek or at a single hourly rate of pay, the rate paid for work on ''special days'' must be at least time and one-half his regular hourly rate in order to qualify under section 7(e)(6). If the employee is a pieceworker or if he works at more than one job for which different hourly or piece rates have been established and these are bona fide rates applicable to the work when performed during nonovertime hours, the extra compensation provided by a premium rate of at least one and one-half times either (1) the bona fide rate applicable to the type of job the employee performs on the ''special days'', or (2) the average hourly earnings in the week in question, will qualify as an overtime premium under this section. (For a

fuller discussion of computation on the average rate, see § 778.111; on the rate applicable to the job, see §§ 778.415 through 778.421; on the ''established'' rate, see § 778.400.)

(b) Bona fide base rate required. The statute authorizes such premiums paid for work on ''special days'' to be treated as overtime premiums only if they are actually based on a ''rate established in good faith for like work performed in nonovertime hours on other days.'' This phrase is used for the purpose of distinguishing the bona fide employment standards contemplated by section 7(e)(6) from fictitious schemes and artificial or evasive devices as discussed in Subpart F of this part. Clearly, a rate which yields the employee less than time and one-half the minimum rate prescribed by the Act would not be a rate established in good faith.

(c) Work on the specified ''special days'': To qualify as an overtime premium under section 7(e)(6), the extra compensation must be paid for work on the specified days. The term ''holiday'' is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion. A day of rest arbitrarily granted to employees because of lack of work is not a ''holiday'' within the meaning of this section, nor is it a ''regular day of rest.'' The term ''regular day of rest'' means a day on which the employee in accordance with his regular prearranged schedule is not expected to report for work. In some instances the ''regular day of rest'' occurs on the same day or days each week for a particular employee; in other cases, pursuant to a swing shift schedule, the schedule day of rest rotates in a definite pattern, such as 6 days work followed by 2 days of rest. In either case the extra compensation provided by a premium rate for work on such scheduled days of rest (if such rate is at least one and one-half times the bona fide rate established for like work during nonovertime hours on other days) may be treated as an overtime premium and thus need not be included in computing the employee's regular rate of pay and may be credited toward overtime payments due under the Act.

(d) Payment of premiums for work performed on the ''special day'': To qualify as an overtime premium under section 7(e)(6), the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an overtime premium under section 7(e)(5), (6), or (7). (For examples distinguishing pay for work on a holiday from idle holiday pay, see § 778.219.) Thus a premium rate paid to an employee only when he received less than 24 hours' notice that he is required to report for work on his regular day of rest is not a premium paid for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay unless such extra compensation is paid the employee on infrequent and sporadic occasions so as to qualify for exclusion under section 7(e)(2) in which event it need not be included in computing his regular rate of pay, as explained in § 778.222.

### § 778.204 "Clock pattern" premium pay.

(a) *Overtime premiums under section 7(e)(7).* Where a collective bargaining agreement or other applicable employment contract in good faith establishes certain hours of the day as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum hours standard applicable under section 7(a)) and provides for the payment of a premium rate for work outside such hours, the extra compensation provided by such premium rate will be treated as an overtime premium if the premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the basic, normal or regular workday or workweek.

(b) *Premiums for hours outside established working hours.* To qualify as an overtime premium under section 7(e)(7) the premium must be paid because the work was performed during hours ''outside of the hours established * * *

as the basic * * * workday or workweek'' and not for some other reason. Thus, if the basic workday is established in good faith as the hours from 8 a.m. to 5 p.m. a premium of time and one-half paid for hours between 5 p.m. and 8 a.m. would qualify as an overtime premium. However, where the contract does not provide for the payment of a premium except for work between midnight and 6 a.m. the premium would not qualify under this section since it is not a premium paid for work outside the established workday but only for certain special hours outside the established workday, in most instances because they are undesirable hours. Similarly, where payments of premium rates for work are made after 5 p.m. only if the employee has not had a meal period or rest period, they are not regarded as overtime premiums; they are premiums paid because of undesirable working conditions.

(c) *Payment in pursuance of agreement.* Premiums of the type which section 7(e)(7) authorizes to be treated as overtime premiums must be paid ''in pursuance of an applicable employment contract or collective bargaining agreement,'' and the rates of pay and the daily and weekly work periods referred to must be established in good faith by such contract or agreement. Although as a general rule a collective bargaining agreement is a formal agreement which has been reduced to writing, an employment contract for purposes of section 7(e)(7) may be either written or oral. Where there is a written employment contract and the practices of the parties differ from its provisions, it must be determined whether the practices of the parties have modified the contract. If the practices of the parties have modified the written provisions of the contract, the provisions of the contract as modified by the practices of the parties will be controlling in determining whether the requirements of section 7(e)(7) are satisfied. The determination as to the existence of the requisite provisions in an applicable oral employment contract will necessarily be based on all the facts, including those showing the terms of the oral contract and the actual employment and pay practices thereunder.

### § 778.205 Premiums for weekend and holiday work—example.

The application of section 7(e)(6) may be illustrated by the following example: Suppose an agreement of employment calls for the payment of $7.50 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of $5 for like work performed during non-overtime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of $320 to which the employee is entitled under the employment agreement will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra $20 paid for work on Sunday and the extra $20 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

[46 FR 7311, Jan. 23, 1981]

### § 778.206 Premiums for work outside basic workday or workweek—examples.

The effect of section 7(e)(7) where ''clock pattern'' premiums are paid may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employers and employees in the longshore and stevedoring industries. These agreements specify straight time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. Under one such agreement, for example, such workday and workweek are established as the first 6 hours of work, exclusive of mealtime, each day, Monday through Friday, between the hours of 8 a.m. and 5 p.m. Under another typical agreement, such workday and workweek are established as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m., Monday through Friday. Work outside such

workday and workweek is paid for at premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek. The extra compensation provided by such premium rates will be excluded in computing the regular rate at which the employees so paid are employed and may be credited toward overtime compensation due under the Act. For example, if an employee is paid $5 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and $7.50 per hour for like work outside of such workday, the extra $2.50 will be excluded from the regular rate and may be credited to overtime pay due under the Act. Similarly, if the straight time rate established in good faith by the contract should be higher because of handling dangerous or obnoxious cargo, recognition of skill differentials, or similar reasons, so as to be $7.50 an hour during the hours established as the basic or normal or regular workday or workweek, and a premium rate of $11.25 an hour is paid for the same work performed during other hours of the day or week, the extra $3.75 may be excluded from the regular rate of pay and may be credited toward overtime pay due under the Act. Similar principles are applicable where agreements following this general pattern exist in other industries.

[46 FR 7311, Jan. 23, 1981]

### § 778.207 Other types of contract premium pay distinguished.

(a) *Overtime premiums are those defined by the statute.* The various types of contract premium rates which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate (under section 7(e) (5), (6), and (7) and credited toward statutory overtime pay requirements (under section 7(h)) have been described in §§ 778.201 through 778.206. The plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described cannot be treated as overtime premiums. Wherever such other premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

(b) *Nonovertime premiums.* The Act requires the inclusion in the regular rate of such extra premiums as nightshift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour) and premiums paid for hazardous, arduous or dirty work. It also requires inclusion of any extra compensation which is paid as an incentive for the rapid performance of work, and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour, except in the special case of pieceworkers as discussed in § 778.418, lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer pays 8 hours' pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours' pay received by an employee who completes the job in 6 hours must be included in his regular rate. Similarly, where an employer pays for 8 hours at premium rates for a job performed during the overtime hours whether it is completed in 8 hours or less, no part of the premium paid qualifies as overtime premium under sections 7(e) (5), (6), or (7). (For a further discussion of this and related problems, see §§ 778.308 to 778.314.)

## BONUSES

### § 778.208 Inclusion and exclusion of bonuses in computing the "regular rate."

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in §§ 778.211 through 778.214. Bonuses which do not qualify for exclusion from

the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee. For a discussion on the bonus form as an evasive bookkeeping device, see §§ 778.502 and 778.503.

### § 778.209 Method of inclusion of bonus in regular rate.

(a) *General rules.* Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) *Allocation of bonus where bonus earnings cannot be identified with particular workweeks.* If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

### § 778.210 Percentage of total earnings as bonus.

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation, as described in §§ 778.502 and 778.503.

### § 778.211 Discretionary bonuses.

(a) *Statutory provision.* Section 7(e)(3)(a) of the Act provides that the regular rate shall not be deemed to include ''sums paid in recognition of

services performed during a given period if * * * (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly * * *''. Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Discretionary character of excluded bonus.* In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, is his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid ''pursuant to any prior contract, agreement, or promise.'' For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay.

### § 778.212 Gifts, Christmas and special occasion bonuses.

(a) *Statutory provision.* Section 7(e)(1) of the Act provides that the term ''regular rate'' shall not be deemed to include ''sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency * * *''. Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Gift or similar payment.* To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to

different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

### § 778.213 Profit-sharing, thrift, and savings plans.

Section 7(e)(3)(b) of the Act provides that the term ''regular rate'' shall not be deemed to include ''sums paid in recognition of services performed during a given period if * * * the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations * * *''. Such sums may not, however, be credited toward overtime compensation due under the Act. The regulations issued under this section are parts 547 and 549 of this chapter. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in part 547 or 549 of this chapter, will be properly excluded from the regular rate.

### § 778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) *Statutory provision.* Section 7(e)(4) of the Act provides that the term ''regular rate'' shall not be deemed to include: ''contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees * * *.'' Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Scope and application of exclusion generally.* Plans for providing benefits of the kinds described in section 7(e)(4) are referred to herein as ''benefit plans''. It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. This is true irrespective of any other features the plan may have. Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings. Where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the Profit-Sharing Regulations, part 549 of this chapter, and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in § 778.215. Advance approval by the Department of Labor is not required.

(c) *Tests must be applied to employer contributions.* It should be emphasized that it is the employer's contribution made pursuant to the benefit plan that is excluded from or included in the regular rate according to whether or not the requirements set forth in § 778.215 are met. If the contribution is not made as provided in section 7(e)(4) or if the plan does not qualify as a bona fide benefit plan under that section, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. Overtime compensation based upon the resultant increases in the regular hourly rate is due for each overtime hour worked during any workweek of the period. The subsequent distribution of accrued funds to an employee on account of severance of employment (or for any other reason) would not result in any increase in his regular rate in the week in which the distribution is made.

(d) *Employer contributions when included in fringe benefit wage determinations under Davis-Bacon Act.* As noted in § 778.6 where certain fringe benefits are

included in the wage predeterminations of the Secretary of Labor for laborers and mechanics performing contract work subject to the Davis-Bacon Act and related statutes, the provisions of Public Law 88–349 discussed in § 5.32 of this title should be considered together with the interpretations in this part 778 in determining the excludability of such fringe benefits from the regular rate of such employees. Accordingly, reference should be made to § 5.32 of this title as well as to § 778.215 for guidance with respect to exclusion from the employee's regular rate of contributions made by the employer to any benefit plan if, in the workweek or workweeks involved, the employee performed work as a laborer or mechanic subject to a wage determination made by the Secretary pursuant to part 1 of this title, and if fringe benefits of the kind represented by such contributions constitute a part of the prevailing wages required to be paid such employee in accordance with such wage determination.

(e) *Employer contributions or equivalents pursuant to fringe benefit determinations under Service Contract Act of 1965.* Contributions by contractors and subcontractors to provide fringe benefits specified under the McNamara-O'Hara Service Contract Act of 1965, which are of the kind referred to in section 7(e)(4), are excludable from the regular rate under the conditions set forth in § 778.215. Where the fringe benefit contributions specified under such Act are so excludable, equivalent benefits or payments provided by the employer in satisfaction of his obligation to provide the specified benefits are also excludable from the regular rate if authorized under part 4 of this title, subpart B, pursuant to the McNamara-O'Hara Act, and their exclusion therefrom is not dependent on whether such equivalents, if separately considered, would meet the requirements of § 778.215. See § 778.7.

[33 FR 986, Jan. 26, 1968, as amended at 36 FR 4699, Mar. 11, 1971]

### § 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In a plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) NOTE: The requirements in paragraphs (a)(3) (ii) and (iii) of this section for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for

all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See part 531 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided, however,* That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

(b) *Plans under section 401(a) of the Internal Revenue Code.* Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a)(1), (4), and (5) of this section.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

PAYMENTS NOT FOR HOURS WORKED

### § 778.216 The provisions of section 7(e)(2) of the Act.

Section 7(e)(2) of the Act provides that the term ''regular rate'' shall not be deemed to include ''payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *.'' However, since such payments are not made as compensation for the employee's hours worked in any workweek, no

part of such payments can be credited toward overtime compensation due under the Act.

### § 778.217 Reimbursement for expenses.

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) *Illustrations.* Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(2) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(3) The actual or reasonably approximate amount expended by an employee, who is traveling ''over the road'' on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(4) ''Supper money'', a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

The foregoing list is intended to be illustrative rather than exhaustive.

(c) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as ''reimbursement'' is disproportionately large, the excess amount will be included in the regular rate.

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as ''reimbursement for expenses.'' Whether the employer ''reimburses'' the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay as discussed in § 778.116. See also § 531.37(b) of this chapter.

### § 778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited

toward overtime compensation due under the Act.

(b) *Limitations on exclusion.* This provision of section 7(e)(2) deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular ''absences'' such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either ''holidays'' or ''vacations,'' or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

(c) *Failure to provide work.* The term ''failure of the employer to provide sufficient work'' is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule (as discussed in §§ 778.321 through 778.329), ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

(d) *Other similar cause.* The term ''other similar cause'' refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of ''similar causes'' are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the ''other similar cause'' category.

**§ 778.219 Pay for foregoing holidays and vacations.**

(a) *Sums payable whether employee works or not.* As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday or vacation are not required to be included in the regular rate because they are not regarded as compensation for working. Suppose an employee who is entitled to such a paid idle holiday or paid vacation foregoes his holiday or vacation and performs work for the employer on the holiday or during the vacation period. If, under the terms of his employment, he is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate. It is still not regarded as compensation for hours of work if he is otherwise compensated at his customary rate (or at a higher rate) for his work on such days. Since it is not compensation for work it may not be credited toward overtime compensation due under the Act. Two examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is $5 an hour and who usually works a 6-day 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—$240. He foregoes his vacation and works 50 hours in the week in question. He is owed $250 as his total straight-time earnings for the week, and $240 in addition as his vacation pay. Under the statute he is owed an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the payment of $240 vacation pay, but no part of the $240 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to $240 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that

vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides $240 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours' pay at his rate of $5 an hour for the Christmas holiday, foregoes his holiday and works 9 hours on that day. During the entire week he works a total of 50 hours. He is paid under his contract, $250 as straight-time compensation for 50 hours plus $40 as idle holiday pay. He is owed, under the statute, an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the holiday pay but no part of the $40 holiday pay may be credited toward statutory overtime compensation due.

(b) *Premiums for holiday work distinguished.* The example in paragraph (a)(2) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he foregoes his holiday also, under his contract, foregoes his idle holiday pay.

(1) The typical situation is one in which an employee is entitled by contract to 8 hours' pay at his rate of $5 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of $7.50 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, $67.50 (9×$7.50) for the holiday work and $205 for the other 41 hours worked in the week, a total of $272.50. Under the statute (which does not require premium pay for a holiday) he is owed $275 for a workweek of 50 hours at a rate of $5 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of $2.50 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of $10 (double time) for each hour worked on the holiday, the employee would receive, under his contract $90 (9×$10) for the holiday work in addition to $205 for the other 41 hours worked, a total of $295. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In example (2) the employee received a total of $85 attributable to the holiday: 8 hours' idle holiday pay at $5 an hour, due him whether he worked or not, and $45 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph the employee received $90 pay for working on the holiday—double time for 9 hours of work. Thus, clearly, all of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

### § 778.220 "Show-up" or "reporting" pay.

(a) *Applicable principles.* Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has

been scheduled to work, he is not provided with the expected amount of work. The amounts that may be paid under such an agreement over and above what the employee would receive if paid at his customary rate only for the number of hours worked are paid to compensate the employee for the time wasted by him in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. One of the primary purposes of such an arrangement is to discourage employers from calling their employees in to work for only a fraction of a day when they might get full-time work elsewhere. Pay arrangements of this kind are commonly referred to as ''show-up'' or ''reporting'' pay. Under the principles and subject to the conditions set forth in subpart B of this part and §§ 778.201 through 778.207, that portion of such payment which represents compensation at the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $5 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the $10 earned in the 2 hours of work on Monday but an extra 2 hours' ''show-up'' pay, or $10 by reason of this agreement. However, since this $10 in ''show-up'' pay is not regarded as compensation for hours worked, the employee's regular rate remains $5 and the overtime requirements of the Act are satisfied if he receives, in addition to the $210 straight-time pay for 42 hours and the $10 ''show-up'' payment, the sum of $5 as extra compensation for the 2 hours of overtime work on Saturday.

[46 FR 7312, Jan. 23, 1981]

### § 778.221 "Call-back" pay.

(a) *General.* In the interest of simplicity and uniformity, the principles discussed in § 778.220 are applied also with respect to typical minimum ''call-back'' or ''call-out'' payments made pursuant to employment agreements. Typically, such minimum payments consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on infrequent and sporadic occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work.

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of $5 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or $22.50, under the

call-back provision, in addition to $200 for working his regular schedule and $7.50 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to $215 pay at the $5 rate for all these hours, he has received under the agreement a premium of $2.50 for the 1 overtime hour on Monday and of $5 for the 2 hours of overtime work on the call, plus an extra sum of $7.50 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of $7.50) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra $7.50 received under the call-back provision is not regarded as paid for hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains $5, and he has received an overtime premium of $2.50 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7313, Jan. 23, 1981]

### § 778.222 Other payments similar to "call-back" pay.

The principles discussed in §§ 778.220 and 778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay, such as: (a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a ''rest period.'' The extra payment, over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked.

### § 778.223 Pay for non-productive hours distinguished.

Under the Act an employee must be compensated for all hours worked. As a general rule the term ''hours worked'' will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining ''on call'', traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on ''hours worked'') and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as ''payments not for hours worked.'' Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of ''payments made for occasional periods when no work is performed due

to * * * failure of the employer to provide sufficient work, or other similar cause'' as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of $5 for each 8–hour period during which they are ''on call'' in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent ''on call'' are not considered as hours worked. Although the payment received by such employees for such ''on call'' time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

[46 FR 7313, Jan. 23, 1981]

### § 778.224 "Other similar payments".

(a) *General*. The preceding sections have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided under section 7(e)(2) because they are not made as compensation for hours of work. Section 7(e) (2) also authorizes exclusion from the regular rate of ''other similar payments to an employee which are not made as compensation for his hours of employment.'' Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be ''similar'' in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(b) *Examples of other excludable payments*. A few examples may serve to illustrate some of the types of payments intended to be excluded as ''other similar payments'':

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.

TALENT FEES IN THE RADIO AND TELEVISION INDUSTRY

### § 778.225 Talent fees excludable under regulations.

Section 7(e)(3) provides for the exclusion from the regular rate of ''talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs.'' Regulations defining ''talent fees'' have been issued as part 550 of this chapter. Payments which accord with this definition are excluded from the regular rate.

## Subpart D—Special Problems

INTRODUCTORY

### § 778.300 Scope of subpart.

This subpart applies the principles of computing overtime to some of the problems that arise frequently.

CHANGE IN THE BEGINNING OF THE WORKWEEK

### § 778.301 Overlapping when change of workweek is made.

As stated in § 778.105, the beginning of the workweek may be changed for an employee or for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the ''old'' workweek as previously constituted and the

''new'' workweek. Thus, if the workweek in the plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

### § 778.302 Computation of overtime due for overlapping workweeks.

(a) *General rule.* When the beginning of the workweek is changed, if the hours which fall within both ''old'' and ''new'' workweeks as explained in § 778.301 are hours in which the employee does no work, his statutory compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department of Labor, as an enforcement policy, will assume that the overtime requirements of section 7 of the Act have been satisfied if computation is made as follows:

(1) Assume first that the overlapping hours are to be counted as hours worked only in the ''old'' workweek and not in the new; compute straight time and overtime compensation due for each of the 2 workweeks on this basis and total the two sums.

(2) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(3) Pay the employee an amount not less than the greater of the amounts computed by methods (1) and (2).

(b) *Application of rule illustrated.* Suppose that, in the example given in § 778.301, the employee, who receives $5 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 7, 1965. Suppose also that his last ''old'' workweek commenced at 7 a.m. on Monday, March 1, and he worked 40 hours March 1 through March 5 so that for the workweek ending March 7 he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the ''new'' workweek at 7 a.m. on March 7. If in the ''new'' workweek of Sunday, March 7, through Saturday, March 13, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13-day period. He should, therefore, be paid $237.50 (40×$5+5×$7.50) for the period of March 1 through March 7, and $175 (35×$5) for the period of March 8 through March 13.

(c) *Nonstatutory obligations unaffected.* The fact that this method of compensation is permissible under the Fair Labor Standards Act when the beginning of the workweek is changed will not alter any obligation the employer may have under his employment contract to pay a greater amount of overtime compensation for the period in question.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

## ADDITIONAL PAY FOR PAST PERIOD

### § 778.303 Retroactive pay increases.

Where a retroactive pay increase is awarded to employees as a result of collective bargaining or otherwise, it operates to increase the regular rate of pay of the employees for the period of its retroactivity. Thus, if an employee is awarded a retroactive increase of 10 cents per hour, he is owed, under the Act, a retroactive increase of 15 cents for each overtime hour he has worked during the period, no matter what the agreement of the parties may be. A retroactive pay increase in the form of a lump sum for a particular period must be prorated back over the hours of the period to which it is allocable to determine the resultant increases in the regular rate, in precisely the same manner as a lump sum bonus. For a discussion of the method of allocating bonuses based on employment in a prior period to the workweeks covered by the bonus payment, see § 778.209.

HOW DEDUCTIONS AFFECT THE REGULAR RATE

### § 778.304 Amounts deducted from cash wages—general.

(a) The word ''deduction'' is often loosely used to cover reductions in pay resulting from several causes:

(1) Deductions to cover the cost to the employer of furnishing ''board, lodging or other facilities,'' within the meaning of section 3(m) of the Act.

(2) Deductions for other items such as tools and uniforms which are not regarded as ''facilities.''

(3) Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments).

(4) Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.

(5) Deductions for disciplinary reasons.

(b) In general, where such deductions are made, the employee's ''regular rate'' is the same as it would have been if the occasion for the deduction had not arisen. Also, as explained in part 531 of this chapter, the requirements of the Act place certain limitations on the making of some of the above deductions.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

### § 778.305 Computation where particular types of deductions are made.

The regular rate of pay of an employee whose earnings are subject to deductions of the types described in paragraphs (a)(1), (2), and (3) of § 778.304 is determined by dividing his total compensation (except statutory exclusions) before deductions by the total hours worked in the workweek. (See also §§ 531.36–531.40 of this chapter.)

### § 778.306 Salary reductions in short workweeks.

(a) The reductions in pay described in § 778.304(a)(4) are not, properly speaking, ''deductions'' at all. If an employee is compensated at a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $200 for a 40-hour week, his hourly rate is $5. When he works only 36 hours he is therefore entitled to $180. The employer makes a ''deduction'' of $20 from his salary to achieve this result. The regular hourly rate is not altered.

(b) When an employee is paid a fixed salary for a workweek of variable hours (or a guarantee of pay under the provisions of section 7(f) of the Act, as discussed in §§ 778.402 through 778.414), the understanding is that the salary or guarantee is due the employee in short workweeks as well as in longer ones and ''deductions'' of this type are not made. Therefore, in cases where the understanding of the parties is not clearly shown as to whether a fixed salary is intended to cover a fixed or a variable workweek the practice of making ''deductions'' from the salary for hours not worked in short weeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

### § 778.307 Disciplinary deductions.

Where deductions as described in § 778.304(a)(5) are made for disciplinary reasons, the regular rate of an employee is computed before deductions are made, as in the case of deductions of the types in paragraphs (a) (1), (2), and (3) of § 778.304. Thus where disciplinary deductions are made from a pieceworker's earnings, the earnings at piece rates must be totaled and divided by the total hours worked to determine the regular rate before the deduction is applied. In no event may such deductions (or deductions of the type described in § 778.304(a)(2)) reduce the earnings to an average below the applicable minimum wage or cut into any part of the overtime compensation due the employee. For a full discussion of the limits placed on such deductions, see part 531 of this chapter. The principles set forth therein with relation to

deductions have no application, however, to situations involving refusal or failure to pay the full amount of wages due. See part 531 of this chapter; also § 778.306. It should be noted that although an employer may penalize an employee for lateness subject to the limitations stated above by deducting a half hour's straight time pay from his wages, for example, for each half hour, or fraction thereof of his lateness, the employer must still count as hours worked all the time actually worked by the employee in determining the amount of overtime compensation due for the workweek.

[46 FR 7314, Jan. 23, 1981]

LUMP SUM ATTRIBUTED TO OVERTIME

### § 778.308 The overtime rate is an hourly rate.

(a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under section 7(e)(5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§ 778.400 through 778.421).

(b) To qualify under section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half or two times that rate. To qualify under section 7(e)(6) or (7), the overtime rate may not be less than one and one-half times the bonafide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one-half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate for example, if the nonovertime rate is $5 per hour, the overtime rate may not be less than $7.50 but may be set at a higher arbitrary figure such as $8 per hour.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

### § 778.309 Fixed sum for constant amount of overtime.

Where an employee works a regular fixed number of hours in excess of the statutory maximum each workweek, it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.

### § 778.310 Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis. For example, an agreement that provides for the payment of a flat sum of $75 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $5 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $75 or time and one-half the employee's regular rate for all hours worked on Sunday, whichever is greater, the $75 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The

Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason, where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due.

[46 FR 7314, Jan. 23, 1981]

### § 778.311 Flat rate for special job performed in overtime hours.

(a) *Flat rate is not an overtime premium.* The same reasoning applies where employees are paid a flat rate for a special job performed during overtime hours, without regard to the time actually consumed in performance. (This situation should be distinguished from ''show-up'' and ''call-back'' pay situations discussed in §§ 778.220 through 778.222 and from payment at a rate not less than one and one-half times the applicable rate to pieceworkers for work performed during overtime hours, as discussed in §§ 778.415 through 778.421). The total amount paid must be included in the regular rate; no part of the amount may be credited toward statutory overtime compensation due.

(b) *Application of rule illustrated.* It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(1) An employment agreement calls for the payment of $5 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of $7.50 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours' pay at the rate of $7.50 per hour (a total payment of $45) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(2) Suppose an employee under such an agreement works the following schedule:

| | M | T | W | T | F | S | S |
|---|---|---|---|---|---|---|---|
| Hours within basic workday | 8 | 8 | 7 | 8 | 8 | 0 | 0 |
| Pay under contract | $40 | $40 | $35 | $40 | $40 | 0 | 0 |
| Hours outside basic workday | 2 | 2 [1] | 1 | 0 | 0 | 4 | 0 |
| Pay under contract | $15 | $45 | $7.50 | 0 | 0 | $30 | 0 |

[1] Hours spent in the performance of special work.

(3) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exclusion under section 7(e)(7) of the Act, as discussed in § 778.204. The $15 paid on Monday, the $7.50 paid on Wednesday and the $30 paid on Saturday are paid pursuant to rates which qualify as premium rates under section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is $17.50. The sum of $17.50 should be subtracted from the total of $292.50 due the employee under the employment agreement. No part of the $45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $275 must thus be divided by 48 hours to determine the regular rate—$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—$22.92. The extra compensation in the amount of $17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $22.92 owed as statutory overtime premiums. No part of the $45 payment may be so credited. The employer must pay the employee an additional $5.42 as statutory overtime pay—a total of $297.92 for the week.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7315, Jan. 23, 1981]

## ''TASK'' BASIS OF PAYMENT

### § 778.312 Pay for task without regard to actual hours.

(a) Under some employment agreements employees are paid according to

a job or task rate without regard to the number of hours consumed in completing the task. Such agreements take various forms but the two most usual forms are the following:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 ''hours'' of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the ''hours'' so credited and at one and one-half times such rate for the ''hours'' so credited in excess of 40. The number of ''hours'' credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. ''Overtime'' may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours' pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or ''task'' hours (or combination thereof) for which he received pay at the established rate. ''Overtime'' pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.

(b) These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives. Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.

(c) Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8 per day or 40 per week, they cannot qualify as overtime premiums under section 7(e) (5), (6), or (7) of the Act. They must therefore be included in the regular rate and no part of them may be credited against statutory overtime compensation due. Under plans of the second type, however, where the pay of an employee on a given day is actually controlled by the established hourly rate (because he fails to complete the task in the 8-hour period) and he is paid at one and one-half times the established rate for hours in excess of 8 hours actually worked, the premium rate paid on that day will qualify as an overtime premium under section 7(e)(5).

### § 778.313 Computing overtime pay under the Act for employees compensated on task basis.

(a) An example of the operation of a plan of the second type discussed in § 778.312 may serve to illustrate the effects on statutory overtime computations of payment on a task basis. Assume the following facts: The employment agreement establishes a basic hourly rate of $5 per hour, provides for the payment of $7.50 per hour for overtime work (in excess of the basic workday or workweek) and defines the basic workday as 8 hours, and the basic workweek as 40 hours, Monday through Friday. It further provides that the assembling of a machine constitutes a day's work. An employee who completes the assembling job in less than 8 hours will be paid 8 hours' pay at the established rate of $5 per hour and will receive pay at the ''overtime'' rate for hours worked after the completion of the task. An employee works the following hours in a particular week:

| | M | T | W | T | F | S | S |
|---|---|---|---|---|---|---|---|
| Hours spent on task | 6 | 7 | 7 | 9 | 8½ | 6 | 0 |
| Day's pay under contract | $40 | $40 | $40 | $40 | $40 | $60 | 0 |
| Additional hours | 2 | 0 | 2 | 0 | ½ | 0 | 0 |
| Additional pay under contract | $15 | 0 | $15 | $7.50 | $7.50 | 0 | 0 |

(b) In the example in paragraph (a) of this section the employee has actually worked a total of 48 hours and is owed under the contract a total of $305 for the week. The only sums which can be excluded as overtime premiums from this total before the regular rate is determined are the extra $2.50 payments for the extra hour on Thursday and Friday made because of work actually in excess of 8 hours. The payment of the other premium rates under the contract is either without regard to whether or not the hours they compensated were in excess of a bona fide daily or weekly standard or without regard to the number of overtime hours worked. Thus only the sum of $5 is excluded from the total. The remaining $300 is divided by 48 hours to determine the regular rate—$6.25 per hour. One-half this rate is due under the Act as extra compensation for each of the 8 overtime hours—$25. The $5 payment under the contract for actual excess hours may be credited and the balance—$20—is owed in addition to the $305 due under the contract.

[46 FR 7315, Jan. 23, 1981]

### § 778.314 Special situations.

There may be special situations in which the facts demonstrate that the hours for which contract overtime compensation is paid to employees working on a ''task'' or ''stint'' basis actually qualify as overtime hours under section 7(e)(5), (6), or (7). Where this is true, payment of one and one-half times an agreed hourly rate for ''task'' or ''stint'' work may be equivalent to payment pursuant to agreement of one and one-half time a piece rate. The alternative methods of overtime pay computation permitted by section 7(g)(1) or (2), as explained in §§ 778.415 through 778.421 may be applicable in such a case.

## EFFECT OF FAILURE TO COUNT OR PAY FOR CERTAIN WORKING HOURS

### § 778.315 Payment for all hours worked in overtime workweek is required.

In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act 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.

### § 778.316 Agreements or practices in conflict with statutory requirements are ineffective.

While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked. Since a lower rate cannot lawfully be set for overtime hours it is obvious that the parties cannot lawfully agree that the working time will not be paid for at all. An agreement that only the first 8 hours of work on any days or only the hours worked between certain fixed hours of the day or only the first 40 hours of any week will be counted as working time will clearly fail of its evasive purpose. An announcement by

the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee's right to compensation for work which he is actually suffered or permitted to perform.

### § 778.317 Agreements not to pay for certain nonovertime hours.

An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $5 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $7.50 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid $25 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act. Unless the employee is first paid $5 for each nonovertime hour worked, the $7.50 per hour payment purportedly for overtime hours is not in fact an overtime payment.

[46 FR 7315, Jan. 23, 1981]

### § 778.318 Productive and nonproductive hours of work.

(a) *Failure to pay for nonproductive time worked.* Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.

(b) *Compensation payable for nonproductive hours worked.* The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, as discussed in § 778.115 and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all of the first 40 hours and at a rate not less than one and one-half times this rate for all hours in excess of 40. (See § 778.415 for the alternative method of computing overtime pay on the applicable rate.) In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(c) *Compensation attributable to both productive and nonproductive hours.* The situation described in paragraph (a) of this section is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in downtime (waiting for work) will not be paid for or will be neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable maximum hours standard.

## EFFECT OF PAYING FOR BUT NOT COUNTING CERTAIN HOURS

### § 778.319 Paying for but not counting hours worked.

In some contracts provision is made for payment for certain hours, which constitute working time under the Act, coupled with a provision that these

hours will not be counted as working time. Such a provision is a nullity. If the hours in question are hours worked, they must be counted as such in determining whether more than the applicable maximum hours have been worked in the workweek. If more hours have been worked, the employee must be paid overtime compensation at not less than one and one-half times his regular rate for all overtime hours. A provision that certain hours will be compensated only at straight time rates is likewise invalid. If the hours are actually hours worked in excess of the applicable maximum hours standard, extra half-time compensation will be due regardless of any agreement to the contrary.

### § 778.320 Hours that would not be hours worked if not paid for.

In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement of the parties will be respected, if reasonable.

(a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

[46 FR 7315, Jan. 23, 1981]

## Reduction in Workweek Schedule With No Change in Pay

### § 778.321 Decrease in hours without decreasing pay—general.

Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment (except statutory exclusions) for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased.

### § 778.322 Reducing the fixed workweek for which a salary is paid.

If an employee whose maximum hours standard is 40 hours was hired at a salary of $200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn $200, so that he earns his salary at the average rate of $5.71 per hour. His regular rate thus becomes $5.71 per hour; it is no longer $5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of $200 now covers 35 hours of work and no more, the employee would be owed $5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times $5.71 ($8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive $5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours—$200, 5 hours' pay at $5.71 per hour for the 5 hours between 35 and 40—$28.55, and 1 hour's pay at $8.57 for the 1 hour in excess of 40—$8.57, or a total of $237.12 for the week.

[46 FR 7316, Jan. 23, 1981]

### § 778.323 Effect if salary is for variable workweek.

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives $200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is $5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains $7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect of deductions on the regular rate, see §§ 778.304 to 778.307.)

[46 FR 7316, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

### § 778.324 Effect on hourly rate employees.

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

### § 778.325 Effect on salary covering more than 40 hours' pay.

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was

hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $5 per hour and he is due, in addition to his salary, extra compensation of $2.50 for each hour over 40 but not over 55 and full time and one-half, or $7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $5.50 per hour for the hours not worked.

[46 FR 7316, Jan. 23, 1981]

### § 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $5 an hour and regularly worked 50 hours, earning $275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $5 per hour to $6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $285. The parties cannot, however, agree that the employee is to receive exactly $285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an ''agreed'' number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

[46 FR 7316, Jan. 23, 1981]

### § 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at $6 per hour for all workweeks in which the employee worked 40 hours or less, approximately $5.93 per hour for workweeks of 41 hours, approximately $5.86 for workweeks of 42 hours, approximately $5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime

at these ''rates'') $6 an hour regardless of the number of overtime hours worked. This is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See *Walling* v. *Green Head Bit & Supply Co.*, 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, $6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide $6 rate usually working 50 hours and taking home $330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to $7.65 for such weeks so that their total compensation is $328.95 for a 42-hour week the question may properly be asked, when they return to the 50–hour week, whether the $6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra $1.05 or is their ''regular'' rate really now $7.65 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

[46 FR 7317, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

### § 778.328 Plan for gradual permanent reduction in schedule.

In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from say, 48 hours to 40 hours, an agreement is entered into with a view to lessening the shock caused by the expected reduction in take-home wages. The agreement may provide for a rising scale of rates as the workweek is gradually reduced. The varying rates established by such agreement will be recognized as bona fide in the weeks in which they are respectively operative provided that (a) the plan is bona fide and there is no effort made to evade the overtime requirements of the Act; (b) there is a clear downward trend in the duration of the workweek throughout the period of the plan even though fluctuations from week-to-week may not be constantly downward; and (c) the various rates are operative for substantial periods under the plan and do not vary from week-to-week in accordance with the number of hours which any particular employee or group happens to work.

### § 778.329 Alternating workweeks of different fixed lengths.

In some cases an employee is hired on a salary basis with the understanding that his weekly salary is intended to cover the fixed schedule of hours (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. For example, many offices operate with half staff on Saturdays and, in consequence, employees are hired at a fixed salary covering a fixed working schedule of 7 hours a day Monday through Friday and 5 hours on alternate Saturdays. The parties agree that extra compensation is to be paid for all hours worked in excess of the schedule in either week at the base rate for hours between 35 and 40 in the short week and at time and one-half such rate for hours in excess of 40 in all weeks. Such an arrangement results in the employee's working at two different rates of pay—one thirty-fifth of the salary in short workweeks and one-fourtieth of the salary in the longer weeks. If the provisions of such a contract are followed, if the nonovertime hours are compensated in full at the applicable regular rate in each week and overtime compensation is properly computed for hours in excess of 40 at time and one-half the rate applicable in the particular workweek, the overtime requirements of the Fair Labor Standards Act will be met. While this situation bears some resemblance to the one discussed in § 778.327 there is this significant difference; the arrangement is permanent, the length of the respective workweeks and the rates for such weeks are fixed on a permanent-schedule basis far in advance and are

therefore not subject to the control of the employer and do not vary with the fluctuations in business. In an arrangement of this kind, if the employer required the employee to work on Saturday in a week in which he was scheduled for work only on the Monday through Friday schedule, he would be paid at his regular rate for all the Saturday hours in addition to his salary.

PRIZES AS BONUSES

**§ 778.330 Prizes or contest awards generally.**

All compensation (except statutory exclusions) paid by or on behalf of an employer to an employee as remuneration for employment must be included in the regular rate, whether paid in the form of cash or otherwise. Prizes are therefore included in the regular rate if they are paid to an employee as remuneration for employment. If therefore it is asserted that a particular prize is not to be included in the regular rate, it must be shown either that the prize was not paid to the employee for employment, or that it is not a thing of value which is part of wages.

**§ 778.331 Awards for performance on the job.**

Where a prize is awarded for the quality, quantity or efficiency of work done by the employee during his customary working hours at his normal assigned tasks (whether on the employer's premises or elsewhere) it is obviously paid as additional remuneration for employment. Thus prizes paid for cooperation, courtesy, efficiency, highest production, best attendance, best quality of work, greatest number of overtime hours worked, etc., are part of the regular rate of pay. If the prize is paid in cash, the amount paid must be allocated (for the method of allocation see § 778.209) over the period during which it was earned to determine the resultant increase in the average hourly rate for each week of the period. If the prize is merchandise, the cost to the employer is the sum which must be allocated. Where the prize is either cash or merchandise, with the choice left the employee, the amount to be allocated is the amount (or the cost) of the actual prize he accepts.

**§ 778.332 Awards for activities not normally part of employee's job.**

(a) Where the prize is awarded for activities outside the customary working hours of the employee, beyond the scope of his customary duties or away from the employer's premises, the question of whether the compensation is remuneration for employment will depend on such factors as the amount of time, if any, spent by the employee in competing, the relationship between the contest activities and the usual work of the employee, whether the competition involves work usually performed by other employees for employers, whether an employee is specifically urged to participate or led to believe that he will not merit promotion or advancement unless he participates.

(b) By way of example, a prize paid for work performed in obtaining new business for an employer would be regarded as remuneration for employment. Although the duties of the employees who participate in the contest may not normally encompass this type of work, it is work of a kind normally performed by salesmen for their employers, and the time spent by the employee in competing for such a prize (whether successfully or not) is working time and must be counted as such in determining overtime compensation due under the Act. On the other hand a prize or bonus paid to an employee when a sale is made by the company's sales representative to a person whom he recommended as a good sales prospect would not be regarded as compensation for services if in fact the prize-winner performed no work in securing the name of the sales prospect and spent no time on the matter for the company in any way.

**§ 778.333 Suggestion system awards.**

The question has been raised whether awards made to employees for suggestions submitted under a suggestion system plan are to be regarded as part of the regular rate. There is no hard and fast rule on this point as the term ''suggestion system'' has been used to describe a variety of widely differing plans. It may be generally stated, however, that prizes paid pursuant to a bona fide suggestion system plan may be excluded from the regular rate at

least in situations where it is the fact that:

(a) The amount of the prize has no relation to the earnings of the employee at his job but is rather geared to the value to the company of the suggestion which is submitted; and

(b) The prize represents a bona fide award for a suggestion which is the result of additional effort or ingenuity unrelated to and outside the scope of the usual and customary duties of any employee of the class eligible to participate and the prize is not used as a substitute for wages; and

(c) No employee is required or specifically urged to participate in the suggestion system plan or led to believe that he will not merit promotion or advancement (or retention of his existing job) unless he submits suggestions; and

(d) The invitation to employees to submit suggestions is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on or develop; and

(e) There is no time limit during which suggestions must be submitted; and

(f) The employer has, prior to the submission of the suggestion by an employee, no notice or knowledge of the fact that an employee is working on the preparation of a suggestion under circumstances indicating that the company approved the task and the schedule of work undertaken by the employee.

## Subpart E—Exceptions From the Regular Rate Principles

COMPUTING OVERTIME PAY ON AN ''ESTABLISHED'' RATE

### § 778.400 The provisions of section 7(g)(3) of the Act.

Section 7(g)(3) of the Act provides the following exception from the provisions of section 7(a):

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection:

* * * * *

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (1) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

### § 778.401 Regulations issued under section 7(g)(3).

Regulations issued pursuant to section 7(g) (3) of the Act are published as Part 548 of this chapter. Payments made in conformance with these regulations satisfy the overtime pay requirements of the Act.

GUARANTEED COMPENSATION WHICH INCLUDES OVERTIME PAY

### § 778.402 The statutory exception provided by section 7(f) of the Act.

Section 7(f) of the Act provides the following exception from the provisions of section 7(a):

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

**§ 778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).**

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§ 778.207, 778.321–778.329, and 778.308–778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

**§ 778.404 Purposes of exemption.**

The exception to the requirements of section 7(a) provided by section 7(f) of the Act is designed to provide a means whereby the employer of an employee whose duties necessitate irregular hours of work and whose total wages if computed solely on an hourly rate basis would of necessity vary widely from week to week, may guarantee the payment, week-in, week-out, of at least a fixed amount based on his regular hourly rate. Section 7(f) was proposed and enacted in 1949 with the stated purpose of giving express statutory validity, subject to prescribed limitations, to a judicial ''gloss on the Act'' by which an exception to the usual rule as to the actual regular rate had been recognized by a closely divided Supreme Court as permissible with respect to employment in such situations under so-called ''Belo'' contracts. See *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670, rehearing denied 164 F. 2d 678 (C.A. 2); *Walling* v. *A. H. Belo Co.*, 316 U.S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17; 95 Cong. Rec. 11893, 12365, 14938, A2396, A5233, A5476. Such a contract affords to the employee the security of a regular weekly income and benefits the employer by enabling him to anticipate and control in advance at least some part of his labor costs. A guaranteed wage plan also provides a means of limiting overtime computation costs so that wide leeway is provided for working employees overtime without increasing the cost to the employer, which he would otherwise incur under the Act for working employees in excess of the statutory maximum hours standard. Recognizing both the inherent advantages and disadvantages of guaranteed wage plans, when viewed in this light, Congress sought to strike a balance between them which would, on the one hand, provide a feasible method of guaranteeing pay to employees who needed this protection without, on the other hand, nullifying the overtime requirements of the Act. The provisions of section 7(f) set forth the conditions under which, in the view of Congress, this may be done. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability section 7(a).

**§ 778.405 What types of employees are affected.**

The type of employment agreement permitted under section 7(f) can be made only with (or by his representatives on behalf of) an employee whose ''duties * * * necessitate irregular hours of work.'' It is clear that no contract made with an employee who works a regularly scheduled workweek or whose schedule involves alternating fixed workweeks will qualify under this subsection. Even if an employee does in fact work a variable workweek, the question must still be asked whether his duties necessitate irregular hours of work. The subsection is not designed to apply in a situation where the hours of work vary from week to week at the discretion of the employer or the employee, nor to a situation where the employee works an irregular number of hours according to a predetermined schedule. The nature of the employee's

duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week. Furthermore, for the reasons set forth in § 778.406, his duties must necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours. Some examples of the types of employees whose duties may necessitate irregular hours of work would be outside buyers, on-call servicemen, insurance adjusters, newspaper reporters and photographers, propmen, script girls and others engaged in similar work in the motion picture industry, firefighters, troubleshooters and the like. There are some employees in these groups whose hours of work are conditioned by factors beyond the control of their employer or themselves. However, the mere fact that an employee is engaged in one of the jobs just listed, for example, does not mean that his duties necessitate irregular hours. It is always a question of fact whether the particular employee's duties do or do not necessitate irregular hours. Many employees not listed here may qualify. Although office employees would not ordinarily qualify, some office employees whose duties compel them to work variable hours could also be in this category. For example, the confidential secretary of a top executive whose hours of work are irregular and unpredictable might also be compelled by the nature of her duties to work variable and unpredictable hours. This would not ordinarily be true of a stenographer or file clerk, nor would an employee who only rarely or in emergencies is called upon to work outside a regular schedule qualify for this exemption.

### § 778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.

Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called ''Belo'' contracts appropriate and so fails to meet the requirements of section 7(f) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The ''security of a regular weekly income'' which the Supreme Court viewed as an important feature of the ''Belo'' wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of nonovertime work contemplated by section 7(a). It is such employees whose duties necessitate ''irregular hours'' within the meaning of section 7(f) and whose ''security of a regular weekly income'' can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b) (1) and (2), the benefits that might inure to employees

from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not ''irregular'' within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See *Goldberg* v. *Winn-Dixie Stores* (S.D. Fla.), 15 WH Cases 641; *Wirtz* v. *Midland Finance Co.* (N.D. Ga.), 16 WH Cases 141; *Trager* v. *J. E. Plastics Mfg. Co.* (S.D.N.Y.), 13 WH Cases 621; *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670; *Foremost Dairies* v. *Wirtz*, 381 F. 2d 653 (C.A. 5).)

**§ 778.407 The nature of the section 7(f) contract.**

Payment must be made ''pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees.'' It cannot be a one-sided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be ''bona fide.'' This implies that both the making of the contract and the settlement of its terms were done in good faith.

**§ 778.408 The specified regular rate.**

(a) To qualify under section 7(f), the contract must specify ''a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable).'' The word ''regular'' describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (*Walling* v. *A. H. Belo Company*, 316 U.S. 624, and *Walling* v. *Halliburton Oil Well Cementing Company*, 331 U.S.17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a ''regular rate,'' indicates that this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee's compensation.

(c) The rate specified in the contract must also be a ''regular'' rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of $5 per hour in addition to which he has received a cost-of-living bonus of $7 a week and a 2-percent commission on sales which averaged $70 per week. It is now proposed to employ him under a guaranteed pay contract which

specifies a rate of $5 per hour and guarantees $200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the ''regular rate'' as defined in section 7(e). It is also apparent that the $5 rate specified in the contract is not a ''regular rate'' under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a ''regular rate'' under section 7(f) the rate specified in the contract together with the guarantee must be the actual measure of the regular wages which the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, by way of extra premiums for work on holidays, or for extraordinarily excessive work (such as for work in excess of 16 consecutive hours in a day, or for work in excess of 6 consecutive days of work), year-end bonuses and similar payments which are not regularly paid as part of the employee's usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7317, Jan. 23, 1981]

### § 778.409 Provision for overtime pay.

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those covered by the guarantee, must be compensated at one and one-half times (or a higher multiple) of the specified regular rate. A contract which guaranteed a weekly salary of $169, specified a rate of $3.60 per hour, and provided that not less than one and one-half times such rate would be paid only for all hours up to and including 46⅔ hours would not qualify under this section. The contract must provide for payment at time and one-half (or more) for all hours in excess of the applicable maximum hours standard in any workweek. A contract may provide a specific overtime rate greater than one and one-half times the specified rate, for example, double time. If it does provide a specific overtime rate it must provide that such rate will be paid for all hours worked in excess of the applicable maximum hours standard.

[46 FR 7317, Jan. 23, 1981]

### § 778.410 The guaranty under section 7(f).

(a) The statute provides that the guaranty must be a weekly guaranty. A guaranty of monthly, semimonthly, or biweekly pay (which would allow averaging wages over more than one workweek) does not qualify under this paragraph. Obviously guarantees for periods less than a workweek do not qualify. Whatever sum is guaranteed must be paid in full in all workweeks, however short in which the employee performs any amount of work for the employer. The amount of the guaranty may not be subject to proration or deduction in short weeks.

(b) The contract must provide a guaranty of pay. The amount must be specified. A mere guaranty to provide work for a particular number of hours does not qualify under this section.

(c) The pay guaranteed must be ''for not more than 60 hours based on the rate so specified.''

### § 778.411 Sixty-hour limit on pay guaranteed by contract.

The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standard and at the specified overtime rate for the additional hours, not to exceed a total of 60 hours. Thus, if the maximum hours standard is 40 hours and the specified regular rate is $5 an hour the weekly guaranty cannot be greater than $350. This does not mean that an

employee employed pursuant to a guaranteed pay contract under this section may not work more than 60 hours in any week; it means merely that pay in an amount sufficient to compensate for a greater number of hours cannot be covered by the guaranteeed pay. If he works in excess of 60 hours he must be paid, for each hour worked in excess of 60, overtime compensation as provided in the contract, in addition to the guaranteed amount.

[46 FR 7317, Jan. 23, 1981]

### § 778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.

While the guaranteed pay may not cover more than 60 hours, the contract may guarantee pay for a lesser number of hours. In order for a contract to qualify as a bona fide contract for an employee whose duties necessitate irregular hours of work, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be wholly fictitious and therefore would not be a ''regular rate'' as discussed above. When the parties enter into a guaranteed pay contract, therefore, they should determine, as far as possible, the range of hours the employee is likely to work. In deciding the amount of the guaranty they should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks. In both *Walling* v. *A. H. Belo Co.*, 316 U.S. 624 and *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17 the court found that the employees did actually exceed the number of hours (60 and 84 respectively) for which pay was guaranteed on fairly frequent occasions so that the hourly rate stipulated in the contract in each case was often operative and did actually control the compensation received by the employees. In cases where the guaranteed number of hours has not been exceeded in a significant number of workweeks, this fact will be weighed in the light of all the other facts and circumstances pertinent to the agreement before reaching a conclusion as to its effect on the validity of the pay arrangement. By a periodic review of the actual operation of the contract the employer can determine whether a stipulated contract rate reasonably expected by the parties to be operative in a significant number of workweeks is actually so operative or whether adjustments in the contract are necessary to ensure such an operative rate.

### § 778.413 Guaranty must be based on rates specified in contract.

The guaranty of pay must be ''based on the rate so specified,'' in the contract. If the contract specifies a regular rate of $5 and an overtime rate of $7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be $275, if it is to be based on the rates so specified. A guaranty of $290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, $290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

[46 FR 7318, Jan. 23, 1981]

### § 778.414 "Approval" of contracts under section 7(f).

(a) There is no requirement that a contract, to qualify under section 7(f), must be approved by the Secretary of Labor or the Administrator. The question of whether a contract which purports to qualify an employee for exemption under section 7(f) meets the

requirements is a matter for determination by the courts. This determination will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder. It will turn on the question of whether the duties of the employee in fact necessitate irregular hours, whether the rate specified in the contract is a ''regular rate''—that is, whether it was designed to be actually operative in determining the employee's compensation—whether the contract was entered into in good faith, whether the guaranty of pay is in fact based on the regular and overtime rates specified in the contract. While the Administrator does have the authority to issue an advisory opinion as to whether or not a pay arrangement accords with the requirements of section 7(f) he can do so only if he has knowledge of these facts.

(b) As a guide to employers, it may be helpful to describe a fact situation in which the making of a guaranteed salary contract would be appropriate and to set forth the terms of a contract which would comply, in the circumstances described, with the provisions of section 7(f).

*Example:* An employee is employed as an insurance claims adjuster; because of the fact that he must visit claimants and witnesses at their convenience, it is impossible for him or his employer to control the hours which he must work to perform his duties. During the past 6 months his weekly hours of work have varied from a low of 30 hours to a high of 58 hours. His average workweek for the period was 48 hours. In about 80 percent of the workweeks he worked less than 52 hours. It is expected that his hours of work will continue to follow this pattern. The parties agree upon a regular rate of $5 per hour. In order to provide for the employee the security of a regular weekly income the parties further agree to enter into a contract which provides a weekly guaranty of pay. If the applicable maximum hours standard is 40 hours, guaranty of pay for a workweek somewhere between 48 hours (his average week) and 52 would be reasonable. In the circumstances described the following contract would be appropriate.

The X Company hereby agrees to employ John Doe as a claims adjuster at a regular hourly rate of pay of $5 per hour for the first 40 hours in any workweek and at the rate of $7.50 per hour for all hours in excess of 40 in any workweek, with a guarantee that John Doe will receive, in any week in which he performs any work for the company, the sum of $275 as total compensation, for all work performed up to and including 50 hours in such workweek.

(c) The situation described in paragraph (b) of this section is merely an example and nothing herein is intended to imply that contracts which differ from the example will not meet the requirements of section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

## COMPUTING OVERTIME PAY ON THE RATE APPLICABLE TO THE TYPE OF WORK PERFORMED IN OVERTIME HOURS (SECS. 7(G) (1) AND (2))

### § 778.415 The statutory provisions.

Sections 7(g) (1) and (2) of the Act provide:

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection:

(1) In the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) In the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours;

* * * * *

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

**§ 778.416 Purpose of provisions.**

The purpose of the provisions set forth in § 778.415 is to provide an exception from the requirement of computing overtime pay at not less than one and one-half times the regular rate for hours worked in excess of the applicable maximum hours standard for a particular workweek and to allow, under specified conditions, a simpler method of computing overtime pay for employees paid on the basis of a piece rate, or at a variety of hourly rates or piece rates, or a combination thereof. This provision is not designed to exclude any group of employees from the overtime benefits of the Act. The intent of the provision is merely to simplify the method of computation while insuring the receipt by the affected employees of substantially the same amount of overtime compensation.

**§ 778.417 General requirements of section 7(g).**

The following general requirements must be met in every case before the overtime computation authorized under section 7(g)(1) or (2) may be utilized.

(a) First, in order to insure that the method of computing overtime pay permitted in this section will not in any circumstances be seized upon as a device for avoiding payment of the minimum wage due for each hour, the requirement must be met that employee's average hourly earnings for the workweek (exclusive of overtime pay and of all other pay which is excluded from the regular rate) are not less than the minimum. This requirement insures that the employer cannot pay subminimum nonovertime rates with a view to offsetting part of the compensation earned during the overtime hours against the minimum wage due for the workweek.

(b) Second, in order to insure that the method of computing overtime pay permitted in this section will not be used to circumvent or avoid the payment of proper overtime compensation due on other sums paid to employees, such as bonuses which are part of the regular rate, the section requires that extra overtime compensation must be properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

**§ 778.418 Pieceworkers.**

(a) Under section 7(g)(1), an employee who is paid on the basis of a piece rate for the work performed during nonovertime hours may agree with his employer in advance of the performance of the work that he shall be paid at a rate not less than one and one-half times this piece rate for each piece produced during the overtime hours. No additional overtime pay will be due under the Act provided that the general conditions discussed in § 778.417 are met and:

(1) The piece rate is a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7);

(3) The number of overtime hours for which such overtime piece rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek; and

(4) The compensation paid for the overtime hours is at least equal to pay at one and one-half times the applicable minimum rate for the total number of hours worked in excess of the applicable maximum hours standard.

(b) The piece rate will be regarded as bona fide if it is the rate actually paid for work performed during the nonovertime hours and if it is sufficient to yield at least the minimum wage per hour.

(c) If a pieceworker works at two or more kinds of work for which different straight time piece rates have been established, and if by agreement he is paid at a rate not less than one and one-half whichever straight time piece rate is applicable to the work performed during the overtime hours, such piece rate or rates must meet all the tests set forth in this section and the general tests set forth in § 778.417 in order to satisfy the overtime requirements of the Act under section 7(g) (2).

**§ 778.419 Hourly workers employed at two or more jobs.**

(a) Under section 7(g)(2) an employee who performs two or more different kinds of work, for which different

straight time hourly rates are established, may agree with his employer in advance of the performance of the work that he will be paid during overtime hours at a rate not less than one and one-half times the hourly nonovertime rate established for the type of work he is performing during such overtime hours. No additional overtime pay will be due under the act provided that the general requirements set forth in § 778.417 are met and;

(1) The hourly rate upon which the overtime rate is based in a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7); and

(3) The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard.

(b) An hourly rate will be regarded as a bona fide rate for a particular kind of work it is equal to or greater than the applicable minimum rate therefor and if it is the rate actually paid for such work when performed during nonovertime hours.

### § 778.420 Combined hourly rates and piece rates.

Where an employee works at a combination of hourly and piece rates, the payment of a rate not less than one and one-half times the hourly or piece rate applicable to the type of work being performed during the overtime hours will meet the overtime requirements of the Act if the provisions concerning piece rates (as discussed in § 778.418) and those concerning hourly rates (as discussed in § 778.419) are respectively met.

### § 778.421 Offset hour for hour.

Where overtime rates are paid pursuant to statute or contract for hours in excess of 8 in a day, or in excess of the applicable maximum hours standard, or in excess of the employees' normal working hours or regular working hours (as under section 7(e)(5) or for work on ''special days'' (as under section 7(e)(6), or pursuant to an applicable employment agreement for work outside of the hours established in good faith by the agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the applicable maximum hours standard) (under section 7(e) (7), the requirements of section 7(g) (1) and 7(g)(2) will be met if the number of such hours during which overtime rates were paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek. It is not necessary to determine whether the total amount of compensation paid for such hours equals or exceeds the amount of compensation which would be due at the applicable rates for work performed during the hours after the applicable maximum in any workweek.

## Subpart F—Pay Plans Which Circumvent the Act

DEVICES TO EVADE THE OVERTIME REQUIREMENTS

### § 778.500 Artificial regular rates.

(a) Since the term *regular rate* is defined to include all remuneration for employment (except statutory exclusions) whether derived from hourly rates, piece rates, production bonuses or other sources, the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means. The established hourly rate is the ''regular rate'' to an employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial ''regular'' rate will not result in compliance with the overtime provisions of the Act.

(b) It may be helpful to describe a few schemes that have been attempted and to indicate the pitfalls inherent in the adoption of such schemes. The device of the varying rate which decreases as the length of the workweek increases has already been discussed in §§ 778.321 through 778.329. It might be well, however, to re-emphasize that the hourly rate paid for the identical work during the hours in excess of the applicable maximum hours standard cannot be

lower than the rate paid for the non-overtime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. It has been pointed out that, except in limited situations under contracts which qualify under section 7(f), it is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

(c) Where the employee is hired at a low hourly rate supplemented by facilities furnished by the employer, bonuses (other than those excluded under section 7(e)), commissions, pay ostensibly (but not actually) made for idle hours, or the like, his regular rate is not the hourly rate but is the rate determined by dividing his total compensation from all these sources in any workweek by the number of hours worked in the week. Payment of overtime compensation based on the hourly rate alone in such a situation would not meet the overtime requirements of the Act.

(d) One scheme to evade the full penalty of the Act was that of setting an arbitrary low hourly rate upon which overtime compensation at time and one-half would be computed for all hours worked in excess of the applicable maximum hours standard; coupled with this arrangement was a guarantee that if the employee's straight time and overtime compensation, based on this rate, fell short, in any week, of the compensation that would be due on a piece-rate basis of x cents per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it never (or seldom) was operative. This scheme was found by the Supreme Court to be violative of the overtime provisions of the Act in the case of *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 427. The regular rate of the employee involved was found to be the quotient of total piece-rate earnings paid in any week divided by the total hours worked in such week.

(e) The scheme is no better if the employer agrees to pay straight time and overtime compensation on the arbitrary hourly rates and to make up the difference between this total sum and the piece-rate total in the form of a bonus to each employee. (For further discussion of the refinements of this plan, see §§ 778.502 and 778.503.)

### § 778.501 The "split-day" plan.

(a) Another device designed to evade the overtime requirements of the Act was a plan known as the ''Poxon'' or ''split-day'' plan. Under this plan the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the ''straight time'' portion of the day and the other the ''overtime'' portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as the regular rate: ''time and one-half'' based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $5 per hour under a contract which provides for the payment of so-called ''overtime'' for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive $20 for the first 4 hours and $30 for the remaining 4 hours; and a total of $50 for 8 hours. (This is exactly what he would receive at the straight time rate of $6.25 per hour.) On the sixth 8-hour day the employee likewise receives $50 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at ''overtime'' rates for 20 hours of the workweek.

(b) Such a division of the normal 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of $5 an hour and the alleged overtime rate of $7.50 per hour is not paid for overtime work. It is not geared either to hours ''in excess of the employee's normal working hours or regular working hours'' (section 7(e)(5) or

for work ''outside of the hours established in good faith * * * as the basic, normal, or regular workday'' (section 7(e) (7)) and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is $6.25 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard. This rule was settled by the Supreme Court in the case of *Walling* v. *Helmerich & Payne*, 323 U.S. 37, and its validity has been reemphasized by the definition of the term ''regular rate'' in section 7(e) of the Act as amended.

[46 FR 7318, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

PSEUDO-BONUSES

### § 778.502 Artificially labeling part of the regular wages a "bonus".

(a) The term ''bonus'' is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract.

(b) For example, if an employer has agreed to pay an employee $300 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the $300 salary by the number of hours worked in the week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same $300 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of $4.80 an hour, overtime compensation at $7.20 per hour and labels the balance a ''bonus'' (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this ''bonus'' by prorating it back over the hours of the workweek. Overtime compensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(1) In the first week the employee whose applicable maximum hours standard is 40 hours, works 40 hours and receives $300. The books show he has received $192 (40 hours×$4.80 an hour) as wages and $108 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives $300. The books show he has received $192 for the first 40 hours and $36 (5 hours×$7.20 an hour) for the 5 hours over 40, or a total of $228 as wages, and the balance as a bonus of $72. Overtime compensation is then computed by the employer by dividing $72 by 45 hours to discover the average hourly increase resulting from the bonus—$1.60 per hour—and half this rate is paid for the 5 overtime hours—$4. This is improper. The employee's regular rate in this week is $6.67 per hour. He is owed $316.85 not $304.

(3) In the third week the employee works 50 hours and is paid $300. The books show that the employee received $192 for the first 40 hours and $72 (10 hours×$7.20 per hour) for the 10 hours over 40, for a total of $264 and the balance as a bonus of $36. Overtime pay due on the ''bonus'' is found to be $3.60. This is improper. The employee's regular rate in this week is $6 and he is owed $330, not $303.60.

(d) Similar schemes have been devised for piece-rate employees. The method is the same. An employee is assigned an arbitrary hourly rate (usually the minimum) and it is agreed that his straight-time and overtime earnings will be computed on this rate but that if these earnings do not amount to the sum he would have earned had his earnings been computed on a piece-rate basis of ''x'' cents per piece, he will be paid the difference as a ''bonus.'' The subterfuge does not serve to conceal the fact that this employee is actually compensated on a piece-rate basis, that there is no bonus and his regular rate is the quotient of piece-rate earnings divided by hours

worked (*Walling* v. *Youngerman-Reynolds Hardwood Company*, 325 U.S. 419).

(e) The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply.

[33 FR 986, Jan. 26, 1968; 33 FR 3172, Feb. 20, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

### § 778.503 Pseudo "percentage bonuses."

As explained in § 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act's overtime requirements, if it is paid unconditionally. Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. Some bonuses, however, although expressed as a percentage of both straight time and overtime wages, are in fact a sham. Such bonuses, like the bonuses described in § 778.502 of this part, are generally separated out of a fixed weekly wage and usually decrease in amount in direct proportion to increases in the number of hours worked in a week in excess of 40. The hourly rate purportedly paid under such a scheme is artificially low, and the difference between the wages paid at the hourly rate and the fixed weekly compensation is labeled a percentage of wage ''bonus.''

*Example:* An employer's wage records show an hourly rate of $5.62 per hour, and an overtime rate of one and one-half times that amount, or $8.43 per hour. In addition, the employer pays an alleged percentage of wage bonus on which no additional overtime compensation is paid:

| | |
|---|---|
| Week 1—40 hours worked: | |
| 40 hours at $5.62 per hour | $224.80 |
| Percentage of total earnings bonus at 33.45% of $224.80 | 75.20 |
| Total | 300.00 |
| Week 2—43 hours worked: | |
| 40 hours at $5.62 per hour | 224.80 |
| 3 hours at $8.43 per hour | 25.29 |
| Subtotal | 250.09 |
| Percentage of total earnings bonus at 19.96% of $250.09 | 49.91 |
| Total | 300.00 |
| Week 3—48 hours worked: | |
| 40 hours at $5.62 per hour | 224.80 |
| 8 hours at $8.43 per hour | 67.44 |
| Subtotal | 292.24 |
| Percentage of total earnings bonus at 2.66% of $292.24 | 7.76 |
| Total | 300.00 |

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly $300 per week, no matter how many hours the employee works. The employee's regular rate is $300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

[46 FR 7319, Jan. 23, 1981]

## Subpart G—Miscellaneous

### § 778.600 Veterans' subsistence allowances.

Subsistence allowances paid under Public Law 346 (commonly known as the G.I. bill of rights) to a veteran employed in on-the-job training program work may not be used to offset the wages to which he is entitled under the Fair Labor Standards Act. The subsistence allowances provided by Public Law 346 for payment to veterans are not paid as compensation for services rendered to an employer nor are they intended as subsidy payments for such employer. In order to qualify as wages under either section 6 or section 7 of the Act, sums paid to an employee must be paid by or on behalf of the employer. Since veterans' subsistence allowances are not so paid, they may not be used to make up the minimum wage or overtime pay requirements of the Act nor are they included in the regular rate of pay under section 7.

### § 778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital and residential care establishment employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a workweek basis. It permits a 14-day period to be established for the purpose of

computing overtime compensation by an agreement or understanding between an employer engaged in the operation of a hospital or residential care establishment, and any of his employees employed in connection therewith. The exemption provided by section 7(j) applies:

if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive days for purposes of overtime computation and if, for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(b) *Conditions for application of exemption.* As conditions for use of the 14-day period in lieu of the workweek in computing overtime, section 7(j) requires, first, an agreement or understanding between the employer and the employee before performance of the work that such period is to be used, and second, the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate for all hours worked in excess of eight in any workday within such period and in excess of 80 during the period as a whole.

(c) *The agreement or understanding.* The agreement or understanding between the employer and employee to use the 14-day period for computing overtime must be entered into before the work to which it is intended to apply is performed. It may be arrived at directly with the employee or through his representative. It need not be in writing, but if it is not, a special record concerning it must be kept as required by part 516 of this chapter. The 14-day period may begin at any hour of any day of the week; it need not commence at the beginning of a calendar day. It consists of 14 consecutive 24-hour periods, at the end of which a new 14-day period begins. The election to use the 14-day period in lieu of the workweek must, like selection of an employee's workweek (§ 778.105) be with the intent to use such period permanently or for a substantial period of time. Changes from such period to the workweek and back again to take advantage of less onerous overtime pay liabilities with respect to particular work schedules under one system than under the other are not permissible.

(d) *Payment for overtime under the special provisions.* If the parties have the necessary agreement or understanding to use the 14-day period, computation of overtime pay on the workweek basis as provided in section 7(a) is not required so long as the employee receives overtime compensation at a rate not less than one and one-half times his regular rate of pay ''for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period.'' Such compensation is required for all hours in such period in excess of eight in any workday or workdays therein which are worked by the employee, whether or not more than 80 hours are worked in the period. The first workday in the period, for purposes of this computation, begins at the same time as the 14-day period and ends 24 hours later. Each of the 13 consecutive 24-hour periods following constitutes an additional workday of the 14-day period. Overtime compensation at the prescribed time and one-half rate is also required for all hours worked in excess of 80 in the 14-day period, whether or not any daily overtime is worked during the first 80 hours. However, under the provisions of section 7(h) and 7(e)(5) of the Act, any payments at the premium rate for daily overtime hours within such period may be credited toward the overtime compensation due for overtime hours in excess of 80.

(e) *Use of 14-day period in lieu of workweek.* Where the 14-day period is used as authorized in section 7(j), such period is used in lieu of the workweek in computing the regular rate of pay of employees to whom it applies (i.e., those of the hospital's or residential care establishment's employees with whom the employer has elected to enter into the necessary agreement or understanding as explained in paragraph (c) of this section). With this exception, the computation of the regular rate and the application of statutory exclusions therefrom is governed by

the general principles set forth in this part 778.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7319, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

### § 778.602 Special overtime provisions under section 7(b).

(a) *Daily and weekly overtime standards.* The general overtime pay requirements of the Act provide for such pay only when the number of hours worked exceeds the standard specified for the workweek; no overtime compensation on a daily basis is required. However, section 7 of the Act, in subsection (b), provides certain partial exemptions from the general overtime provisions, each of which is conditioned upon the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate of pay for his hours worked in the workweek in excess of daily, as well as weekly, standards specified in the subsection. Under these provisions, when an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which such an 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 8.

(b) *Standards under section 7(b).* The partial exemptions provided by section 7(b) apply to an employee under the conditions specified in clause (1), (2), or (3) of the subsection ''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.'' As an example, suppose an employee is employed under the other conditions specified for an exemption under section 7(b) at an hourly rate of $5.20 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: Daily, 5 (hours over 12); weekly, 12 (hours over 56).

Since the weekly overtime hours are greater, the employee is entitled to pay for 12 hours at $7.80 an hour (1½×$5.20), a total of $93.60 for the overtime hours, and to pay at his regular rate for the remaining 56 hours (56×$5.20) in the amonut of $291.20 or a total of $384.80 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 no 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×$5.20=$39) plus the pay at his regular rate for the remaining 55 hours (55×$5.20=$286), making a total of $325 due him for the week.

[33 FR 986, Jan. 26, 1968, as amended at 34 FR 144, Jan. 4, 1969; 46 FR 7319, Jan. 23, 1981]

### § 778.603 Special overtime provisions for certain employees receiving remedial education under section 7(q).

Section 7(q) of the Act, enacted as part of the 1989 Amendments, provides an exemption from the overtime pay requirements for time spent by certain employees who are receiving remedial education. The exemption provided by section 7(q), as implemented by these regulations, allows any employer to require that an employee spend up to 10 hours in the aggregate in any workweek in remedial education without payment of overtime compensation provided that the employee lacks a high school diploma or educational attainment at the eighth-grade level; the remedial education is designed to provide reading and other basic skills at an eighth-grade level or below, or to fulfill the requirements for a high school diploma or General Educational Development (GED) certificate; and the remedial education does not include job-specific training. Employees must be compensated at their regular rate of pay for the time spent receiving such remedial education. The employer must maintain a record of the hours

that an employee is engaged each workday and each workweek in receiving remedial education, and the compensation paid each pay period for the time so engaged, as described in 29 CFR 516.34. The remedial education must be conducted during discrete periods of time set aside for such a program, and, to the maximum extent practicable, away from the employee's normal work station. An employer has the burden to establish compliance with all applicable requirements of this special overtime provision as set forth in section 7(q) of the Act and in this section of the regulations. Section 7(q) is solely an exemption from the overtime provisions of section 7(a) of the Act. It is not an exemption from the requirements of any other law that regulates employment practices, including the standards that are used to select individuals for employment. An employer creating a remedial education program pursuant to section 7(q) should be mindful not to violate other applicable requirements. See, for example, title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*; Executive Order 11246, as amended, 3 CFR part 339 (1964–1965 Compilation), *reprinted in* 42 U.S.C. 2000e note; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*; and the Uniform Guidelines on Employee Selection Procedures published at 41 CFR part 60–3.

[56 FR 61101, Nov. 29, 1991]

# PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES

## Subpart A—General

INTRODUCTORY

Sec.
779.0 Purpose of interpretative bulletin.
779.1 General scope of the Act.
779.2 Previous and new coverage.
779.3 Pay standards for employees subject to previous coverage of the Act.
779.4 Pay standards for newly covered employment.
779.5 Matters discussed in this part.
779.6 Matters discussed in other interpretative bulletins.

INTERPRETATIONS OF THE LAW

779.7 Significance of official interpretations.
779.8 Basic support for interpretations.
779.9 Reliance on interpretations.
779.10 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

779.11 General statement.
779.12 Commerce.
779.13 Production.
779.14 Goods.
779.15 Sale and resale.
779.16 State.
779.17 Wage and wage payments to tipped employees.
779.18 Regular rate.
779.19 Employer, employee, and employ.
779.20 Person.
779.21 Enterprise.
779.22 Enterprise engaged in commerce or in the production of goods for commerce.
779.23 Establishment.
779.24 Retail or service establishment.

## Subpart B—Employment to Which the Act May Apply: Basic Principles and Individual Coverage

GENERAL PRINCIPLES

779.100 Basic coverage in general.
779.101 Guiding principles for applying coverage and exemption provisions.
779.102 Scope of this subpart.

EMPLOYEES ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

779.103 Employees ''engaged in commerce.''
779.104 Employees ''engaged in the production of goods for commerce.''
779.105 Employees engaged in activities ''closely related'' and ''directly essential'' to the production of goods for commerce.
779.106 Employees employed by an independent employer.
779.107 Goods defined.
779.108 Goods produced for commerce.
779.109 Amount of activities which constitute engaging in commerce or in the production of goods for commerce.
779.110 Employees in retailing whose activities may bring them under the Act.
779.111 Buyers and their assistants.
779.112 Office employees.
779.113 Warehouse and stock room employees.
779.114 Transportation employees.
779.115 Watchmen and guards.
779.116 Custodial and maintenance employees.
779.117 Salesmen and sales clerks.
779.118 Employees providing central services for multi-unit organizations.

779.119 Exempt occupations.

## Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

ENTERPRISE; THE BUSINESS UNIT

779.200 Coverage expanded by 1961 and 1966 amendments.
779.201 The place of the term ''enterprise'' in the Act.
779.202 Basic concepts of definition.
779.203 Distinction between ''enterprise,'' ''establishment,'' and ''employer.''
779.204 Common types of ''enterprise.''

RELATED ACTIVITIES

779.205 Enterprise must consist of ''related activities.''
779.206 What are ''related activities.''
779.207 Related activities in retail operations.
779.208 Auxiliary activities which are ''related activities.''
779.209 Vertical activities which are ''related activities.''
779.210 Other activities which may be part of the enterprise.
779.211 Status of activities which are not ''related.''

COMMON BUSINESS PURPOSE

779.212 Enterprise must consist of related activities performed for a ''common business purpose.''
779.213 What is a common business purpose.
779.214 ''Business'' purpose.

UNIFIED OPERATION OR COMMON CONTROL

779.215 General scope of terms.
779.216 Statutory construction of the terms.
779.217 ''Unified operation'' defined.
779.218 Methods to accomplish ''unified operation.''
779.219 Unified operation may be achieved without common control or common ownership.
779.220 Unified operation may exist as to separately owned or controlled activities which are related.
779.221 ''Common control'' defined.
779.222 Ownership as factor.
779.223 Control where ownership vested in individual or single organization.
779.224 Common control in other cases.

LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

779.225 Leased departments.
779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.
779.227 Conditions which must be met for exception.
779.228 Types of arrangements contemplated by exception.
779.229 Other arrangements.
779.230 Franchise and other arrangements.
779.231 Franchise arrangements which do not create a larger enterprise.
779.232 Franchise or other arrangements which create a larger enterprise.
779.233 Independent contractors performing work ''for'' an enterprise.
779.234 Establishments whose only regular employees are the owner or members of his immediate family.
779.235 Other ''enterprises.''

COVERED ENTERPRISES

779.236 In general.
779.237 Enterprise engaged in commerce or in the production of goods for commerce.
779.238 Engagement in described activities determined on annual basis.
779.239 Meaning of ''engaged in commerce or in the production of goods for commerce.''

EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE BY ANY PERSON

779.240 Employees ''handling * * * or otherwise working on goods.''
779.241 Selling.
779.242 Goods that ''have been moved in'' commerce.
779.243 Goods that have been ''produced for commerce by any person.''

COVERED RETAIL ENTERPRISE

779.244 ''Covered enterprises'' of interest to retailers of goods or services.
779.245 Conditions for coverage of retail or service enterprises.

INTERSTATE INFLOW TEST UNDER PRIOR ACT

779.246 Inflow test under section 3(s)(1) of the Act prior to 1966 amendments.
779.247 ''Goods'' defined.
779.248 Purchase or receive ''goods for resale.''
779.249 Goods which move or have moved across State lines.
779.250 Goods that have not lost their out-of-State identity.
779.251 Goods that have lost their out-of-State identity.
779.252 Not in deliveries from the reselling establishment.
779.253 What is included in computing the total annual inflow volume.

THE GASOLINE SERVICE ESTABLISHMENT ENTERPRISE

779.254 Summary of coverage and exemptions prior to and following the 1966 amendments.
779.255 Meaning of ''gasoline service establishment.''

779.256 Conditions for enterprise coverage of gasoline service establishments.
779.257 Exemption applicable to gasoline service establishments under the prior Act.

ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE

779.258 Sales made or business done.
779.259 What is included in annual gross volume.
779.260 Trade-in allowances.

EXCISE TAXES

779.261 Statutory provision.
779.262 Excise taxes at the retail level.
779.263 Excise taxes not at the retail level.
779.264 Excise taxes separately stated.

COMPUTING THE ANNUAL VOLUME

779.265 Basis for making computations.
779.266 Methods of computing annual volume of sales or business.
779.267 Fluctuations in annual gross volume affecting enterprise coverage and establishment exemptions.
779.268 Grace period of 1 month for computation.
779.269 Computations for a new business.

## Subpart D—Exemptions for Certain Retail or Service Establishments

GENERAL PRINCIPLES

779.300 Purpose of subpart.
779.301 Statutory provisions.

''ESTABLISHMENT'' BASIS OF EXEMPTIONS

779.302 Exemptions depend on character of establishment.
779.303 ''Establishment'' defined; distinguished from ''enterprise'' and ''business.''
779.304 Illustrations of a single establishment.
779.305 Separate establishments on the same premises.
779.306 Leased departments not separate establishments.
779.307 Meaning and scope of ''employed by'' and ''employee of.''
779.308 Employed within scope of exempt business.
779.309 Employed ''in'' but not ''by.''
779.310 Employees of employers operating multi-unit businesses.
779.311 Employees working in more than one establishment of same employer.

STATUTORY MEANING OF RETAIL OR SERVICE ESTABLISHMENT

779.312 ''Retail or service establishment'', defined in section 13(a)(2).
779.313 Requirements summarized.

MAKING SALES OF GOODS AND SERVICES ''RECOGNIZED AS RETAIL''

779.314 ''Goods'' and ''services'' defined.
779.315 Traditional local retail or service establishments.
779.316 Establishments outside ''retail concept'' not within statutory definition; lack first requirement.
779.317 Partial list of establishments lacking ''retail concept.''
779.318 Characteristics and examples of retail or service establishments.
779.319 A retail or service establishment must be open to general public.
779.320 Partial list of establishments whose sales or service may be recognized as retail.
779.321 Inapplicability of ''retail concept'' to some types of sales or services of an eligible establishment.

''RECOGNIZED'' AS RETAIL ''IN THE PARTICULAR INDUSTRY''

779.322 Second requirement for qualifying as a ''retail or service establishment.''
779.323 Particular industry.
779.324 Recognition ''in.''
779.325 Functions of the Secretary and the courts.
779.326 Sources of information.
779.327 Wholesale sales.
779.328 Retail and wholesale distinguished.
779.329 Effect of type of customer and type of goods or services.

SALES NOT MADE FOR RESALE

779.330 Third requirement for qualifying as a ''retail or service establishment.''
779.331 Meaning of sales ''for resale.''
779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.
779.333 Goods sold for use as raw materials in other products.
779.334 Sales of services for resale.
779.335 Sales of building materials for residential or farm building construction.
779.336 Sales of building materials for commercial property construction.

GENERAL TESTS OF EXEMPTION UNDER SECTION 13(a)(2)

779.337 Requirements of exemption summarized.
779.338 Effect of 1961 and 1966 amendments.

SALES MADE WITHIN THE STATE

779.339 More than 50 percent intrastate sales required.
779.340 Out-of-State customers.
779.341 Sales ''made within the State'' and ''engagement in commerce'' distinguished.

COMPUTING ANNUAL DOLLAR VOLUME AND COMBINATION OF EXEMPTIONS

779.342 Methods of computing annual volume of sales.
779.343 Combinations of exemptions.

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

779.345 Exemption provided in section 13(a)(4).
779.346 Requirements for exemption summarized.
779.347 Exemption limited to ''recognized retail establishment''; factories not exempt.
779.348 Goods must be made at the establishment which sells them.
779.349 The 85-percent requirement.
779.350 The section 13(a)(4) exemption does not apply to service establishments.

ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

779.351 Exemption provided.
779.352 Requirements for exemption.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

779.353 Basis for classification.

LUMBER AND BUILDING MATERIALS DEALERS

779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.
779.355 Classification of lumber and building materials sales.
779.356 Application of exemptions to employees.

COAL DEALERS

779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.

ICE MANUFACTURERS AND ICE DEALERS

779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

LIQUEFIED-PETROLEUM-GAS AND FUEL OIL DEALERS

779.359 May qualify as exempt 13(a)(2) establishments.
779.360 Classification of liquefied-petroleum-gas sales.
779.361 Classification of other fuel oil sales.

FEED DEALERS

779.362 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

MONUMENT DEALERS

779.363 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

FROZEN-FOOD LOCKER PLANTS

779.364 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

AUTOMOTIVE TIRE ESTABLISHMENTS

779.365 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.
779.366 Recapping or retreading tires for sale.

COMMERCIAL STATIONERS

779.367 Commercial stationers may qualify as exempt 13(a)(2) establishments.
779.368 Printing and engraving establishments not recognized as retail.

FUNERAL HOMES

779.369 Funeral home establishments may qualify as exempt 13(a)(2) establishments.

CEMETERIES

779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).
779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

779.381 Establishments within special exceptions or exemptions.

HOTELS AND MOTELS

779.382 May qualify as exempt 13(a)(2) establishments.
779.383 ''Hotel'' and ''motel'' exemptions under section 13(b)(8).

MOTION PICTURE THEATERS

779.384 May qualify as exempt establishments.

SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

779.385 May qualify as exempt establishments.

RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

779.386 Restaurants may qualify as exempt 13(a) (2) establishments.
779.387 ''Restaurant'' exemption under section 13(b) (8).

779.388 Exemption provided for food or beverage service employees.

## Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments

GENERAL PRINCIPLES

779.400 Purpose of subpart.

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

779.401 Statutory provision.
779.402 ''Executive'' and ''administrative'' employees defined.
779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.
779.404 Other section 13(a)(1) employees employed in covered enterprises.

STUDENTS, LEARNERS, AND HANDICAPPED WORKERS

779.405 Statutory provisions.
779.406 ''Student-learners.''
779.407 Learners other than ''student-learners.''
779.408 ''Full-time students.''
779.409 Handicapped workers.

EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS

779.410 Statutory provision.
779.411 Employee of a ''retail or service establishment.''
779.412 Compensation requirements for overtime pay exemption under section 7(i).
779.413 Methods of compensation of retail store employees.
779.414 Types of employment in which this overtime pay exemption may apply.
779.415 Computing employee's compensation for the representative period.
779.416 What compensation ''represents commissions.''
779.417 The ''representative period'' for testing employee's compensation.
779.418 Grace period for computing portion of compensation representing commissions.
779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's ''regular rate'' of pay.
779.420 Recordkeeping requirements.
779.421 Basic rate for computing overtime compensation of nonexempt employees receiving commissions.

## Subpart F—Other Provisions Which May Affect Retail Enterprises

GENERAL

779.500 Purpose of subpart.

EQUAL PAY PROVISIONS

779.501 Statutory provisions.

CHILD LABOR PROVISIONS

779.502 Statutory provisions; regulations in Part 1500 of this title.
779.503 The retailer and section 12(a).
779.504 The retailer and section 12(c).
779.505 ''Oppressive child labor'' defined.
779.506 Sixteen-year minimum.
779.507 Fourteen-year minimum.
779.508 Eighteen-year minimum.

DRIVER OR DRIVER'S HELPER MAKING LOCAL DELIVERIES

779.509 Statutory provision.
779.510 Conditions that must be met for section 13(b) (11) exemption.
779.511 ''Finding by Secretary.''

RECORDS TO BE KEPT BY EMPLOYERS

779.512 The recordkeeping regulations.
779.513 Order and form of records.
779.514 Period for preserving records.
779.515 Regulations should be consulted.

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

SOURCE: 35 FR 5856, Apr. 9, 1970, unless otherwise noted.

# Subpart A—General

INTRODUCTORY

### § 779.0 Purpose of interpretative bulletin.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of those provisions of the Fair Labor Standards Act, hereinafter referred to as the Act, which govern rights and obligations of employees and employers in the various enterprises in which retail sales of goods or services are made. The application of the Act to employment in such enterprises was greatly broadened by amendments effective September 3, 1961. The Act's application was extended to employment in additional retail and service enterprises by the Fair Labor Standards Amendments of 1966, effective February 1, 1967. Under the amended Act,

there are many employees employed by retail or service establishments and in enterprises having such establishments engaged in the retail selling of goods or services who must be employed in compliance with its provisions. It is an objective of this part to make available in one place, for the guidance of those who may be concerned with the provisions of the law, the official interpretations of these provisions by which the Department of Labor will be guided in carrying out its responsibilities under the Act.

### § 779.1 General scope of the Act.

The Fair Labor Standards Act of 1938, as amended, is a Federal statute of general application which establishes minimum wage, maximum hours, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. Employers and employees in enterprises in which retail sales of goods or services are made 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.

### § 779.2 Previous and new coverage.

Under the Act as amended in 1966, an employer may have some employees subject to its minimum wages, maximum hours, overtime pay, equal pay, or child labor provisions who would be covered by such provisions under the prior law even if the amendments had not been enacted, and other employees whose coverage under such provisions was provided for the first time by the 1966 amendments. As explained in subparts B and C such provisions of the amended Act may apply to an employee by reason of the activities in which he is individually engaged, or because he is employed in an enterprise whose activities satisfy the conditions prescribed in the law prior to the amendments. On the other hand, such provisions of the amended Act may apply to an employee solely because he is employed in an enterprise whose activities satisfy only the conditions provided in the Act as it was amended in 1966. Previously covered employment in retail and service enterprise is subject to different monetary standards than newly covered employment in such enterprises until February 1, 1971. On and after that date, every such employee subject to the minimum wage provisions will be entitled to not less than $1.60 an hour. However, beginning February 1, 1969, every such employee subject to the overtime provisions is entitled to overtime pay for all hours worked in excess of 40 in a workweek at a rate not less than one and one-half times his regular rate of pay. During the period for which different minimum wage provisions were made applicable, beginning with the effective date of the 1966 amendments on February 1, 1967, and ending on January 31, 1971, a lower minimum wage rate is authorized for employees in employment brought under the minimum wage provisions of the Act for the first time by the amendments than for those subject to the minimum wage provisions under the prior Act. Also, in the period beginning with the effective date of the amendments and ending on January 31, 1969, employees in employment brought under the overtime pay provisions for the first time by the amendments could be employed for a longer workweek without overtime pay, as specified in the Act. Accordingly, employers who do not wish to pay aIl covered employees for employment during such periods the minimum wages and overtime pay required for employment covered under the prior provisions will need to identify those employees who are covered under the prior provisions and those who are covered under the new provisions when wages are computed and paid under the Act.

### § 779.3 Pay standards for employees subject to previous coverage of the Act.

Before the 1966 amendments, the Act applied, as it still applies, to employees individually engaged in interstate or foreign commerce or in the production of goods for such commerce, and to employees in certain enterprises, including enterprises in which retail sales of goods or services are made. The tests by which coverage based on the employee's individual activities is determined were not changed by the 1966 amendments and are described in subpart B of this part. An employee in an enterprise whose activities satisfy the conditions prescribed in the law prior to the 1966 amendments (discussed in subpart C) is covered under the present Act. Any employee whose employment satisfies the tests by which individual or enterprise coverage is determined under the Act prior to the 1966 amendments and who would not have come within some exemption in the law prior to the amendments is subject to the monetary provisions prescribed in the law for previously covered employees and is entitled to a minimum wage of at least $1.40 an hour beginning February 1, 1967, and not less than $1.60 an hour beginning February 1, 1968, unless expressly exempted by some provision of the amended Act. (In each instance where there is an increase in the minimum wage, the new minimum wage rate becomes effective 12:01 a.m., on the date indicated.) Such an employee is also entitled to overtime pay for hours worked in excess of 40 in any workweek at a rate not less than one and one-half times his regular rate of pay. (Minimum wage rates in Puerto Rico, the Virgin Islands, and American Samoa are governed by special provisions of the Act. Information on these rates is available at any office of the Wage and Hour Division.)

### § 779.4 Pay standards for newly covered employment.

There are many employees of retailers as well as other employees who would not be subject to the minimum wage or overtime pay provisions of the Act as it was prior to the 1966 amendments, either because of their individual activities or because of the activities of the enterprise in which they are employed, but who are brought under the minimum wage or overtime provisions, or both, for the first time by the changed enterprise coverage provisions or changes in exemptions, or both, which were enacted as part of the amendments and made effective February 1, 1967. The following pay standards apply to this newly covered employment, unless a specific exemption has been retained or provided in the amendments; such employees must be paid not less than the minimum wages for hours worked and not less than one and one-half times their regular rates of pay for overtime, as shown in the following schedule:

| Minimum wage | Beginning |
|---|---|
| $1.00 an hour | February 1, 1967. |
| $1.15 an hour | February 1, 1968. |
| $1.30 an hour | February 1, 1969. |
| $1.45 an hour | February 1, 1970. |
| $1.60 an hour | February 1, 1971 and thereafter. |

In each instance where there is an increase in the minimum wage, the new minimum wage rate becomes effective 12:01 a.m., on the date indicated. (Minimum wage rates for newly covered employees in Puerto Rico, the Virgin Islands, and American Samoa are set by wage order under special industry committee procedures. Information on these rates and their effective dates may be obtained at any office of the Wage and Hour Division.)

| Overtime pay | Beginning |
|---|---|
| After 44 hours in a workweek | Feb. 1, 1967. |
| After 42 hours in a workweek | Feb. 1, 1968. |
| After 40 hours in a workweek and thereafter. | Feb. 1, 1969. |

In each instance where a new overtime pay standard is applicable, it shall be effective as to any workweek beginning on or after the date indicated.

### § 779.5 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 that make retail sales of goods or services. It discusses in some detail those provisions of the Act which refer specifically to such employers and employees and such enterprises or establishments.

The criteria for determining the employments in which these employers and employees may be subject to the law are discussed in subparts B and C of this part and the criteria for exclusion from its provisions under specific exemptions are discussed in subpart D of this part. Other provisions of special interest to retailers and their employees are discussed in subparts E and F of this part.

### § 779.6 Matters discussed in other interpretative bulletins.

Bulletins having general application to others subject to the law as well as to retailers and their employees have been issued on a number of subjects of general interest. These will be found in other parts of this chapter of the Code of Federal Regulations. Reference should be made to them for guidance on matters which they discuss in detail and which this part does not undertake to do. They include part 776 of this chapter, discussing general coverage, including the employer-employee relationship under the Act; part 531 of this chapter, discussing methods of 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.

## INTERPRETATIONS OF THE LAW

### § 779.7 Significance of official interpretations.

The regulations in this part contain the 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 reexamination of an interpretation, that it is incorrect.

### § 779.8 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 bulletin 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. Pl. 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 as constructed 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.

### § 779.9 Reliance on interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. In addition, the Supreme Court has recognized that such interpretations of the 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.) Some of the interpretations in subpart D of this part relating to the scope of the exemption provided for retail or service establishments are interpretations of this exemption as it appeared in the original Act before amendment in 1949 and 1961, which have remained unchanged because they were consistent with the amendments. These interpretations may be said to have Congressional sanction because ''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.)

### § 779.10 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. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as part 779 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 by the Fair Labor Standards Amendments of 1961 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 retailers 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 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 District Office of the Division.

## SOME BASIC DEFINITIONS

### § 779.11 General statement.

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. Some of these definitions and their application are considered in detail in other interpretative bulletins. The application of the others is considered in the sections of this part where the particular provisions containing the defined terms are discussed.

### § 779.12 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 § 779.16.) The application of this definition and the kinds of activities which it includes are discussed at length in the interpretative bulletin on general coverage of the Act, part 776 of this chapter.

### § 779.13 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 the interpretative bulletin on general coverage of the Act, part 776 of this chapter. 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 § 779.16.)

### § 779.14 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.'' The interpretative bulletin on general coverage of the Act, part 776 of this chapter, contains a detailed discussion of the application of this definition and what is included in it.

### § 779.15 Sale and resale.

(a) Section 3(k) of the Act provides that ''Sale'' or ''sell'', as used in the Act, ''includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.'' Since ''goods'', as defined, includes any part or ingredient of goods (see § 779.14), a ''resale'' of goods includes their sale in a different form than when first purchased or sold, such as the sale of goods of which they have become a component part (*Arnold* v. *Kanowsky*, 361 U.S. 388). The Act, in section 3(n), provides one exception to this rule by declaring that ''resale'', as used in the Act, ''shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.'' A resale of goods is not confined to resale of the goods as such, but under section 3(k) may include an ''other disposition'' of the goods in which they are disposed of in a transaction of a different kind; thus the sale by a restaurant to an airline of prepared meals to be served in flight to passengers whose tickets entitle them to a ''complimentary'' meal is a sale of goods ''for resale''. (*Mitchell* v. *Sherry Corine Corp.*, 264 F 2d 831 (C.A. 4), cert. denied 360 U.S. 934.)

(b) In construing section 3(s)(1) of the Act as it was prior to the 1966 amendments it should be noted that section 3(n) of the prior Act defined ''resale'' by declaring that this term, ''except as used in subsection (s)(1), shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.'' Thus, although section 3(n) of the prior Act also provided the one exception to the meaning of ''resale'', it made clear that the exception was inapplicable in determining under section 3(s)(1) of the prior Act, ''if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total volume to $250,000 or more''. The application of the inflow test under section 3(s) (1) of the prior Act is discussed fully in subpart C of this part.

### § 779.16 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 §§ 779.12, 779.13) is discussed in the interpretative bulletin on general coverage, part 776 of this chapter. This definition is also important in determining whether goods ''for resale'' purchased or received by an enterprise move or have moved across State lines within the meaning of former section 3(s)(1) of the Act (prior to the 1966 amendments) and whether sales of goods or services are ''made within the State'' within the meaning of the retail or service establishment exemption in section 13(a)(2), as discussed in subpart D of this part.

### § 779.17 Wage and wage payments to tipped employees.

Section 3(m) of the Act provides that as used in the Act, ''wage'' paid to any employee:

> includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

As explained in part 531 of this chapter, section 3(m) of the Act governs the payment of wages required by the Act, including payment in other than cash and in tips. Part 531 of this chapter contains the regulations under which the reasonable cost or fair value of such facilities furnished may be computed for inclusion as part of wages required by the Act. Section 3(m) provides a method for determining the wage of a ''tipped employee'' and this term as defined in section 3(t) of the Act ''means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips''. Regulations under which wage credits are permitted on account of tips paid to ''tipped employees'' are also contained in part 531 of this chapter.

### § 779.18 Regular rate.

As explained in the interpretative bulletin on overtime compensation, part 778 of this chapter, 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 ''regular rate'' in the following language:

> (e) As used in this section the *regular rate* at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:
>
> (1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;
>
> (3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

This definition, which is discussed at length in part 778 of this chapter, also governs the computation of ''regular rate'' for purposes of the special overtime exemption of certain commission employees of retail or service establishments which is contained in section 7(i) of the Act and is discussed in subpart E of this part.

### § 779.19 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 (except with respect to employees of a State or a political subdivision thereof, employed (a) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (b) in the operation of a railway or carrier referred to in such sentence), 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'' (except that the term is further qualified for purposes of counting man-days of employment by an employer in agriculture). ''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 the interpretative bulletin on general coverage, part 776 of this chapter, 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.

### § 779.20 Person.

As used in the Act (including the definition of ''enterprise'' set forth in § 779.21), ''person'' is defined as meaning ''an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.'' (Act, section 3(a).)

### § 779.21 Enterprise.

(a) Section 3(r) of the Act provides, in pertinent part that ''enterprise'' as used in the Act:

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, (a) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (b) that it will join with other such establishments in the same industry for the purpose of the collective purchasing, or (c) 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 * * *

The scope and application of this definitional language is discussed in subpart C of this part.

(b) The 1966 amendments added two clauses to the above language of the definition to make it clear that ''the activities performed by any person or persons'' will be regarded as performed for a business purpose if they are performed:

(1) In connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(2) In connection with the operation of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit).

A discussion of the scope and application of this added language is contained in part 776 of this chapter.

### § 779.22 Enterprise engaged in commerce or in the production of goods for commerce.

The portions of the former and present definitions of ''enterprise engaged in commerce or in the production of goods for commerce'' (contained in section 3(s) of the Act prior to the 1966 amendments and as amended in 1966) which are important to a determination of the application of provisions of the Act to employees employed by retailers generally and by certain retail or service establishments are as follows:

Previous coverage (prior to the 1966 amendments):

(s) Enterprise engaged in commerce or in the production of goods for commerce means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) Any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1 million, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

* * * * *

(5) Any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excise taxes at the retail level which are separately stated:

*Provided,* That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner.

New coverage (beginning with the 1966 amendments):

(s) *Enterprise engaged in commerce or in the production of goods for commerce* means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which:

(1) During the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

* * * * *

(4) Is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

### § 779.23 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., 1st Sess., p. 25). As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

### § 779.24 Retail or service establishment.

In the 1949 amendments to the Act, the term ''retail or service establishment'', which was not previously defined in the law, was given a special definition for purposes of the Act. The legislative history of the 1961 and the 1966 amendments to the Act, which use the same term in a number of provisions relating to coverage and exemptions, indicates that no different meaning was intended by the term ''retail or service establishment'' as used in the new provisions from that already established by the Act's definition. On the contrary, the existing definition was reenacted in section 13(a)(2) of the Act as amended in 1961 and 1966 as follows: ''A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry''. The application of this definition, which has had much judicial construction since its original enactment, is considered at length in subpart D of this part. As is apparent from the quoted language, not every establishment which engages in retail selling of goods or services will constitute a ''retail or service establishment'' within the meaning of the Act.

## Subpart B—Employment to Which the Act May Apply: Basic Principles and Individual Coverage

GENERAL PRINCIPLES

### § 779.100 Basic coverage in general.

Except as otherwise provided in specific exemptions, the minimum wage, maximum hours, overtime pay, equal pay, and child labor provisions of the Act have applied and continue to apply subsequent to the 1966 amendments to

employees who are individually engaged in interstate commerce or in the production of goods for such commerce as these terms are defined in the Act and to employees in certain enterprises described in the amended section 3(s) which were covered under section 3(s) of the Act prior to the amendments. Through the broadening of the definition of a covered enterprise the Act's coverage was extended to additional employees because of their employment in certain enterprises beginning February 1, 1967, and in certain other enterprises beginning February 1, 1969. Such covered enterprises are described in section 3(s) as enterprises engaged in commerce or in the production of goods for commerce and further described in sections 3(s) (1) through (4) of the amended Act. A detailed discussion of the coverage of employees in those enterprises covered under the prior and amended Act of interest to the retail industry is contained in subpart C of this part. The employer must comply with the minimum wage and overtime requirements of the Act with respect to all employees who are covered either because they are individually engaged in interstate or foreign commerce or in the production of goods for such commerce, or because of their employment in an enterprise covered under the prior or amended enterprise definition of the Act, except those who may be denied one or both of these benefits by virtue of some specific exemption provision of the Act. Of special interest to the retailer in a covered enterprise is the exemption from the minimum wage and overtime provisions for certain small retail or service establishments of such enterprise. This exemption is applicable under the conditions and subject to exceptions stated in section 13(a) (2) of the Act to any retail or service establishment which has an annual dollar volume of sales of less than $250,000 (exclusive of certain excise taxes) even if the establishment is a part of an enterprise that is covered by the Act. This exemption and other exemptions of particular interest to retailers and their employees are discussed in subparts D and E of this part. The child labor provisions as they apply to retail or service businesses are discussed in subpart F of this part.

### § 779.101 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; *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.) ''The details with which the exemptions in this Act have been made preclude their enlargement by implication.'' (*Addison* v. *Holly Hill*, 322 U.S. 60; *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 restricted or narrow 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. *Gonzalez*, 127 F. 2d 934; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52.)

### § 779.102 Scope of this subpart.

The Act has applied since 1938 and continues to apply 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. (See §§ 779.12–779.16 for definitions governing the scope of this coverage.) Prior to the 1961 amendments a retailer was not generally concerned with the coverage provisions as they applied to his individual employees because retail or service establishments ordinarily were exempt. However, in some cases such coverage was applicable as where employees were employed

in central offices of warehouses of retail chain store systems and, therefore, were not exempt. (See § 779.118.) Some exemptions for retail or service establishments were narrowed as a result of the 1961 amendments and further revised or eliminated by the 1966 amendments effective February 1, 1967. Therefore, discussion of the individual coverage provisions of the Act is pertinent and this subpart will discuss briefly the principles of such coverage with particular reference to employment in the retail or service trades. A more comprehensive discussion with respect to employees engaged in commerce or in the production of goods for commerce may be found in part 776 of this chapter, the general coverage bulletin.

EMPLOYEES ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

### § 779.103 Employees "engaged in commerce."

Employees are ''engaged in commerce'' within the meaning of the Act when they are performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) among the several States or between any State and any place outside thereof. (The statutory definition of commerce is contained in section 3(b) of the Act and is set forth in § 779.12.) The courts have made it clear that this includes every employee employed in the channels of such commerce or in activities so closely related to this commerce, as to be considered a part of it as a practical matter. (Court cases are cited in the discussion of this term in §§ 776.9–776.13 of this chapter). Typically, but not exclusively, employees engaged in interstate or foreign commerce include employees in distributing industries, such as wholesaling or retailing, who sell, handle or otherwise work on goods moving in interstate commerce as well as workers who order, receive, pack, ship, or keep records of such goods; clerical and other workers who regularly use the mails, telephone or telegraph for interstate communication; and employees who regularly travel across State lines while working.

### § 779.104 Employees "engaged in the production of goods for commerce."

The activities constituting ''production'' within the meaning of the phrase ''engaged in * * * the production of goods for commerce'' are defined in section 3(j) of the Act. (The statutory definition is set forth in § 779.13.) The handling or otherwise working on goods intended for shipment out of the State, directly or indirectly, in engagement in the ''production'' of goods for commerce. Thus, employees in retail stores who sell, pack, or otherwise work on goods which are to be shipped or delivered outside of the State are engaged in the production of goods for commerce. Typically, but not exclusively, employees engaged in the production of goods for interstate or foreign commerce, include those who work in manufacturing, processing and distributing establishments, including wholesale or retail establishments, that produce goods for interstate or foreign commerce. This includes everyone, including office, management, sales and shipping personnel, and maintenance, custodial and protective employees, whether they are employed by the producer or an intermediary. Employees may be covered even if their employer does not ship his goods directly in such commerce. The goods may leave the State through another firm. The workers may produce goods which become a part or ingredient of goods shipped in interstate or foreign commerce by another firm. Also covered are workers who are engaged in a closely related process or occupation directly essential to such production. (See § 779.105.)

### § 779.105 Employees engaged in activities "closely related" and "directly essential" to the production of goods for commerce.

Some employees are covered because their work, although not actually a part of such production, is ''closely related'' and ''directly essential'' to it. This group of employees includes bookkeepers, stenographers, clerks, accountants and auditors and other office and white collar workers, and employees doing payroll, timekeeping and time study work for the producer of goods; employees in the personnel,

labor relations, advertising, promotion, and public relations activities of the producing enterprise; work instructors for the producer; employees maintaining, servicing, repairing or improving the buildings, machinery, equipment, vehicles or other facilities used in the production of goods for commerce, and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are illustrative, rather than exhaustive, of the group of employees of a producer who are ''engaged in the production of goods for commerce'' by reason of performing activities closely related and directly essential to such production.

### § 779.106 Employees employed by an independent employer.

Where the work of an employee would be closely related and directly essential to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer. (See §§ 776.17(c) and 776.19 of this chapter.)

### § 779.107 Goods defined.

The term *goods* is defined in section 3(i) of the Act and has a well established meaning under the Act since it has been contained in the statute from the date of its enactment in 1938. A comprehensive statement of the meaning of the term ''goods'' is contained in part 776 of this chapter, which also cites the court cases in which the term was construed. The statutory definition of ''goods'' is set forth in § 779.14. It will be observed that the term ''goods'' includes any part or ingredient of the goods. Also that ''goods'' as defined in the Act are not limited to commercial goods, or articles of trade, or, indeed, to tangible property, but include ''articles or subjects of commerce of any character.'' Thus telegraphic messages have been held to be ''goods'' within the meaning of the Act (*Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490). Some of the ''articles or subjects of commerce'' which fall within the definition of ''goods'' include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements; written reports, fiscal and other statements and accounts, correspondence, and other documents; advertising, motion pictures, newspaper and radio copy; art work and manuscripts for publication; sample books, letterheads, envelopes, shipping tags, labels, checkbooks, blankbooks, book covers, advertising circulars, and wrappers and other packaging materials.

### § 779.108 Goods produced for commerce.

Goods are ''produced for commerce'' if they are ''produced, manufactured, mined, handled or in any other manner worked on'' in any State for sale, trade, transportation, transmission, shipment or delivery, to any place outside thereof. Goods are produced for commerce where the producer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in interstate or foreign commerce. If such movement of the goods in commerce can reasonably be anticipated by the producer when the goods are produced, it makes no difference whether he himself or the person to whom the goods are transferred puts the goods in interstate or foreign commerce. The fact that goods do move in interstate or foreign commerce is strong evidence that the producer intended, hoped, expected, or had reason to believe that they would so move. Goods produced to serve the movement of interstate commerce within the same State are also produced for commerce within the meaning of the Act, as explained in part 776 of this chapter.

**§ 779.109 Amount of activities which constitute engaging in commerce or in the production of goods for commerce.**

The Act makes no distinction as to the percentage, volume, or amount of activities of either the employee or the employer which constitute engaging in commerce or in the production of goods for commerce. However, an employee whose in-commerce or production activities are isolated, sporadic, or occasional and involve only insubstantial amounts of goods will not be considered ''engaged in commerce or in the production of goods for commerce'' by virtue of that fact alone. The law is settled that every employee whose activities in commerce or in the production of goods for commerce, even though small in amount are regular and recurring, is considered ''engaged in commerce or in the production of goods for commerce''.

**§ 779.110 Employees in retailing whose activities may bring them under the Act.**

The discussion in §§ 779.103 to 779.109 included general reference to types of employees in the retail or service field whose individual activities constitute engagement in interstate or foreign commerce or in the production of goods for such commerce within the meaning of the Act. There are many classes of employees customarily employed by retail or service establishments or enterprises whose individual activities ordinarily constitute engagement in commerce or in the production of goods for commerce within the meaning of the Act. The groups of employees discussed in the following §§ 779.111 to 779.118, are illustrative only. There are other employees whose activities may be covered; also there are other activities performed by the groups discussed which would result in individual coverage under the Act.

**§ 779.111 Buyers and their assistants.**

Buyers and their assistants, employed by retail businesses, as a regular part of their duties, generally travel across State lines, or use the mails, telegraph, or telephone for interstate communication to order goods; or they regularly send or receive, across State lines, written reports, messages or other documents. These activities of such employees constitute engagement ''in commerce'' within the meaning of the Act.

**§ 779.112 Office employees.**

Similarly office employees of retail businesses who regularly and recurrently check records of and make payments for goods shipped to their employer from outside of the State, or regularly and recurrently keep records of or otherwise work on the accounts of their employer's out-of-State customers, or who regularly and recurrently prepare or mail letters, checks, reports or other documents to out-of-State points, are engaged both in commerce and in the production of goods for commerce within the meaning of the Act. Likewise, timekeepers who regularly and recurrently prepare and maintain payrolls for and pay employees who are engaged in commerce or in the production of goods for commerce are themselves engaged in covered activities.

**§ 779.113 Warehouse and stock room employees.**

Warehouse and stock room employees of retail businesses who regularly and recurrently engage in the loading or unloading of goods moving in commerce, or who regularly and recurrently handle, pack or otherwise work on goods that are destined to out-of-State points are engaged in covered activities.

**§ 779.114 Transportation employees.**

Transportation employees of retail businesses, such as truck drivers or truck drivers' helpers, who regularly and recurrently cross State lines to make deliveries or to pick up goods for their employer; or who regularly and recurrently pick up at rail heads, air, bus or other such terminals goods originating out of State, or deliver to such terminals goods destined to points out of State; and dispatchers who route, plan or otherwise control such out-of-State deliveries and pick ups, are engaged in interstate commerce within the meaning of the Act.

### § 779.115 Watchmen and guards.

Watchmen or guards employed by retail businesses who protect the warehouses, workshops, or store premises where goods moving in interstate or foreign commerce are kept or where goods are produced for such commerce, are covered under the Act.

### § 779.116 Custodial and maintenance employees.

Custodial and maintenance employees who perform maintenance and custodial work on the machinery, equipment, or premises where goods regularly are produced for commerce or from which goods are regularly shipped in interstate commerce are engaged in covered activities.

### § 779.117 Salesmen and sales clerks.

A salesman or a sales clerk who regularly and recurrently takes orders for, or sells, or selects merchandise for delivery to points outside the State or which are to be shipped or delivered to a customer from a point outside the State, i.e. drop shipments; or who wraps, packs, addresses or otherwise prepares goods for out-of-State shipments is performing covered activities.

### § 779.118 Employees providing central services for multi-unit organizations.

Employees providing central services for a multiunit organization may be engaged both ''in commerce'' and ''in the production of goods for commerce'' within the meaning of the Act. For example, employees engaged in work relating to the coordinated purchasing, warehousing and distribution (and in the administrative and clerical work relating to such activities) for various retail units of a chain are covered under the Act. (See *Phillips Co.* v. *Walling*, 324 U.S. 490; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming, 128 F. 2d 935 (CA–5); *Mitchell* v. *C. & P. Stores*, 286 F. 2d 109 (CA–5); *Mitchell* v. *E. G. Shinner & Co.*, Inc., 221 F. 2d 260 (CA–7); *Donovan* v. *Shell Oil Co.*, 168 F. 2d 776 (CA–8).) In addition, employees who regularly and recurrently correspond and maintain records of activities of out-of-State stores and such employees as traveling auditors, inventory men, window display men, etc., who regularly travel from State to State in the performance of their duties are covered under the Act. (See *Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (CA–8).)

### § 779.119 Exempt occupations.

Of course, it should be noted that although employees may be engaged in commerce or in the production of goods for commerce within the meaning of the Act, they may be exempt from the Act's minimum wage or overtime provisions (or both). For a complete list of such exemptions the Act should be consulted. Those exemptions, however, which are of particular interest to employers and employees in the retail field are discussed in subparts D, E, and F of this part.

## Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

ENTERPRISE; THE BUSINESS UNIT

### § 779.200 Coverage expanded by 1961 and 1966 amendments.

The 1961 amendments for the first time since the enactment of the Fair Labor Standards Act of 1938 provided that all employees in a particular business unit are covered by the Act. Prior to the 1961 amendments each employee's coverage depended on whether that employee's activities were in commerce or constituted the production of goods for commerce. All employees employed in an ''enterprise'' described in section 3(s)(1) through (5) of the Act as it was amended in 1961 and section 3(s)(1) through (4) of the Act as amended in 1966 are also covered. Thus, it is necessary to consider the meaning of the term ''enterprise'' as used in the Act.

### § 779.201 The place of the term "enterprise" in the Act.

The term ''enterprise'' is defined in section 3(r) of the Act and, wherever used in the Act, is governed by this definition. (§ 779.21(a) provides that portion of the definition of ''enterprise'' which is pertinent with respect to retail and service enterprises.) The term is a key in determining the applicability of the Act to these businesses.

The ''enterprise'' is the unit for determining whether the conditions of section 3(s)(1) through (5) of the prior Act and section 3(s)(1) through (4) of the amended Act, including, where applicable, the requisite dollar volume are met. The ''enterprise'' is also the unit for determining which employees not individually covered by the Act are entitled to the minimum wage, overtime, and equal pay benefits, and to the child labor protection, under sections 6, 7, and 12 of the Act. In general, if the ''enterprise'' comes within any of the categories described in section 3(s)(1) through (5) of the prior Act or section 3(s)(1) through (4) of the amended Act, all employees employed in the ''enterprise'' are covered by the Act and, regardless of their duties, are entitled to the Act's benefits unless a specific exemption applies.

**§ 779.202 Basic concepts of definition.**

Under the definition, the ''enterprise'' consists of ''the related activities performed * * * for a common business purpose.'' All of the activities comprising the enterprise must be ''related.'' Activities serving a single business purpose may be related, although different, but other activities which are not related are not included in the enterprise. The definition makes clear that the enterprise includes all such related activities which are performed 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. Specifically included, as a part of the enterprise, are departments of an establishment operated through leasing arrangements. On the other hand, the definition excludes from the ''enterprise'' activities only performed ''for'' the enterprise rather than as a part of it by an independent contractor even if they are related to the activities of the enterprise. Also, it makes clear that a truly independent retail or service establishment does not become a part of a larger enterprise merely because it enters into certain types of franchise or collective purchasing arrangements or because it has a common landlord with other such retail establishments.

**§ 779.203 Distinction between "enterprise," "establishment," and "employer."**

The coverage, exemption and other provisions of the Act depend, in part, on the scope of the terms *employer*, *establishment*, or *enterprise*. As explained more fully in part 776 of this chapter, these terms are not synonymous. The term *employer* has been defined in the Act since its inception and has a well established meaning. As defined in section 3(d), it includes, with certain stated exceptions, any person acting directly or indirectly in the interest of an employer in relation to an employee. (See § 779.19.) The term *establishment* means a *distinct physical place of business* rather than *an entire business or enterprise*. (See § 779.23.) The term *enterprise* was not used in the Act prior to the 1961 amendments, but the careful definition and the legislative history of the 1961 and 1966 amendments provide guidance as to its meaning and application. 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 may consist of a single establishment (see § 779.204(a)) 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 (see § 779.204(b)). The enterprise is not necessarily coextensive with the entire business activities of an employer; a single employer may operate more than one enterprise (see § 779.204(c)). The Act treats as separate enterprises different businesses which are unrelated to each other even if they are operated by the same employer.

**§ 779.204 Common types of "enterprise."**

(a) *The single establishment business.* In the simplest type of organization—the entire business ordinarily is one enterprise. The entire business activity of the single owner-employer may be performed in one establishment, as in the typical independently owned and controlled retail store. In that case the establishment and the enterprise are one and the same. All of the activities

of the store are ''related'' and are performed for a single business purpose and there is both unified operation and common control. The entire business is the unit for applying the statutory tests. If the coverage tests are met, all of the employees employed by the establishment are employed in the enterprise and will be entitled to the benefits of the Act unless otherwise exempt.

(b) *The multiunit business.* In many cases, as in the typical chain of retail stores, one company conducts its single business in a number of establishments. All of the activities ordinarily are related and performed for one business purpose, the single company which owns the chain also controls the entire business, and the entire business is a single enterprise. The dollar volume of the entire business from all of its establishments is added together to determine whether the requisite dollar volume tests are met. If the coverage tests are met, all of the employees employed in the business will be entitled to the benefits of the Act unless otherwise exempt.

(c) *Complex business organizations.* In complex retail and service organizations, questions may arise as to whether certain activities are a part of a particular enterprise. In some cases one employer may operate several separate enterprises; in others, several employers may conduct their business activities in such a manner that they are part of a single enterprise. The answer, in each case, as to whether or not the ''enterprise'' includes certain activities will depend upon whether the particular activities are ''related'' to the business purpose of such enterprise and whether they are performed with its other activities through ''unified operation'' or ''common control,'' or whether, on the other hand, they are performed for a separate and distinct business purpose. As the Senate Report states,

> related activities conducted by separate business entities will be considered a part of the same enterprise where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose.

(S. Rept. 145, 87th Cong., 1st Sess., p. 41; see also H. Rept. 1366, 89th Cong., 2d Sess., p. 9.) §§ 779.205 through 779.211 discuss the terms of the definition and may aid in making these determinations.

RELATED ACTIVITIES

### § 779.205 Enterprise must consist of "related activities."

The enterprise must consist of certain ''related activities'' performed for a common business purpose; activities which are not ''related'' are not a part of the enterprise even if performed by the same employer. Moreover, even if activities are ''related'' they may be excluded from the enterprise if they are performed only ''for'' the enterprise and not as a part of it by an independent contractor. This is discussed separately in § 779.206.

### § 779.206 What are "related activities."

(a) The Senate Report on the 1961 amendments states as follows, with respect to the meaning of related activities:

> Within the meaning of this term, activities are ''related'' when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. They are also ''related'' when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising and other services. Likewise, activities are ''related'' when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose. (Senate Report No. 145, 87th Cong., 1st Sess., Page 41.)

Thus, activities will be regarded as ''related'' when they are the same or similar or when they are auxiliary or service activities such as warehousing, bookkeeping, purchasing, advertising, including, generally, all activities which are necessary to the operation and maintenance of the particular business. So also, all activities which are performed as a part of the unified business operation will be ''related,'' including, in appropriate cases, the manufacturing, warehousing, and distribution of its goods, the repair and

maintenance of its equipment, machinery and its premises, and all other activities which are performed for the common business purpose of the enterprise. The Senate Report on the 1966 amendments makes it plain that related, even if somewhat different, business activities can frequently be part of the same enterprise, and that activities having a reasonable connection with the major purpose of an enterprise would be considered related. (Senate Report No. 1487, 89th Cong., 2d Sess., Page 7.) A more comprehensive discussion of ''related activities'' will be found in part 776 of this chapter.

(b) Generally, the answer to the question whether particular activities are ''related'' or not, will depend in each case upon whether the activities serve a business purpose common to all the activities of the enterprise, or whether they serve a separate and unrelated business purpose. For example, where a company operates retail or service establishments, and also engages in a separate and unrelated construction business, the construction activities will not be ''related'' and will constitute a separate enterprise if they are conducted independently and apart from the retail operations. Where, however, the retail and construction activities are conducted for a common business purpose, they may be ''related,'' and if they are performed through unified operation or common control, they will be a part of a single enterprise. Thus, a retail store enterprise may engage in construction activities as an additional outlet for building materials which it sells, or otherwise to serve its retail operations. It may act as its own contractor in constructing or reconstructing its own stores and related facilities. In such a case, the construction activities will be ''related'' activities. Other examples may also be cited. The answer in each case will necessarily depend upon all the facts.

### § 779.207 Related activities in retail operations.

In the case of an enterprise which has one or more retail or service establishments, all of the activities which are performed for the furtherance of the common business purpose of operating the retail or service establishments are ''related activities.'' It is not material that the enterprise sells different goods or provides different services, or that it operates separate retail or service establishments. As stated in the definition, the enterprise includes all related activities whether performed ''in one or more establishments.'' Since the activities performed by one retail or service establishment are the ''same or similar'' to the activities performed by another, they are, as such, ''related activities.'' (See Senate Report No. 145, 87th Cong. 1st Sess. p. 41.) For example, in operations of a single retailing business a drug store may sell a large variety of different products, and a grocery store may sell clothing and furniture and other goods. Clearly all of these activities are ''related.'' Similarly it is clear that all activities of a department store are ''related activities,'' even if the store sells a great variety of different types of goods and services and even if, as in some cases, the departmentalized business is conducted in more than one location, as where the department selling garden supplies or electrical appliances is located on separate premises. Whether on the same premises or at separate locations, the activities involved in retail selling of goods or services, of any type, are related activities and they will be considered one enterprise where they are performed, through unified operation or common control, for a common business purpose.

### § 779.208 Auxiliary activities which are "related activities."

As stated in Senate Report No. 145, 87th Congress, 1st Session, cited in § 779.206, auxiliary and service activities, such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising and other similar services, also are ''related activities.'' When such activities are performed through unified operation or common control, for a common business purpose, they will be included in the enterprise. The following are some additional examples of auxiliary activities which are ''related activities'' and which may be included in the enterprise:

(a) Credit rating and collection services;

(b) Promotional activities including advertising, sign painting, display services, stamp redemptions, and prize contests;

(c) Maintenance and repair services of plant machinery and equipment including painting, decorating, and similar services;

(d) Store or plant engineering, site location and related survey activities;

(e) Detective, guard, watchmen, and other protective services;

(f) Delivery services;

(g) The operation of employee or customer parking lots;

(h) The recruitment, hiring and training activities, and other managerial services;

(i) Recreational and health facilities for customers or employees including eating and drinking facilities (note that employees primarily engaged in certain food service activities in retail establishments may be exempt from the overtime provisions under section 13(b)(18) of the Act if the specific conditions are met; see § 779.388);

(j) The operation of employee benefit and insurance plans; and

(k) Repair and alteration services on goods for sale or sold to customers.

### § 779.209 Vertical activities which are "related activities."

(a) The Senate Report also states (see § 779.206 that activities are ''related'' when they are ''part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products.'' Where such activities are performed through unified operation or common control for a common business purpose they will be regarded as a part of the enterprise.

(b) Whether activities are vertically ''related'' activities and part of a single enterprise, or whether they constitute separate businesses are separate enterprises, depends upon the facts in each case. In all of these cases of so-called ''vertical operations,'' the determination whether the activities are ''related,'' depends upon the extent to which the various business activities, such as a wholesaling and retailing or manufacturing and retailing, are interrelated and interdependent and are performed to serve a business objective common to all. The mere fact that they are under common ownership is not, by itself, sufficient to bring them within the same enterprise. Thus, where a manufacturing business is carried on separately from and wholly independently of a retail business, with neither serving the business purpose of the other, they are separate businesses even if they are under common ownership. However, where the manufacturing operations are performed in substantial part for the purpose of distributing the goods through the retail stores, or the retail outlet serves to carry out a business purpose of the manufacturing plant, retailing and manufacturing will be ''related'' activities and performed for a ''common business purpose,'' and they will be a single enterprise if they are performed through unified operations or common control.

(c) In these cases of ''vertical operations'' a practical judgment will be required to determine whether the activities are maintained and operated as separate and distinct businesses with different objectives or whether they, in fact, constitute a single integrated business enterprise. The answer necessarily will depend upon all the facts in each case.

### § 779.210 Other activities which may be part of the enterprise.

(a) An enterprise may perform certain activities that appear entirely foreign to its principal business but which may be a part of the enterprise because of the manner in which they are performed. In some cases these activities may be a very minor and incidental part of its business operations. For example a retail store may accept payments of utility bills, provide a notarial service, sell stamps, bus and theater tickets, or travellers' checks, etc. These and other activities may be entirely different from the enterprise's principal business but they may be performed on the same premises and by the same employees or otherwise under such circumstances as to be a part of the enterprise.

(b) Sometimes such activities are performed as an adjunct to the principal business to create good will or to attract customers. In other cases, the businessman may engage in them primarily for the additional revenue. Some such foreign activities may be conducted in a more elaborate manner, as where the enterprise operates a bus stop or a post office substation as an adjunct to a principal business such as a hotel or a retail store. Where in such a case the activities are performed in a physically separate ''establishment'' (see §§ 779.303–779.308) from the other business activities of the enterprise and are functionally operated as a separate business, separately controlled, with separate employees, separate records, and a distinct business objective of its own, they may constitute a separate enterprise. Where, however, such activities are intermingled with the other activities of the enterprise and have a reasonable connection to the same business purpose they will be a part of the enterprise.

### § 779.211 Status of activities which are not "related."

Activities which are not related even if performed by the same employer are not included as a part of the enterprise. The receipts from the unrelated activities will not be counted toward the annual dollar volume of sales or business under section 3(s) and the employees performing such unrelated activities will not be covered merely because they work for the same employer. Common ownership standing alone does not bring unrelated activities within the scope of the same enterprise. If, for example, one individual owns or controls a bank, a filing station, and a factory, the mere fact of common ownership will not make them one enterprise. However, if it appears that there is a reasonable relationship of all the activities to a single business purpose a different conclusion might be warranted. Activities which are not ''related'' will be treated separately for purposes of the tests contained in section 3(s)(1) through (5) of the prior Act and section 3(s)(1) through (4) of the amended Act. For example, in the case where a single company operates retail grocery stores and also engages in an unrelated business of constructing homes, one ''enterprise'' for purposes of section 3(s)(1) of both the prior and the amended Act will consist of the retail grocery stores and any activities related to them, and home construction activities will constitute a separate enterprise. The latter will not be included in determining whether the retail business enterprise meets the conditions of section 3(s)(1), and the construction employees will not be covered merely because the retail business is covered. The construction business will be considered separately under section 3(s)(4) of the poor Act and section 3(s)(3) of the amended Act.

## COMMON BUSINESS PURPOSE

### § 779.212 Enterprise must consist of related activities performed for a "common business purpose."

The related activities described in section 3(r) as included in the statutory enterprise are those performed for a ''common business purpose.'' (See the comprehensive discussion in 29 CFR part 776.) The term ''common business purpose'' as used in the definition does not have a narrow concept and is not intended to be limited to a single business establishment or a single type of business. As pointed out above, retailing, wholesaling and manufacturing may, under certain circumstances be engaged in for a ''common business purpose.'' (See § 779.209.) An example was also cited where retailing and construction were performed for a common business purpose. (See § 779.206.) On the other hand, it is clear that even a single individual or corporation may perform activities for different business purposes. (See § 779.211.) Thus the reports of the House of Representatives cite, as an example of this, the case of a single company which owns several retail apparel stores and is also engaged in the lumbering business. It concludes that these activities are not part of a single enterprise. (H. Rept. 75, 87th Cong.,1st Sess., p. 7 and H. Rept. 1366, 89th Cong. 2d Sess., p. 9.)

### § 779.213 What is a common business purpose.

Generally, the term ''common business purpose'' will encompass activities whether performed by one person or by

more than one person, or corporation, or other business organization, which are directed to the same business objective or to similar objectives in which the group has an interest. The scope of the term ''enterprise'' encompasses a single business entity as well as a unified business system which performs related activities for a common business purpose. What is a ''common business purpose'' in any particular case involves a practical judgment based on the facts in the light of the statutory provisions and the legislative intent. The answer ordinarily will be readily apparent from the facts. The facts may show that the activities are related to a single business objective or that they are so operated or controlled as to form a part of a unified business system which is directed to a single business objective. In such cases, it will follow that they are performed for a common business purpose. Where, however, the facts show that the activities are not performed as a part of such enterprise but for an entirely separate and unrelated business, they will be considered performed for a different business purpose and will not be a part of that enterprise. The application of these principles is considered in more detail in part 776 of this chapter.

### § 779.214 "Business" purpose.

The activities described in section 3(r) are included in an enterprise only when they are performed for a ''business'' purpose. Activities of eleemosynary, religious, or educational organization may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise. (See *Mitchell* v. *Pilgrims Holiness Church Corp.*, 210 F. 2d 879 (CA-7); cert. den. 347 U.S. 1013.) However, the nonprofit educational, religious, and eleemosynary activities will not be included in the enterprise unless they are of the types which the last sentence of section 3(r), as amended in 1966, declares shall be deemed to be performed for a business purpose. Such activities were not regarded as performed for a business purpose under the prior Act and are not so considered under the Act as it was amended in 1966 except for those activities listed in the last sentence of amended section 3(r). (See § 779.21.)

## UNIFIED OPERATION OR COMMON CONTROL

### § 779.215 General scope of terms.

(a) Under the definition related activities performed for a common business purpose will be a part of the enterprise when they are performed either through ''unified operation'' or ''common control.'' It should be noted that these conditions are stated in the alternative. Thus if it is established that the described activities are performed through ''common control,'' it is unnecessary to show that they are also performed through ''unified operation,'' although frequently both conditions may exist.

(b) Under the definition the terms ''unified operation'' and ''common control'' refer to the performance of the ''related activities.'' They do not refer to the ownership of the activities. Although ownership may be a significant factor in determining control (see § 779.222), the related activities will be a part of the enterprise even if they are not under common ownership, so long as they are performed for a common business purpose through unified operation or common control. Further, under the definition the terms ''unified operation'' and ''common control'' refer to the performance only of the particular related activities and not to other activities which may be performed by the various persons, corporations, or other business organizations, comprising the enterprise. Thus where two or more individual or business organizations perform certain of their activities through unified operation or common control, these activities will be part of a single enterprise, assuming of course they are related activities performed for a common business purpose. Finally, the definition in section 3(r) makes clear that the described activities may be performed through unified operation or common control ''in one or more establishments or by one or more corporate or other organizational units.'' The Senate Report on

the 1966 amendments makes the following comment with respect to this:

> Also, the operations through substantial ownership or control of a number of firms engaged in similar types of business activities constitute, in the committee's view, related activities performed through unified operation or common control within the meaning of the definition of enterprise. The fact the firms are independently incorporated or physically separate or under the immediate direction of local management, as in *Wirtz* v. *Hardin*, 16 Wage Hour Cases 722 (N.D. Ala.), is not determinative of this question. (Sen. Rept. No. 1487, 89th Congress, 2nd session, page 7.)

But where, as in the case of a retail store owned by a partnership and another store owned by one of the partners providing similar goods or services, it appears that the activities of the separate stores have no functional interdependence and that they are separately conducted to serve the business purpose of the partnership on the one hand and the business purpose of the individual on the other hand, the requirement of performance ''through common control'' of ''related activities'' for a ''common business purpose'' may not be sufficiently met.

### § 779.216 Statutory construction of the terms.

The terms ''unified operation'' and ''common control'' do not have a fixed legal or technical meaning. As used in the definition, these and other terms must be given an interpretation consistent with the Congressional intention to be ascertained from the context in which they are used, the legislation of which they form a part, and the legislative history. In extending coverage of the Act on an ''enterprise'' basis, the Congress intended, by the 1961 and 1966 amendments to cover, among others, business organizations and chain store systems which may perform their related activities through complex business arrangements or business structures, whether they perform their activities for a common business purpose through unified operation or through the retention or exercise of control. For these reasons, the definition of the term ''enterprise'' is stated in broad general terms. This legislative intent is evidenced both by the statements in the Committee Reports and by the definition itself, particularly the broad references to the inclusion in the ''enterprise'' of ''all such activities'' whether performed ''in one or more establishments'' or ''by one or more corporate or other organizational units.'' When the Act was amended in 1966 the Congress further broadened coverage by redefining an enterprise engaged in commerce or in the production of goods for commerce in section 3(s). (See § 779.22.) Where the Congress intended to exclude certain arrangements or activities from the ''enterprise'' it did so by specific provision under the prior and amended Act.

### § 779.217 "Unified operation" defined.

Webster defines the word ''unify'' to mean ''to cause to be one; to make into a unit; to unite.'' The pertinent definition of ''operation'' is a method or way of operating, working or functioning. Since the term ''unified operation'' has reference to the method of performing the related activities, it means combining, uniting, or organizing their performance so that they are in effect a single business unit or an organized business system which is an economic unit directed to the accomplishment of a common business purpose. The term ''unified operation'' thus includes a business which may consist of separate segments but which is conducted or operated as a unit or as a single business for a common business purpose.

### § 779.218 Methods to accomplish "unified operation."

There are many instances where several establishments, persons, corporations, or other business organizations, join together to perform some or all of their activities as a unified business or business system. They may accomplish such unification through agreements, franchises, grants, leases, or other arrangements which have the effect of aligning or integrating the activities of one company with the activities of others so that they constitute a single business or unified business system. Whether in any particular case the activities are performed through ''unified operation'' and have the effect of creating a single enterprise, will depend

upon all the facts, including the manner in which the activities are performed, the agreements and arrangements which govern their performance, and the other relationships between the parties, considered in the light of the statutory provision and the legislative intent. (cf *Wirtz* v. *Wornom's Pharmacy* (E.D. Va.), 18 WH Cases 289, 365; 57 Labor Cases 32,006, 32,030.)

### § 779.219 Unified operation may be achieved without common control or common ownership.

The performance of related activities through ''unified operation'' to serve a common business purpose may be achieved without common control and without common ownership. In particular cases ownership or control of the related activities may be factors to be considered, along with all facts and circumstances, in determining whether the activities are performed through ''unified operation.'' It is clear from the definition that if the described activities are performed through unified operation they will be part of the enterprise whether they are performed by one company or by more than one corporate or other organizational unit. The term ''unified operation'' has reference particularly to enterprises composed of a number of separate companies as is clear in the quotation from the Senate Report in § 779.215. Where the related activities are performed by a single company, or under other single ownership, they will ordinarily be performed through ''common control,'' and the question of whether they are also performed through unified operation will not need to be decided. (*Wirtz* v. *Barnes Grocer Co.*, 398 F. 2d 718 (C.A. 8).)

### § 779.220 Unified operation may exist as to separately owned or controlled activities which are related.

Whether there is unified operation of related activities will thus be of concern primarily in those cases where the related activities are separately owned or controlled but where, through arrangement, agreement or otherwise, they are so performed as to constitute a unified business system organized for a common business purpose. For example, a group of separately incorporated, separately owned companies, may agree to conduct their activities in such manner as to be for all intents and purposes a single business system except for the fact that the ownership and control of the individual segments of the business are retained, in part or in whole, by the individual companies comprising the unified business system. The various units may operate under a single trade name; construct their establishment to appear identical; use identical equipment; sell generally the same goods or provide the same type of services, and, in some cases, at uniform standardized prices; and in other respects appear to the persons utilizing their services or purchasing their goods as being the same business. They also may arrange for group purchasing and warehousing; for advertising as a single business; and for standardization of their records, as well as their credit, employment, and other business policies and practices. In such circumstances the activities may well be performed through ''unified operation'' sufficient to consider all of the related activities performed by the group of units as constituting one enterprise, despite the separate ownership of the various segments and despite the fact that the individual units or segments may retain control as to some or all of their own activities. That this is in accord with the congressional intent is plain, since where the Congress intended that such arrangements shall not bring a group of certain individual retail or service establishments into a single enterprise, provision to accomplish such exception was specifically included. (See § 779.226, discussing the proviso in section 3(r) with respect to certain franchise and other specified arrangements entered into between independently owned retail or service establishments and other businesses.)

### § 779.221 "Common control" defined.

Under the definition the ''enterprise'' includes all related activities performed through ''common control'' for a common business purpose. The word ''control'' may be defined as the act of fact of controlling; power or authority to control; directing or restraining domination. ''Control'' thus includes

the power or authority to control. In relation to the performance of the described activities, the ''control,'' referred to in the definition in section 3(r) includes the power to direct, restrict, regulate, govern, or administer the performance of the activities. ''Common'' control includes the sharing of control and it is not limited to sole control or complete control by one person or corporation. ''Common'' control therefore exists where the performance of the described activities are controlled by one person or by a number of persons, corporations, or other organizational units acting together. This is clearly supported by the definition which specifically includes in the ''enterprise'' all such activities whether performed by ''one or more corporate or other organizational units.'' The meaning of ''common control'' is discussed comprehensively in part 776 of this chapter.

### § 779.222 Ownership as factor.

As pointed out in § 779.215 ''unified operation'' and ''common control'' do not refer to the ownership of the described activities but only to their performance. It is clear, however, that ownership may be an important factor in determining whether the activities are performed through ''unified operation or common control.'' Thus common control may exist where there is common ownership. Where the right to control, one of the prerogatives of ownership, exists, there may be sufficient ''control'' to meet the requirements of the statute. Ownership, or sufficient ownership to exercise control, will be regarded as sufficient to meet the requirement of ''common control.'' Where there is such ownership, it is immaterial that some segments of the related activities may operate on a semi-autonomous basis, superficially free of actual control, so long as the power to exercise control exists through such ownership. (See *Wirtz* v. *Barnes Grocer Co.*, 398 F. 2d 718 (C.A. 8).) For example, a parent corporation may operate a chain of retail or service establishments which, for business reasons, may be divided into several geographic units. These units may have certain autonomy as to purchasing, marketing, labor relations, and other matters. They may be separately incorporated, and each unit may maintain its own records, including records of its profits or losses. All the units together, in such a case, will constitute a single enterprise with the parent corporation. They would constitute a single business organization under the ''common control'' of the parent corporation so long as they are related activities performed for a common business purpose. The common ownership in such cases provides the power to exercise the ''control'' referred to in the definition. It is clear from the Act and the legislative history that the Congress did not intend that such a chain organization should escape the effects of the law with respect to any segment of its business merely by separately incorporating or otherwise dividing the related activities performed for a common business purpose.

### § 779.223 Control where ownership vested in individual or single organization.

Ownership, sufficient to exercise ''control,'' of course, exists where total ownership is vested in a single person, family unit, partnership, corporation, or other single business organization. Ownership sufficient to exercise ''control'' exist also where there is more than 50 percent ownership of voting stock. (See *West* v. *Wal-Mart*, 264 F. Supp. 168 (W.D. Ark.).) But ''control'' may exist with much more limited ownership, and, in certain cases exists in the absence of any ownership. The mere ownership of stock in a corporation does not by itself establish the existence of the ''control'' referred to in the definition. The question whether the ownership in a particular case includes the right to exercise the requisite ''control'' will necessarily depend upon all the facts in the light of the statutory provisions.

### § 779.224 Common control in other cases.

(a) As stated in § 779.215 ''common control'' may exist with or without ownership. The actual control of the performance of the related activities is sufficient to establish the ''control'' referred to in the definition. In some cases an owner may actually relinquish

his control to another, or by agreement or other arrangement, he may so restrict his right to exercise control as to abandon the control or to share the control of his business activities with other persons or corporations. In such a case, the activities may be performed under ''common control.'' In other cases, the power to control may be reserved through agreement or arrangement between the parties so as to vest the control of the activities of one business in the hands of another.

(b) Activities are considered to be performed under ''common control'' even if, because of the particular methods of operation, the power to control is only seldom used, as where the business has been in operation for a long time without change in methods of operation and practically no actual direction is necessary; also common control may exist where the control, although rarely visibly exercised, is evidenced by the fact that mere suggestions are adopted readily by the business being controlled.

(c) In the retail industry, particularly, there are many instances where, for business reasons, related activities performed by separate companies are so unified or controlled as to constitute a single enterprise. A common example, specifically named in the definition, is the leased department. This and other examples are discussed in §§ 779.225 through 779.235.

LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

### § 779.225 Leased departments.

(a) As stated in section 3(r) of the enterprise includes ''departments of an establishment operated through leasing arrangements.'' This statutory provision is based on the fact that ordinarily the activities of such leased departments are related to the activities of the establishment in which they are located, and they are performed for a common business purpose either through ''unified operation'' or ''common control.'' A general discussion will be found in part 776 of this chapter.

(b) In the ordinary case, a retail or service establishment may control many of the operations of a leased department therein and unify its operation with its own. Thus, they may operate under a common trade name: The host establishment may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies; advertising, adjustment and credit operations, may be unified, and insurance, taxes, and other matters may be included as a part of the total operations of the establishment. Some or all of these and other functions, which are the normal prerogatives of an independent businessman, may be controlled or unified with the store's other activities in such a way as to constitute a single enterprise under the Act.

(c) Since the definition specifically includes in the ''enterprise,'' for the purpose of this Act, ''departments of an establishment operated through leasing arrangements,'' any such department will be considered a part of the host establishment's enterprise in the absence of special facts and circumstances warranting a different conclusion.

(d) Whether, in a particular case, the relationship is such as to constitute the lessee's operation to be a separate establishment of a different enterprise rather than a ''leased department'' of the host establishment as described in the definition, will depend upon all the facts including the agreements and arrangements between the parties as well as the manner in which the operations are conducted. If, for example, the facts show that the lessee occupies a physically separate space with (or even without) a separate entrance, and operates under a separate name, with his own separate employees and records, and in other respects conducts his business independently of the lessor's, the lessee may be operating a separate establishment or place of business of his own and the relationship of the parties may be only that of landlord and tenant. In such a case, the lessee's operation will not be regarded as a ''leased department'' and will not be included in the same enterprise with the lessor.

(e) The employees of a leased department would not be covered on an enterprise basis if such leased department is

located in an establishment which is not itself a covered enterprise or part of a covered enterprise. Likewise, the applicability of exemptions for certain retail or service establishments from the Act's minimum wage or overtime pay provisions, or both, to employees of a leased department would depend upon the character of the establishment in which the leased department is located. Other sections of this subpart discuss the coverage of leased retail and service departments in more detail while subpart D of this part explains how exemptions for certain retail and service establishments apply to leased department employees.

### § 779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.

While certain franchise and other arrangements may operate to bring the one to whom the franchise is granted into another enterprise (see § 779.232), section 3(r) contains a specific exception for certain arrangements entered into by a retail or service establishment which is under independent ownership. The specific exception in section 3(r) reads as follows:

*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, (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.

### § 779.227 Conditions which must be met for exception.

This exception, in accordance with its specific terms, will apply to exclude an establishment from enterprise coverage only if the following conditions are met:

(a) The establishment must be a ''retail or service establishment'' as this term is defined in section 13(a)(2) of the Act (see discussion of this term in §§ 779.312 and 779.313); and

(b) The retail or service establishment must not be an ''enterprise'' which is large enough to come within the scope of section 3(s) of the Act; and

(c) The retail or service establishment must be under independent ownership.

### § 779.228 Types of arrangements contemplated by exception.

If the retail or service establishment meets the requirements in paragraphs (a) through (c) of § 779.227, it may enter into the following arrangements without becoming a part of the larger enterprise, that is, without losing its status as a ''separate and distinct enterprise'' to which section 3(s) would not otherwise apply:

(a) Any arrangement, whether by agreement, franchise or otherwise, that it will sell, or sell only certain goods specified by a particular manufacturer, distributor, or advertiser.

(b) Any such arrangement 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.

(c) Any such arrangement by which it will join with other similar retail or service establishments in the same industry for the purpose of collective purchasing. Where an agreement for ''collective purchasing'' is involved, further requirements are imposed, namely, that all of the other establishments joining in the agreement must be retail or service establishments under independent ownership, and that all of the establishments joining in the collective purchasing arrangement must be ''in the same industry.'' This has reference to such arrangements by a group of grocery stores, or by some other trade group in the retail industry.

(d) Any arrangement whereby the establishment's premises are leased from a person who also leases premises to other retail or service establishments. In connection with this rental arrangement, the Senate Report cites as an example the retail establishment which

rents its premises from a shopping center operator (S. Rept. 145, 87th Cong., 1st Sess., p. 41). It is clear that this exception was not intended to apply to the usual leased department in an establishment, which is specifically included within the larger enterprise under the definition of section 3(r). (See discussion under § 779.225.)

### § 779.229 Other arrangements.

With respect to those arrangements specifically described in the proviso contained in the definition, an independently owned retail or service establishment will not be considered to be other than a separate and distinct enterprise, if other arrangements the establishment makes do not have the effect of bringing the establishment within a larger enterprise. Whether or not other arrangements have such an effect will necessarily depend upon all the facts. The Senate Report makes the following observations with respect to this:

> Thus the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same ''enterprise.'' This is also the case in food retailing because of the great extent to which local independent food store operators have joined together in many phases of their business. While maintaining their stores as independently owned units, they have affiliated together not just for the purchasing of merchandise, but also for providing numerous other services such as (1) central warehousing; (2) advertising; (3) sales promotions; (4) managerial advice; (5) store engineering; (6) accounting systems; (7) site locations; and (8) hospitalization and life insurance protection. (S. Rept. 145, 87th Cong., 1st Sess., p. 42.)

The report continues with the following observations:

> Whether such arrangements bring the establishment within the franchisor's, lessor's, or grantor's ''enterprise'' is a question to be determined on all the facts. The facts may show that the arrangements reserve the necessary right of control in the grantor or unify the operations among the separate ''franchised'' establishments so as to create an economic unity of related activities for a common business purpose. In that case, the ''franchised'' establishment will be considered a part of the same ''enterprise.'' For example, whether a franchise, lease, or other contractual arrangement between a distributor and a retail dealer has the effect of bringing the dealer's establishments within the enterprise of the distributor will depend upon the terms of the agreements and the related facts concerning the relationship between the parties.
>
> 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?''
>
> For instance, a bona fide independent automobile dealer will not be considered a part of the enterprise of the automobile manufacturer or of the distributor. Likewise, the same result will also obtain with respect to the independent components of a shopping center.
>
> 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 prerogatives 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, right, or concession. (S. Rept. 145, 87th Cong., 1st Sess., 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 create a larger ''enterprise'' will necessarily depend on all the facts. Some arrangements which do not create a larger enterprise and some which do are discussed in §§ 779.230 through 779.235.

### § 779.230 Franchise and other arrangements.

(a) There are many different and complex arrangements by which businesses may join to perform their activities for a common purpose. A general discussion will be found in part 776 of this chapter. The quotation in § 779.229 from the Senate Report shows that Congress recognized that some franchise, lease, or other arrangements

have the effect of creating a larger enterprise and whether they do or not depends on the facts. The facts may show that the arrangements are so restrictive as to deprive the individual establishment of those prerogatives which are the essential attributes of an independent business. (Compare *Wirtz* v. *Lunsford*, 404 F. 2d, 693 (C.A. 6).) An establishment through such arrangements may transfer sufficient ''control'' so that it becomes in effect a unit in a unified chain operation. In such cases the result of the arrangement will be to create a larger enterprise composed of the various segments, including the establishment which relinquishes its control.

(b) The term ''franchise'' is not susceptible of precise definition. The extent to which a businessman relinquishes the control of his business or the extent to which a franchise results in the performance of the activities through unified operation or common control depends upon the terms of the contract and the other relationships between the parties. Ultimately the determination of the precise scope of such arrangements which result in creating larger enterprises rests with the courts.

### § 779.231 Franchise arrangements which do not create a larger enterprise.

(a) While it is clear that in every franchise a businessman surrenders some rights, it equally is clear that every franchise does not create a larger enterprise. In the ordinary case a franchise may involve no more than an agreement to sell the particular product of the one granting the franchise. It may also prohibit the sale of a competing product. Such arrangements, standing alone, do not deprive the individual businessman of his ''control'' so as to bring him into a larger enterprise with the one granting the franchise.

(b) The portion of the Senate Report quoted in the § 779.229 cites a ''bona fide independent automobile dealer'' as an example of such a franchise arrangement. (It is recognized that salesmen, mechanics, and partsmen primarily engaged in selling or servicing automobiles, trucks, trailers, farm implements, or aircraft, employed by nonmanufacturing establishments primarily engaged in the business of selling such vehicles to ultimate purchasers are specifically exempt from the overtime pay provisions under section 13(b)(10) of the Act. Section 779.372 discusses the exemption provided by section 13(b)(10) and its application whether or not the establishment meets the Act's definition of a retail or service establishment. The automobile dealer is used here only as an example of the type of franchise arrangement which, within the intent of the Congress, does not result in creating a larger enterprise.) The methods of operation of the independent automobile dealer are widely known. While he operates under a franchise to sell a particular make of automobile and also may be required to stock certain parts and to maintain specified service facilities, it is clear that he retains the control of the management of his business in those respects which characterize an independent businessman. He determines the prices for which he sells his merchandise. Even if prices are suggested by the manufacturer, it is well known that the dealer exercises wide discretion in this respect, free of control by the manufacturer or distributor. Also the automobile dealer retains control with respect to the management of his business, the determination of his employment practices, the operation of his various departments, and his business policies. The type of business in which he is engaged leaves him wide latitude for the exercise of his judgment and for decisions with respect to important aspects of his business upon which its success or failure depends. On the basis of these considerations, it is evident why the independent automobile dealer was cited as an example of the type of franchise which does not create a larger enterprise encompassing the dealer, the manufacturer or the distributor. Similar facts will lead to the same conclusion in other such arrangements.

### § 779.232 Franchise or other arrangements which create a larger enterprise.

(a) In other instances, franchise arrangements do result in bringing a

dealer's business into a larger enterprise with the one granting the franchise. Where the franchise arrangement results in vesting control over the operations of the dealer's business in the one granting the franchise, the result is to place the dealer in a larger enterprise with the one granting the franchise. Where there are multiple units to which such franchises have been granted, the several dealers are considered to be subject to the common control of the one granting the franchise and all would be included in the same larger enterprise.

(b) It is not possible to lay down specific rules to determine whether a franchise or other agreement is such that a single enterprise results because all the facts and circumstances must be examined in the light of the definition of the term ''enterprise'' as discussed above in this subpart. However, the following example illustrates a franchising company and independently owned retail establishments which would constitute a single enterprise:

(1) The franchisor had developed a system of retail food store operations, built up a large volume of buying power, formulated rules and regulations for the successful operation of stores together constituting a system which for many years proved in practice to be of commercial value to the separate stores; and

(2) The franchisor desired to extend its business through the operation of associated franchise stores, by responsible persons in various localities to act as limited agents, and to be parts of the system, to the end that the advantages of and the profits from the business could be enjoyed by those so associated as well as by the franchisor; and

(3) The stores were operated under the franchise as part of the general system and connected with the home office of the franchisor from which general administrative jurisdiction was exercised over all franchised stores, wherever located; and

(4) The stores operated under the franchise agreement were always subject to the general administrative jurisdiction of the franchisor and agreed to comply with it; and

(5) The stores operated under the franchise agreed to install appliances, fixtures, signs, etc. according to plans and specifications provided by the franchisor and to purchase their merchandise through the franchisor except to the extent that the latter may authorize local purchase of certain items; and

(6) The stores operated under the franchise agreed to participate in special promotions, sales and advertising as directed by the franchisor, to attend meetings of franchise store operators and to pay a fee to the franchisor at the rate of one-half of 1 percent of total gross sales each month for the privileges to them and the advantages and profits derived from operating a local unit of the franchisor's system; and

(7) The franchisor under the franchise agreement had the right to place on a prohibited list any merchandise which it considered undesirable for sale in a franchise store, and the stores operated pursuant to the franchise agreed to immediately discontinue sale of any such blacklisted merchandise.

(c) It is clear from the facts and circumstances surrounding this franchise arrangement described in paragraph (b) of this section that the operators of the franchised establishments are denied the essential prerogatives of the ordinary independent businessman because of restrictions as to products, prices, profits and management. The last paragraph of the Senate Report quoted in § 779.229 makes clear that in such cases the franchised establishment, dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, right, or concession.

### § 779.233 Independent contractors performing work "for" an enterprise.

(a) The definition in section 3(r) specifically provides that the ''enterprise'' shall not include ''the related activities performed for such enterprise by an independent contractor.'' This exclusion will apply where the related activities are performed ''for'' the enterprise and if such activities are performed by ''an independent contractor.'' This provision is discussed generally in part 776 of this chapter.

(b) The Senate Report in referring to this exception states as follows:

> It does not include the related activities performed for such an enterprise by an independent contractor, such as an independent accounting firm or sign service or advertising company, * * * (S. Rept. No. 145, 87th Cong., 1st Sess., p. 40).

The term ''independent contractor'' as used in section 3(r) has reference to an independent business which performs services for other businesses as an established part of its own business activities. The term ''independent contractor'' as used in 3(r) thus has reference to an independent business which is a separate ''enterprise,'' and which deals in the ordinary course of its own business operations, at arms length, with the enterprises for which it performs services.

(c) There are many instances in industry where one business performs activities for separate businesses without becoming a part of a larger enterprise. In addition to the examples cited in the Report they may include such services as repairs, window cleaning, transportation, warehousing, collection services, and many others. The essential test in each case will be whether such services are performed ''for'' the enterprise by an independent, separate enterprise, or whether the related activities are performed for a common purpose through unified operation or common control. In the latter case the activities will be considered performed ''by'' the enterprise, rather than ''for'' the enterprise, and will be a part of the enterprise. The distinction in the ordinary case will be readily apparent from the facts. In those cases where questions arise a determination must be made on the basis of all the facts in the light of the statute and the legislative history.

### § 779.234 Establishments whose only regular employees are the owner or members of his immediate family.

Section 3(s) provides that any ''establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner'' shall not be considered to be an ''enterprise'' as described in section 3(r) or a part of any other enterprise. Further the sales of such establishment are not included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of section 3(s). The term ''other member of the immediate family of such owner'' is considered to include relationships such as brother, sister, grandchildren, grandparents, and in-laws but not distant relatives from separate households. The 1966 amendments extended the exception to include family operated establishments which only employ persons other than members of the immediate family infrequently, irregularly, and sporadically. (See general discussion in part 776 of this chapter.)

### § 779.235 Other "enterprises."

No attempt has been made in the discussion of the term ''enterprise,'' to consider every possible situation which may, within the meaning of section 3(r), constitute an ''enterprise'' under the Act. The discussion is designed to explain and illustrate the application of the term in some cases; in others, the discussion may serve as a guide in applying the criteria of the definition to the particular fact situation. A more complete discussion is contained in part 776 of this chapter.

## COVERED ENTERPRISES

### § 779.236 In general.

Sections 779.201 through 779.235 discuss the various criteria for determining what business unit or units constitute an ''enterprise'' within the meaning of the Act. Sections 779.237 through 779.245 discuss the criteria for determining what constitutes a ''covered enterprise'' under the Act with respect to the conditions for coverage of those enterprises in which retail sale of goods or services are made. As explained in §§ 779.2 through 779.4, previously covered employment in retail and service enterprises will be subject to different monetary standards than newly covered employment in such enterprises until February 1, 1971. For this reason the enterprise coverage provisions of both the prior and the amended Act are discussed in the following sections of this subpart.

### § 779.237 Enterprise engaged in commerce or in the production of goods for commerce.

Under section 3(s) the ''enterprise'' to be covered must be an ''enterprise engaged in commerce or in the production of goods for commerce.'' This is defined in section 3(s) as follows:

> Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person * * *.

In order for an enterprise to come within the coverage of the Act, it must, therefore, be established that the enterprise has some employees who are:

(a) Engaged in commerce or in the production of goods for commerce, including

(b) Employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person.

The legislative history of the 1966 amendments does not indicate a difference between the meaning of the above wording and the wording used in the prior Act. (See § 779.22.) For a complete discussion of the employees who come within the quoted language see subpart B of the Interpretative Bulletin on general coverage, part 776 of this chapter.

### § 779.238 Engagement in described activities determined on annual basis.

As set forth in the preceding section an enterprise to be a ''covered enterprise'' must have at least some employees engaged in certain described activities. This requirement will be determined on an annual basis in order to give full effect to the intent of Congress. Thus, it is not necessary that the enterprise have two or more employees engaged in the named activities every week. An enterprise described in section 3(s)(1) or (5) of the prior Act or in section 3(s)(1) of the Act as it was amended in 1966 will be considered to have employees engaged in commerce or in the production of goods for commerce, including the handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, if during the annual period which it uses in calculating its annual sales for purposes of the other conditions of these sections, it regularly and recurrently has at least two or more employees engaged in such activities. On the other hand, it is plain that an enterprise that has employees engaged in such activities only in isolated or sporadic occasions, will not meet this condition.

### § 779.239 Meaning of "engaged in commerce or in the production of goods for commerce."

The term ''engaged in commerce or in the production of goods for commerce,'' as used in section 3(s) of the Act in reference to employees who are so engaged is the same as the term which has been used in the Act for many years. The statutory definitions of these terms are set forth in §§ 779.12 through 779.16. The interpretative bulletin on general coverage part 776 of this chapter) contains the Division's interpretations as to which employees are ''engaged in commerce or in the production of goods for commerce.'' These interpretations are equally applicable under section 3(s) in determining which employees are ''engaged in commerce or in the production of goods for commerce'' within the meaning of this section. A brief discussion of the guiding principles of retail or service establishments are ''engaged in commerce or in the production of goods for commerce'' is set forth in subpart B of this part.

## EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE BY ANY PERSON

### § 779.240 Employees "handling * * * or otherwise working on goods."

(a) *''Goods'' upon which the described activities are performed.* Employees will be considered to be handling, selling, or otherwise working on goods within the meaning of section 3(s) if they engage in the described activities on ''goods'' which ''have been moved in or produced for commerce by any person.'' They may be handling or working on such goods which the enterprise does not

sell. The term ''goods'' is defined in section 3(i) of the Act. The definition is explained in § 779.107 and discussed comprehensively in part 776 of this chapter. As defined in section 3(i) of the Act, the term includes any part or ingredient of ''goods'' and, in general, includes ''articles or subjects of commerce of any character.'' Thus the term ''goods,'' as used in section 3(s), includes all goods which have been moved in or produced for commerce, such as stock-in-trade, or raw materials that have been moved in or produced for commerce.

(b) *''Handling * * * or otherwise working on goods.''* The term ''handling * * * or otherwise working on goods'' used in section 3(s) is substantially the same as the term used since 1938 in section 3(j) of the Act. Both terms will therefore be considered to have essentially the same meaning. (See part 776 of this chapter, the interpretative bulletin on the general coverage of the Act.) Thus, the activities encompassed in the term ''handling or in any other manner working on goods'' in section 3(s) are the same as the activities, encompassed in the similar term in section 3(j), by which goods are ''produced'' within the meaning of the Act. In general, the term ''handling * * * or otherwise working on goods'' includes employees who sort, screen, grade, store, pack, label, address, transport, deliver, print, type, or otherwise handle or work on the goods. The same will be true of employees who handle or work on ''any part of ingredient of the goods'' referred to in the discussion of the term ''goods'' in § 779.107. An employee will be considered engaged in ''handling * * * or otherwise working on goods,'' within the meaning of section 3(s), only if he performs the described activities on goods that ''have been moved in or produced for commerce by any person.'' This requirement is discussed in §§ 779.242 and 779.243.

### § 779.241 Selling.

The statutory definition of the term ''sale'' or ''sell'' is quoted in § 779.15. As long as the employee in any way participates in the sale of the goods he will be considered to be ''selling'' the goods, whether he physically handles them or not. Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the ''sale'' of the particular goods, he will be considered to be ''selling'' the goods. ''Selling'' goods, under section 3(s) has reference only to goods which ''have been moved in or produced for commerce by any person,'' as discussed in §§ 779.242 and 779.243.

### § 779.242 Goods that "have been moved in" commerce.

For the purpose of section 3(s), goods will be considered to ''have been moved * * * in commerce'' when they have moved across State lines before they are handled, sold, or otherwise worked on by the employees. It is immaterial in such a case that the goods may have ''come to rest'' within the meaning of the term ''in commerce'' as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees in the enterprise. Such movement in commerce may take place before they have reached the enterprise, or within the enterprise, such as from a warehouse of the enterprise in one State to a retail store of the same enterprise located in another State. Thus, employees will be considered to be ''handling, selling, or otherwise working on goods that have been moved in * * * commerce'' where they are engaged in the described activities on ''goods'' that have moved across State lines at any time in the course of business, such as from the manufacturer to the distributor, or to the ''enterprise,'' or from one establishment to another within the ''enterprise.'' See the general discussion in part 776 of this chapter.

### § 779.243 Goods that have been "produced for commerce by any person."

An employee will be considered to be handling, selling, or otherwise working on goods that have been ''produced for commerce by any person'' within the meaning of section 3(s), if he is performing the described activities with respect to goods which have been ''produced for commerce'' within the meaning of the Act. The term ''produced'' is defined in section 3(j) of the Act and, as explained above, has a well-established

meaning under the existing law. (See § 779.104 and part 776 of this chapter.) The word as it is used in the context of the phrase ''goods * * * produced for commerce by any person'' in section 3(s) has the same meaning as in 3(j). Therefore, where goods are considered ''produced for commerce'' within the meaning of section 3(j) of the Act they also will be considered ''produced for commerce'' within the meaning of section 3(s). A discussion of when goods are produced for commerce within the meaning of section 3(j) is contained in § 779.108. Of course, within the meaning of section 3(s), the goods will be considered ''produced for commerce'' when they are so produced ''by any person.''

COVERED RETAIL ENTERPRISE

### § 779.244 "Covered enterprises" of interest to retailers of goods or services.

Retailers of goods or services are primarily concerned with the enterprises described in sections 3(s)(1) and 3(s)(5) of the prior Act and section 3(s)(1) of the Act as amended in 1966. Although section 3(s)(1) of the prior Act (under the 1961 amendments) had exclusive application to the retail and service industry, section 3(s)(1) of the Act as amended in 1966 may apply to any enterprise. This part is concerned only with retail or service establishments and enterprises. Enterprises described in clauses (2), (3), and (4) of section 3(s) are discussed herein only with respect to the application to them of provisions relating to retail or service establishments. Coverage of such enterprises and the application of section 3(s)(1) of the amended Act to enterprises generally are discussed in part 776 of this chapter. The statutory definitions of enterprises of interest to retailers under the prior Act and the Act as amended in 1966 are quoted in § 779.22.

### § 779.245 Conditions for coverage of retail or service enterprises.

(a) Retail or service enterprises may be covered under section 3(s)(1) of the prior Act or section 3(s)(1) of the amended Act although the latter is not limited to retail or service enterprises. A retail or service enterprise will be a covered enterprise under section 3(s)(1) of the amended Act if both the following conditions are met:

(1) The enterprise is ''an enterprise engaged in commerce or in the production of goods for commerce.'' This requirement, which is discussed in §§ 779.237 through 779.243, applies to all covered enterprises under the provisions of both the prior and the amended Act; and,

(2) During the period February 1, 1967, through January 31, 1969, the enterprise has an annual gross volume of sales made or business done, exclusive of excise taxes at the retail level which are separately stated, of at least $500,000; or on and after February 1, 1969, the enterprise has an annual gross volume of sales made or business done of at least $250,000, exclusive of excise taxes at the retail level which are separately stated.

(b) A retail or service enterprise will be covered under section 3(s)(1) of the Act prior to the amendments if all four of the following conditions are met:

(1) The enterprise is ''an enterprise engaged in commerce or in the production of goods for commerce'' as explained above in paragraph (a)(1) of this section and,

(2) The enterprise has one or more ''retail or service establishments'' (the statutory definition of the term ''retail or service establishment'' is contained in § 779.24 and discussed in subpart D of this part) and,

(3) The enterprise has an annual gross volume of sales of $1 million or more, exclusive of excise taxes at the retail level which are separately stated and,

(4) The enterprise ''purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more.'' (This requirement is discussed in §§ 779.246 through 779.253.)

(c) Sections 779.258 through 779.260 discuss the meaning of ''annual gross volume of sales made or business done'' and §§ 779.261 through 779.264 discuss what excise taxes may be excluded from the annual gross volume. Sections 779.265 through 779.269 discuss the method of computing the annual gross

volume where it is necessary to determine monetary obligations to employees under the Act.

INTERSTATE INFLOW TEST UNDER PRIOR ACT

**§ 779.246 Inflow test under section 3(s)(1) of the Act prior to 1966 amendments.**

To come within the scope of section 3(s)(1) of the prior Act, the enterprise, in addition to the other conditions, must purchase or receive goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more. To meet this condition, it must be shown that (a) the enterprise purchases or receives goods for resale (§ 779.248), (b) that such goods move or have moved across State lines (§ 779.249), and (c) that such purchases and receipts amount in total annual volume to $250,000 or more (§ 779.253). Enterprises which do not meet this test may be covered under section 3(s)(1) of the present Act, which contains no interstate inflow requirement.

**§ 779.247 "Goods" defined.**

The term ''goods'' as used in section 3(s) of the prior and amended Act is defined in section 3(i) of the Act. The statutory definition is quoted in § 779.14, and is discussed in detail in part 776 of this chapter.

**§ 779.248 Purchase or receive "goods for resale."**

(a) Goods will be considered purchased or received ''for resale'' for purposes of the inflow test contained in section 3(s)(1) of the prior Act if they are purchased or received with the intention of being resold. This includes goods, such as stock in trade which is purchased or received by the enterprise for resale in the ordinary course of business. It does not include machinery, equipment, supplies, and other goods which the enterprise purchases to use in conducting its business. This is true even if such capital goods or other equipment, which the enterprise originally purchased for use in conducting its business, are at some later date actually resold. The distinction is to be found in whether the goods are purchased or received by the enterprise with the intention of reselling them in the same form or after further processing or manufacturing, or whether they are purchased with the intent of being consumed or used by the enterprise itself in the performance of its activities.

(b) Goods, such as raw materials or ingredients, are considered purchased or received by the enterprise ''for resale,'' even if such goods are purchased or received for the purpose of being processed or used as parts or ingredients in the manufacture of other goods which the enterprise intends to sell. For example, where the enterprise purchases flour for use in baking bread or pastries for sale, the goods will be considered to have been purchased ''for resale.'' It is immaterial whether the goods will be resold by the enterprise at retail or at wholesale.

**§ 779.249 Goods which move or have moved across State lines.**

In order to be included in the annual dollar volume for purposes of this test, the goods which the enterprise purchases or receives for resale must be goods that ''move or have moved across the State lines.'' Goods which have not moved across State lines before they are resold by the enterprise will not be included. The movement to which the phrase ''move or have moved'' has reference is that movement which the goods follow in their journey to the enterprise or within the enterprise to the establishment which sells the goods. Thus, if goods have moved across State lines at some stage in the flow of trade before they are actually sold by the enterprise, they will be considered to have moved across State lines. It is not material that the goods may have ''come to rest'' at some time before they are purchased or received and sold by the enterprise; nor is it material that some time may have elapsed between the time the goods have moved across State lines and the time they are purchased or received and sold by the enterprise. It is sufficient if at any time such goods have moved across State lines in the ordinary course of trade before resale by the enterprise.

Much of the goods purchased by retailers are produced from a local intrastate supplier. In many instances these goods may have been stored at the supplier's establishment for some time. However, as long as the particular goods purchased have moved across State lines at some stage in the flow of trade to the retailer, they would have to be included in determining whether or not the enterprise has purchased or received for resale such out-of-State goods amounting to $250,000.

### § 779.250 Goods that have not lost their out-of-State identity.

Goods which are purchased or received by the enterprise from within the State will be considered goods which ''have moved across State lines'' if they have previously been moved across State lines and have not lost their identity as out-of-State goods before they are purchased or received by the enterprise. Also goods which have been assembled within the State after they were moved across State lines but before they are purchased or received by the enterprise will still be regarded as goods which ''have moved across State lines.'' Such goods are still identifiable as goods brought into the State. This is also true in certain cases where goods are processed to some extent without losing their identity as out-of-State goods. For example, out-of-State furniture or television sets which are put together within the State, or milk from outside the State which is pasteurized and bottled within the State, before being purchased or received by the enterprise, are goods which ''have moved across State lines.'' They have already moved across State lines and they retain their out-of-State identity, despite the assembly or processing within the State.

### § 779.251 Goods that have lost their out-of-State identity.

(a) Goods which are purchased or received by the enterprise within the State will not be considered goods which have ''moved across State lines'' if the goods, although they came from outside the State, had been processed or manufactured so as to have lost their identity as out-of-State goods before they are purchased or received by the enterprise. This assumes, of course, that the goods so manufactured or processed do not move across State lines before they are sold by the enterprise. Thus where an enterprise buys bread baked within the State which does not move across State lines before it is resold by the enterprise, the bread is not ''goods, which have moved across State lines'' even if the flour and other ingredients came from outside the State. The same conclusion will follow, under the same circumstances, where clothing is manufactured from out-of-State fabrics.

(b) In those cases where goods are composed in part of goods which have, and in part of goods which have not, moved across State lines, the entire product will be considered as goods which have moved across State lines, if, as a practical matter, it substantially consists of goods which are identifiable as out-of-State goods. Whether goods have been so changed as to have lost their out-of-State identity is question which will depend upon all the facts in a particular case.

### § 779.252 Not in deliveries from the reselling establishment.

Goods which move across State lines only in the course of deliveries from the reselling establishment of the enterprise are not included as goods which ''move or have moved across State lines.'' Thus, goods delivered by the enterprise to its customers outside of the State are not, for that reason, considered goods which ''move or have moved across State lines.'' The purpose of the provision excepting ''deliveries from the reselling establishment'' is to limit the test to goods which flow into the enterprise and to exclude those goods which only cross State lines when they flow out of the enterprise as an incident of the sale of such goods by the enterprise. In other words, this is an inflow test and not an outflow test.

### § 779.253 What is included in computing the total annual inflow volume.

The goods which the establishment purchases or receives for resale that move or have moved across State lines must ''amount in total annual volume to $250,000 or more.'' It will be noted

that taxes are not excluded in measuring this annual dollar volume. Thus, the total cost to the enterprise of such goods will be included in calculating the $250,000. This will include all taxes and other charges which the enterprise must pay for such goods. Generally, all charges will be included in the invoice of the goods. But whether included in the invoice or not, the total amount which the enterprise is required to pay for such goods, including charges for transportation, insurance, delivery, storage and any other will be included in computing the $250,000. The dollar volume of the goods purchased or received by the enterprise is the ''annual'' volume. The method of calculating the annual dollar volume is explained in § 779.266.

THE GASOLINE SERVICE ESTABLISHMENT ENTERPRISE

**§ 779.254 Summary of coverage and exemptions prior to and following the 1966 amendments.**

The ordinary gasoline service establishment is a covered enterprise under the Act if it has an annual gross volume of sales made or business done of not less than $250,000 a year, exclusive of excise taxes at the retail level which are separately stated, and meets the other tests of section 3(s)(5) of the prior Act and section 3(s)(1) of the amended Act. Beginning February 1, 1969, enterprise coverage extends to any gasoline service establishment in an enterprise which has an annual gross volume in such amount, even if the establishment's annual gross volume is less. However, a gasoline service establishment with gross sales of less than $250,000, exclusive of excise taxes at the retail level which are separately stated, may qualify for the minimum wage and overtime pay exemption provided in section 13(a)(2) of the Act if it meets the requirements of that section. Section 779.313 summarizes the requirements. An overtime pay exemption, which was repealed by the 1966 amendments, existed until February 1, 1967, for employees of ordinary gasoline service establishments under the prior Act. Thus, nonexempt employees of a covered gasoline service establishment enterprise are subject to the minimum wage standards for previously covered employment and the overtime pay requirements for newly covered employment as listed below:

| Minimum wage: | Beginning |
|---|---|
| $1.40 an hour | February 1, 1967. |
| $1.60 an hour | February 1, 1968 and thereafter. |
| Overtime pay after: | |
| 44 hours in a workweek | February 1, 1967. |
| 42 hours in a workweek | February 1, 1968. |
| 40 hours in a workweek | February 1, 1969 and thereafter. |

The particular considerations affecting coverage and exemptions are discussed in subsequent sections. The statutory language contained in section 3(s)(5) of the prior Act and 3(s)(1) of the amended Act may be found in § 779.22.

**§ 779.255 Meaning of "gasoline service establishment."**

(a) A gasoline service station or establishment is one which is typically a physically separate place of business engaged primarily (''primarily'' meaning 50 percent or more) in selling gasoline and lubricating oils to the general public at the station or establishment. It may also sell other merchandise or perform minor repair work as an incidental part of the business. (See S. Rept. 145, 87th Cong., first session, p. 32.) No difference in application of the terms ''gasoline service establishment'' and ''gasoline service station'' was intended by Congress (see Senate Report cited above) and both carry the same meaning.

(b) Under section 3(s)(5) of the prior Act and until February 1, 1969, under section 3(s)(1) of the amended Act, the covered enterprise is always a single establishment—a gasoline service establishment, even though such establishment may be a part of some larger enterprise for purposes of other provisions of the ''enterprise'' coverage of the new amendments. As noted above this term refers to what is commonly known as a gasoline service station, a separate ''establishment.'' What constitutes a separate establishment is discussed in §§ 779.303 through 779.306. While receipts from incidental sales and services are included and counted in determining the establishment's annual gross volume of sales for purposes

of enterprise coverage, the establishment's primary source of receipts must be from the sale of gasoline and lubricating oils. (See Senate Report cited above.) An establishment which derives the greater part of its income from the sales of goods other than gasoline or lubricating oils will not be considered a ''gasoline service establishment.'' The mere fact that an establishment has a gasoline pump as an incidental part of other business activities in which it is principally engaged does not constitute it ''a gasoline service establishment'' within the meaning and for the purposes of these sections.

**§ 779.256 Conditions for enterprise coverage of gasoline service establishments.**

(a) The requirement that the enterprise must be ''an enterprise engaged in commerce or in the production of goods for commerce'' is discussed in §§ 779.237 through 779.243. Those sections explain which employees are engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person. In connection with the discussion in those sections as it concerns employees of gasoline service establishments, it should be noted that as a general rule such employees normally are ''engaged in commerce or in the production of goods for commerce'' within the meaning of the Act. For example, gasoline filling station employees servicing motor vehicles used in interstate transportation or in the production of goods for commerce have always been regarded as being ''engaged in commerce or in the production of goods for commerce'' within the meaning of the Act. Such employees will also be considered as engaged in handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, if the gasoline or lubricating oils or the other goods with respect to which they perform the described activities have come from outside the State in which the establishment is located.

(b) For periods before February 1, 1969, a gasoline service establishment was within the scope of the enterprise coverage provisions of the Act only if its annual gross volume of sales was not less than $250,000, exclusive of excise taxes at the retail level which are separately stated. Until such date, a gasoline service establishment which did not have such an annual gross volume of sales was not a covered enterprise, and enterprise coverage did not extend to it by virtue of the fact that it is an establishment of an enterprise which meets coverage tests of section 3(s). In determining whether the establishment has the requisite annual gross volume of sales the receipts from all sales of the establishment are included without limitation to the receipts from sales of gasoline and lubricating oil. In computing the annual gross volume of sales the gross receipts from all types of sales during a 12-month period are included. These gross receipts are measured by the price paid by the purchaser of the goods or services sold by the establishment (Sen. Rept. 1487, 89th Cong. second session p. 7). Thus, where the establishment sells gasoline for an oil company on commission, annual gross volume is based on the retail sale price and not on the smaller amount retained or received as commissions. A further discussion of what sales are included in the annual gross volume is contained in §§ 779.258 through 779.260.

(c) In computing the annual gross volume of sales, excise taxes at the retail level which are separately stated are not counted. A discussion of the excise taxes which may be excluded under this provision is contained in §§ 779.261 through 779.264. Whether the particular taxes are ''excise taxes at the retail level'' depends upon the facts in each case. If the taxes are ''excise taxes at the retail level'' they will be excludable only if they are ''separately stated.'' Where a gasoline station posts a sign on or alongside the gasoline pumps indicating that a certain amount per gallon is for a specific excise tax, this will meet the requirement of being ''separately stated''. The method of calculating annual gross volume of sales is explained in greater detail in §§ 779.265 through 779.269.

### § 779.257 Exemption applicable to gasoline service establishments under the prior Act.

Section 13(b)(8) of the prior Act (before the 1966 amendments) contained an exemption from the overtime pay requirements for ''any employee of a gasoline service station''. This exemption was applicable prior to February 1, 1967, without regard to the annual gross volume of sales of the gasoline service station by which the employee was employed. The removal of this exemption by the 1966 amendments brought non-exempt employees of covered gasoline service stations within the purview of the overtime requirements of the Act for the first time.

## ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE

### § 779.258 Sales made or business done.

The Senate Report on the 1966 amendments reaffirmed the intent to measure the ''dollar volume of sales or business'' including ''the gross receipts or gross business'' to determine whether an enterprise is covered. This concept was first expressed in the Senate Report on the 1961 amendment (S. Rept. No. 145, 87th Congress, first session, p. 38). The phrase ''business done'' added by the 1966 amendments to section 3(s) merely reflects with more clarity the economic test of business size expressed in the prior Act in terms of ''annual gross volume of sales'' and conforms the language of the Act with the Congressional view expressed in the legislative history of the 1961 amendments. Thus, the annual gross volume of an enterprise must include any business activity in which it engages which can be measured on a dollar basis irrespective of whether the enterprise is tested under the prior or amended Act. The Senate Report on the 1966 amendments states:

> The intent to measure the ''dollar volume of sales or business'' including the ''gross receipts or gross business'' in determining coverage of such an enterprise was expressed in the Senate report above cited at page 38. The addition of the term ''business done'' to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue to include both the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, as measured by the price paid by the purchaser for the property or service sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind. (S. Rept. No. 1487, 89th Congress, second session, pp. 7–8.)

### § 779.259 What is included in annual gross volume.

(a) The annual gross volume of sales made or business done of an enterprise consists of its gross receipts from all types of sales made and business done during a 12-month period. The gross volume of sales made or business done means the gross dollar volume (not limited to income) derived from all sales and business transactions including, for example, gross receipts from service, credit, or other similar charges. Credits for goods returned or exchanged and rebates and discounts, and the like, are not ordinarily included in the annual gross volume of sales or business. The gross volume of sales or business includes the receipts from sales made or business done by the retail or service establishments of the enterprise as well as the sales made or business done by any other establishments of the enterprise, exclusive of the internal transactions between them. Gross volume is measured by the price paid by the purchaser for the property or service sold to him, as stated in the Senate Committee Report (§ 779.258). It is not measured by profit on goods sold or commissions on sales made for others. The dollar value of sales or business of the entire enterprise in all establishments is added together to determine whether the applicable dollar test is met. The fact that one or more of the retail or service establishments of the enterprise may have less than $250,000 in annual dollar volume and may meet the other requirements for exemption from the pay provisions of the Act under section 13(a)(2), does not exclude the dollar volume of sales or business of that establishment from the annual gross volume

of the enterprise. However, the dollar volume of an establishment derived from transactions with other establishments in the same enterprise does not ordinarily constitute part of the annual gross volume of the enterprise as a whole. The computation of the annual gross volume of sales or business of the enterprise is made ''exclusive of excise taxes at the retail level which are separately stated''. The taxes which may be excluded are discussed in §§ 779.261 through 779.264. The methods of calculating the annual gross volume of sales of an enterprise are set forth in §§ 779.265 through 779.269.

(b) In the ordinary case the functions of a leased department are controlled or unified in such a way that it is included in the establishment and therefore in the enterprise in which it is located, as discussed in § 779.225. The applicability of enterprise coverage and certain exemptions to such a leased department depends upon the enterprise coverage and the exemption status of the establishment in which the leased department is located. The annual gross volume of such a leased department is included in the annual gross volume of the establishment in which it is located as well as in the annual gross volume of the enterprise of which such establishment is a part.

(c) Likewise, where franchise or other arrangements result in the creation of a larger enterprise by means of operational restrictions so that the establishment, dealer, or concessionaire is an integral part of the related activities of the enterprise which grants the franchise, right, or concession, as discussed in §§ 779.229 and 779.232, it will follow that the annual gross volume of sales made or business done of such an enterprise includes the dollar volume of sales or business of each related establishment dealer, or concessionaire.

### § 779.260 Trade-in allowances.

Where merchandise is taken in trade when a sale is made, the annual gross volume of sales or business will include the gross amount of the sale before deduction of the allowance on such trade-in merchandise. This is so even though an overallowance or excessive value is allowed on the trade-in merchandise. In turn, when the trade-in merchandise is sold the amount of the sale will be included in the annual gross volume.

EXCISE TAXES

### § 779.261 Statutory provision.

Sections 3(s)(1) and 13(a)(2) of the amended Act as well as sections 3(s)(1), 3(s)(2), 3(s)(5), and 13(a)(2)(iv) of the prior Act provide for the exclusion of ''excise taxes at the retail level which are separately stated'' in computing the gross annual volume of sales or business or the annual dollar volume of sales for purposes of certain of the provisions contained in those sections. The Senate Committee report states as follows with respect to this provision:

> * * * in determining whether the enterprise or establishment, as the case may be, has the requisite annual dollar volume of sales, excise taxes will not be counted if they are taxes that are collected at the retail level and are separately identified in the price charged the customer for the goods or services at the time of the sale. Excise taxes which are levied at the manufacturer's, wholesaler's, or other distributive level will not be excluded in calculating the dollar volume of sales nor will excise taxes be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. (S. Rept., 145, 87th Cong., first session, p. 39.)

In applying the above rules to determine annual gross volume of sales or business under section 3(s) or annual dollar volume of sales for purposes of the $250,000 test under section 13(a)(2), excise taxes which (a) are levied at the retail level and (b) are separately stated and identified in the charge to the customer at the time of sale need not be included in the calculation of the gross or dollar volume of sales. Excise taxes which are levied at the manufacturer's, wholesaler's or other distributive level will not, ordinarily, be excluded in calculating the volume of sales, nor will excise taxes, even if levied at the retail level, be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. Excise taxes will be excludable whether they are levied by the Federal, State, or local government provided that the

tax is ''levied at the retail level'' and ''separately stated''.

### § 779.262 Excise taxes at the retail level.

(a) Federal excise taxes are imposed at the retail level on highway vehicle fuels other than gasoline under the provisions of 26 U.S.C. 4041. Such excise taxes are levied at the retail level on any liquid fuel sold for use, or used in a diesel-powered highway vehicle. A similar tax is imposed on the sale of such special motor fuels as benzene and liquefied petroleum gas when used as a motor fuel. To the extent that these taxes are separately stated to the customer, they may be excluded from gross volume of sales. The extent to which State taxes are levied at the retail level, and thus excludable when separately stated, depends, of course, upon the law of the State concerned. However, as a general rule, State, county, and municipal sales taxes are levied at the retail level, and to the extent that they are separately stated, may be excluded. All State excise taxes on gasoline are, for purposes of section 3(s), taxes levied at the retail level, which, if separately stated, may be excluded.

(b) The circumstances surrounding the levying and collection of the Federal excise taxes on gasoline, tires, and inner tubes reflect that, although they are listed under the title of ''Manufacturers Excise Taxes,'' they are, in practical operation, taxes ''at the retail level.'' Federal excise taxes on gasoline, tires, and inner tubes, when ''separately stated,'' may therefore be excluded in computing the annual gross volume of an enterprise for the purpose of determining coverage under section 3(s)(1) of the Act and section 13(a)(2) for purposes of applying the $250,000 test for determining the retail and service establishment exemption of an establishment in a covered enterprise.

### § 779.263 Excise taxes not at the retail level.

There are also a wide variety of taxes levied at the manufacturer's or distributor's level and not at the retail level. It should be noted, however, that the circumstances surrounding the levying and collection of taxes must be carefully considered. The facts concerning the levying and collection of Federal excise taxes on alcoholic beverages and tobacco reflect that such taxes are upon the manufacture of these products and that they are neither levied nor collected at the retail level and thus are not excludable. However, in some cases the circumstances may reflect that despite the fact that such taxes may be levied upon the manufacturer or distributor, nevertheless they may be, in practical operation, taxes at the retail level and may be so regarded for the purpose of this provision.

### § 779.264 Excise taxes separately stated.

A tax is separately stated where it clearly appears that it has been added to the sales price as a separate, identifiable amount, even though there was no invoice or sales slip. In the absence of a sales slip or invoice, the amount of the tax may either be separately stated orally at the time of sale, or visually by means of a poster or other sign reasonable designed to inform the purchaser that the amount of the tax, either as a stated sum per unit or measured by the gross amount of the sale, or as a percentage of the price, is included in the sales price. A sign on a gasoline pump indicating in cents per gallon the amount of State and Federal highway fuel excise taxes is an example of ''separately stated'' taxes.

## COMPUTING THE ANNUAL VOLUME

### § 779.265 Basis for making computations.

The annual gross dollar volume of sales made or business done of an enterprise or establishment consists of the gross receipts from all of its sales or its volume of business done during a 12-month period. Where a computation of the annual gross volume is necessary to determine monetary obligations to employees under the Act whether in an enterprise which has one or more retail or service establishments, or in any establishment in such enterprise, or in any gasoline service establishment, it must be based on the most recent prior experience which it is practicable to

use. This was recognized in the Congress when the legislation was under consideration. (S. Rept. No. 145, 87th Cong., first session, p. 38 discusses in detail the calculation of the annual gross volume.) When gross receipts of an enterprise show that the annual dollar volume of sales made or business done meets the statutory tests for coverage and nonexemption, the employer must comply with the Act's monetary provisions from that time on or until such time as the tests are not met. (See § 779.266.)

### § 779.266 Methods of computing annual volume of sales or business.

(a) No computations of annual gross dollar volume are necessary to determine coverage or exemption in those enterprises in which the gross receipts regularly derived each year from the business are known by the employers to be substantially in excess or substantially under the minimum dollar volume specified in the applicable provision of the Act. Also, where the enterprise or establishment, 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 or business in excess of the dollar amount specified in the statute, it is plain that its annual dollar volume currently is in excess of the statutory amount, and that the Act applies accordingly. The computation described in paragraph (b) of this section, therefore need not be made. Nor is it required where the enterprise or establishment has not yet in such current year exceeded the statutory amount in its gross volume of sales or business, if it has had, in the most recently ended year used by it for income tax purposes, a gross volume of sales made and business done in excess of the amount specified in the Act. In such event, the enterprise or establishment will be deemed to have an annual gross volume in excess of the statutory amount unless the employer establishes, through use of the method set forth in paragraph (b) of this section, an annual gross volume of sales made or business done which is less than the amount specified in the Act. The method described in paragraph (b) of this section shall be used, as intended by the Congress (see S. Rept. 145, 87th Cong. first session, p. 38), for computation of annual dollar volume in all cases when such a computation becomes necessary in order to determine the applicability of provisions of the Act.

(b) In order to determine, when there may be doubt, whether an enterprise or establishment has an annual gross volume of sales made or business done in excess of the amount specified in the statute, and analysis will be made at the beginning of each quarter-year so that the employer 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 quarter-year. The total of the gross receipts from all its sales or business during a 12-month period which immediately precedes the quarter-year being tested will be the basis for analysis. When it is necessary to make a determination for enterprises or establishments which are operated on a calendar year basis for income tax or sales or other accounting purposes the quarter-year periods tested will coincide with the calendar quarters (January 1–March 31; April 1–June 30; July 1–September 30; October 1–December 31). On the other hand, where enterprises or establishments are operated on a fiscal year basis, which consists of an annual period different from the calendar year, the four quarters of the fiscal period will be used in lieu of calendar quarters in computing the annual volume. Once either basis has been adopted it must be used in making subsequent calculations. The sales records maintained as a result of the accounting procedures used for tax or other business purposes may be utilized in computing the annual dollar volume provided the same accounting procedure is used consistently and that such procedure accurately reflects the annual volume of sales or business.

### § 779.267 Fluctuations in annual gross volume affecting enterprise coverage and establishment exemptions.

It is possible that the analysis performed at the beginning of each quarter to determine the applicability of the monetary provisions of the Act may reveal changes in the annual gross

volume or other determinative factors which result in the enterprise or establishment meeting or ceasing to meet one or more of the tests for enterprise coverage or establishment exemption. Thus, enterprise coverage may result where the annual volume increases from an amount under to an amount over $250,000. Also, an enterprise having an annual gross volume of more than $1 million and meeting the requirements for a covered retail enterprise under the prior Act on the basis of previous sales analyses may fall below $1 million when the annual gross volume is computed at the beginning of the quarter being tested and as a result qualify only as a newly covered enterprise for the current quarter under the amended Act. Similarly, an enterprise previously subject to new coverage pay standards, having an annual gross volume of more than $250,000 but less than $1 million on the basis of previous sales analyses, may increase its annual gross volume to $1 million or more when recomputed at the beginning of the quarter being tested. It will thus become for the current quarter an enterprise in which employees are subject to the pay standards for employment covered under the Act prior to the amendments, provided that it meets the other conditions as discussed in § 779.245.

### § 779.268 Grace period of 1 month for computation.

Where it is not practicable to compute the annual gross volume of sales or business under paragraph (b) of § 779.266 in time to determine obligations under the Act for the current quarter, an enterprise or establishment may use a 1-month grace period. If this 1-month grace period is used, the computations made under this section 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.

### § 779.269 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 above. In many cases it is readily apparent that the enterprise or establishment will or will not have the requisite annual dollar volume specified in the Act. For example, where the new business consists of a large department store, or a supermarket, it may be clear from the outset that the business will meet the annual dollar volume tests so as to be subject to the requirements of the Act. 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, in applying the annual volume tests of sections 3(s) and 13(a)(2), for purposes of determining its obligations under the Act in workweeks falling in the following quarter year period. Similarly, for purposes of determining its obligations 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 method described in paragraph (b) of § 779.266 with use of the grace period described in § 779.268, if necessary.

## Subpart D—Exemptions for Certain Retail or Service Establishments

GENERAL PRINCIPLES

### § 779.300 Purpose of subpart.

Subpart C of this part has discussed the various criteria for determining coverage under the Act of employers and employees in enterprises and establishments that make retail sales of goods and services. This subpart deals primarily with the exemptions from the Act's minimum wage and overtime provisions found in section 13(a) (2), (4), (11), and 13(b)(18) for employees of retail or service establishments. Also discussed are some exemptions for special categories of establishments engaged in retailing goods or services, which do not require for exemption that the particular establishment be a retail or service establishment as defined in the

Act. If all the requirements set forth in any of these exemptions are met, to the extent provided therein the employer is relieved from complying with the minimum wage and/or overtime provisions of the Act even though his employees are engaged in interstate or foreign commerce or in the production of goods for such commerce or employed in covered enterprises.

**§ 779.301 Statutory provisions.**

(a) Section 13(a) (2), (4), (11), and section 13(b)(18) of the Act, as amended, grant exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7 as follows:

(1) Section 13(a)(2) exempts from minimum wages and overtime pay:

Any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A ''retail or service establishment'' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(2) Section 13(a)(4) exempts from minimum wages and overtime pay:

Any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this sub-section and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located.

(3) Section 13(a)(11) exempts from minimum wages and overtime pay:

Any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month.

(4) Section 13(b)(18) exempts from overtime pay only:

Any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs.

(b) Sections 13(a)(2), (4), (13), (19), and (20) of the prior Act granted exemptions from both the minimum wage provisions of section 6 and the maximum hours provisions of section 7 as follows:

(1) Section 13(a)(2) exempted:

Any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located, if such establishment—

(i) Is not in an enterprise described in section 3(s), or

(ii) Is in such an enterprise and is a hotel, motel or restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

(iii) Is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

(iv) Is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

A ''retail or service establishment'' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry.

(2) Section 13(a)(4) provided the same exemption as it now does.

(3) Section 13(a)(13) provided the same exemption as section 13(a)(11) of the present Act.

(4) Section 13(a)(19) exempted:

Any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements.

(5) Section 13(a)(20) exempted those employees who are now exempt from the overtime provisions only under section 13(b)(18) of the present Act.

(c) Employees who were exempt from the minimum wage and overtime pay requirements under a provision of the prior Act set forth in paragraph (b) of this section, but are no longer exempt from one or both of such requirements under the present Act must be paid minimum wages or overtime pay, as the case may be, in accordance with the pay standards provided for newly covered employment, in any workweek when they perform work within the individual or enterprise coverage of the Act.

''ESTABLISHMENT'' BASIS OF EXEMPTIONS

### § 779.302 Exemptions depend on character of establishment.

Some exemptions depend on the character of the establishment by which an employee is employed. These include the ''retail or service establishment'' exemptions in sections 13(a) (2), (4), and (11) and the exemptions available to the establishments of the character specified in sections 13(a) (3), (9), and 13(b)(8) (first part). Therefore, if the establishment meets the tests enumerated in these sections, employees ''employed by'' that establishment are generally exempt from sections 6 and 7. (See §§ 779.307 to 779.309 discussing ''employed by.'') Other exemptions establish two criteria, the character of the establishment and the nature of the conditions of the employment of the particular employee. Such exemptions are set forth in section 13(b)(8) (second part), and section 13(b)(18) and (19). To determine whether the exemptions of these sections apply it is necessary to determine both that the establishment meets the enumerated tests and that the employee is engaged in the enumerated activities or employed under the conditions specified. Thus, under section 13(b)(18) some of the employees of a given employer may be exempt from the overtime pay requirements (but not the minimum wage) of the Act, while others may not.

### § 779.303 "Establishment" defined; distinguished from "enterprise" and "business."

As previously stated in § 779.23, the term *establishment* as used in the Act means a distinct physical place of business. The ''enterprise,'' by reason of the definition contained in section 3(r) of the Act and the tests enumerated in section 3(s) of the Act, may be composed of a single establishment. The term ''establishment,'' however, is not synonymous with the words ''business'' or ''enterprise'' when those terms are used to describe multiunit operations. In such a multiunit operation some of the establishments may qualify for exemption, others may not. For example, a manufacturer may operate a plant for production of its goods, a separate warehouse for storage and distribution, and several stores from which its products are sold. Each such physically separate place of business is a separate establishment. In the case of chain store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain store systems, and retail outlets operated by manufacturing or distributing concerns, each separate place of business ordinarily is a separate establishment.

### § 779.304 Illustrations of a single establishment.

(a) The unit store ordinarily will constitute the establishment contemplated by the exemptions. The mere fact that a store is departmentalized will not alter the rule. For example, the typical large department store carries a wide variety of lines which ordinarily are segregated or departmentalized not only as to location within the store, but also as to operation and records. Where such departments are operated as integral parts of a unit, the departmentalized unit taken as a whole ordinarily will be considered to be the establishment contemplated by the exemptions, even if there is diversity of ownership of some of the departments, such as leased departments.

(b) Some stores, such as bakery or tailor shops, may produce goods in a

back room and sell them in the adjoining front room. In such cases if there is unity of ownership and if the back room and the front room are operated by the employer as a single store, the entire premises ordinarily will be considered to be a single establishment for purposes of the tests of the exemption, notwithstanding the fact that the two functions of making and selling the goods, are separated by a partition or a wall. (See H. Mgrs. St., 1949, p. 27.)

### § 779.305 Separate establishments on the same premises.

Although, as stated in the preceding section, two or more departments of a business may constitute a single establishment, two or more physically separated portions of a business though located on the same premises, and even under the same roof in some circumstances may constitute more than one establishment for purposes of exemptions. In order to effect such a result physical separation is a prerequisite. In addition, the physically separated portions of the business also must be engaged in operations which are functionally separated from each other. Since there is no such functional separation between activities of selling goods or services at retail, the Act recognizes that food service activities of such retail or service establishments as drugstores, department stores, and bowling alleys are not performed by a separate establishment which ''is'' a ''restaurant'' so as to qualify for the overtime exemption provided in section 13(b)(8) and accordingly provides a separate overtime exemption in section 13(b)(18) for employees employed by any ''retail or service establishments'' in such activities in order to equalize the application of the Act between restaurant establishments and retail or service establishments of other kinds which frequently compete with them for customers and labor. (See Sen. Rept. 1487, 89th Cong. first session, p. 32.) For retailing and other functionally unrelated activities performed on the same premises to be considered as performed in separate establishments, a distinct physical place of business engaged in each category of activities must be identifiable. The retail portion of the business must be distinct and separate from and unrelated to that portion of the business devoted to other activities. For example, a firm may engage in selling groceries at retail and at the same place of business be engaged in an unrelated activity, such as the incubation of chicks for sale to growers. The retail grocery portion of the business could be considered as a separate establishment for purposes of the exemption, if it is physically segregated from the hatchery and has separate employees and separate records. In other words, the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purpose of the exemption if (a) It is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units. The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit. The requirement has reference to the indiscriminate use of the employee in both units without regard to the segregated functions of such units.

### § 779.306 Leased departments not separate establishments.

It does not follow from the principles discussed in § 779.305 that leased departments engaged in the retail sale of goods or services in a departmentalized store are separate establishments. To the contrary, it is only in rare instances that such leased departments would be separate establishments for purposes of the exemptions. For example, take a situation where the departmentalized retail store, having leased departments, controls the space location, determines the type of goods that may be sold, determines the pricing policy, bills the customers, passes on customers' credit, receives payments due, handles complaints, determines the personnel policies, and performs

other functions as well. In such situations the leased department is an integral part of the retail store and considered to be such by the customers. It is clear that such departments are not separate establishments but rather a part of the retail store establishment and will be considered as such for purposes of the exemptions. The same result may follow in the case of leased departments engaged in the retail sale of goods or services in a departmentalized store where all or most of the departments are leased or otherwise individually owned, but which operate under one common trade name and hold themselves out to the public as one integrated business unit.

### § 779.307 Meaning and scope of "employed by" and "employee of."

Section 13(a)(2) as originally enacted in 1938 exempted any employee ''engaged in'' any retail or service establishment. The 1949 amendments to that section, however, as contained in section 13(a)(2) and (4) exempted any employee ''employed by'' any establishment described in those exemptions. The 1961 and 1966 amendments retained the ''employed by'' language of these exemptions. Thus, where it is found that any of those exemptions apply to an establishment owned or operated by the employer the employees ''employed by'' that establishment of the employer are exempt from the minimum wage and overtime provisions of the Act without regard to whether such employees perform their activities inside or outside the establishment. Thus, such employees as collectors, repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers, and delivery men actually employed by an exempt retail or service establishment are exempt from the minimum wage and overtime provisions of the Act although they may perform the work of the establishment away from the premises. As used in section 13 of the Act, the phrases ''employee of'' and ''employed by'' are synonymous.

### § 779.308 Employed within scope of exempt business.

In order to meet the requirement of actual employment ''by'' the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business. (See *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (CA–4) (holding section 13(a)(2) exemption inapplicable to employees working in manufacturing phase of employer's retail establishment); *Wessling* v. *Carroll Gas Co.*, 266 F. Supp. 795 (N.D. Iowa); *Oliveira* v. *Basteiro*, 18 WH Cases 668 (S.D. Texas). See also, *Northwest Airlines* v. *Jackson*, 185 F. 2d 74 (CA–8); *Walling* v. *Connecticut Co.*, 154 F. 2d 522 (CA–2) certiorari denied, 329 U.S. 667; and *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (CA–6).)

### § 779.309 Employed "in" but not "by."

Since the exemptions by their terms apply to the employees ''employed by'' the exempt establishment, it follows that those exemptions will not extend to other employees who, although actually working in the establishment and even though employed by the same person who is the employer of all under section 3(d) of the Act, are not ''employed by'' the exempt establishment. Thus, traveling auditors, manufacturers' demonstrators, display-window arrangers, sales instructors, etc., who are not ''employed by'' an exempt establishment in which they work will not be exempt merely because they happen to be working in such an exempt establishment, whether or not they work for the same employer. (*Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (CA–8).) For example, if the manufacturer sends one of his employees to demonstrate to the public in a customer's exempt retail establishment the products which he has manufactured, the employee will not be considered exempt under section 13(a)(2) since he is not employed by the retail establishment but by the manufacturer. The same would be true of an employee of the central offices of a chain-store organization who performs work for the central organization on the premises of an exempt retail outlet of the chain (*Mitchell* v. *Kroger Co.*, supra.)

**§ 779.310 Employees of employers operating multi-unit businesses.**

(a) Where the employer's business operations are conducted in more than one establishment, as in the various units of a chain-store system or where branch establishments are operated in conjunction with a main store, the employer is entitled to exemption under section 13(a)(2) or (4) for those of his employees in such business operations, and those only, who are ''employed by'' an establishment which qualifies for exemption under the statutory tests. For example, the central office or central warehouse of a chain-store operation even though located on the same premises as one of the chain's retail stores would be considered a separate establishment for purposes of the exemption, if it is physically separated from the area in which the retail operations are carried on and has separate employees and records. (*Goldberg* v. *Sunshine Department Stores*, 15 W.H. Cases 169 (CA–5) *Mitchell* v. *Miller Drugs, Inc.*, 255 F. 2d 574 (CA–1); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (CA–7).)

(b) Under this test, employees in the warehouse and central offices of chainstore systems have not been exempt prior to, and their nonexempt status is not changed by, the 1961 amendments. Typically, chain-store organizations are merchandising institutions of a hybrid retail-wholesale nature, whose wholesale functions are performed through their warehouses and central offices and similar establishments which distribute to or serve the various retail outlets. Such central establishments clearly cannot qualify as exempt establishments. (*A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Mitchell* v. *C & P Stores*, 286 F. 2d 109 (CA–5).) The employees working there are not ''employed by'' any single exempt establishment of the business; they are, rather, ''employed by'' an organization of a number of such establishments. Their status obviously differs from that of employees of an exempt retail or service establishment, working in a warehouse operated by and servicing such establishment exclusively, who are exempt as employees ''employed by'' the exempt establishment regardless of whether or not the warehouse operation is conducted in the same building as the selling or servicing activities.

**§ 779.311 Employees working in more than one establishment of same employer.**

(a) An employee who is employed by an establishment which qualifies as an exempt establishment under section 13(a)(2) or (4) is exempt from the minimum wage and overtime requirements of the Act even though his employer also operates one or more establishments which are not exempt. On the other hand, it may be stated as a general rule that if such an employer employs an employee in the work of both exempt and nonexempt establishments during the same workweek, the employee is not ''employed by'' an exempt establishment during such workweek. It is recognized, however, that employees performing an insignificant amount of such incidental work or performing work sporadically for the benefit of another establishment of their employer nevertheless, are ''employed by'' their employer's retail establishment. For example, there are situations where an employee of an employer in order to discharge adequately the requirements of his job for the exempt establishment by which he is employed incidentally or sporadically may be called upon to perform some work for the benefit of another establishment. For example, an elevator operator employed by a retail store, in performance of his regular duties for the store incidentally may carry personnel who have a central office or warehouse function. Similarly, a maintenance man employed by such store incidentally may perform work which is for the benefit of the central office or warehouse activities. Also, a sales clerk employed in a retail store in one of its sales departments sporadically may be called upon to release some of the stock on hand in the department for the use of another store.

(b) The application of the principles discussed in § 779.310 and in paragraph (a) of this section would not preclude the applicability of the exemption to the employee whose duties require him to spend part of his week in one exempt retail establishment and the balance of the week in another of his employer's exempt retail establishments; provided

that his work in each of the establishments will qualify him as ''employed'' by such a retail establishment at all times within the individual week. As an example, a shoe clerk may sell shoes for part of a week in one exempt retail establishment of his employer and in another of his employer's exempt retail establishments for the remainder of the workweek. In that entire workweek he would be considered to be employed by an exempt retail establishment. In such a situation there is no central office or warehouse concept, nor is the employee considered as performing services for the employer's business organization as a whole since there is no period during the week in which the employee is not ''employed by'' a single exempt retail establishment.

STATUTORY MEANING OF RETAIL OR SERVICE ESTABLISHMENT

**§ 779.312 "Retail or service establishment", defined in section 13(a)(2).**

The 1949 amendments to the Act defined the term ''retail or service establishment'' in section 13(a)(2). That definition was retained in section 13(a)(2) as amended in 1961 and 1966 and is as follows:

> A ''retail or service establishment'' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

It is clear from the legislative history of the 1961 amendments to the Act that no different meaning was intended by the term ''retail or service establishment'' from that already established by the Act's definition, wherever used in the new provisions, whether relating to coverage or to exemption. (See S. Rept. 145, 87th Cong., first session p. 27; H.R. 75, 87th Cong., first session p. 9.) The legislative history of the 1949 amendments and existing judicial pronouncements regarding section 13(a)(2) of the Act, therefore, will offer guidance to the application of this definition.

**§ 779.313 Requirements summarized.**

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

MAKING SALES OF GOODS AND SERVICES ''RECOGNIZED AS RETAIL''

**§ 779.314 "Goods" and "services" defined.**

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

**§ 779.315 Traditional local retail or service establishments.**

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

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

### § 779.316 Establishments outside "retail concept" not within statutory definition; lack first requirement.

The term ''retail'' is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions. The same is true of an electric power company selling electrical energy to private consumers. As to establishments of such businesses, therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term ''retail or service establishment'' is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a ''retail concept'' cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. (95 Cong. Rec. pp. 1115, 1116, 12502, 12506, 21510, 14877, and 14889; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Phillips Co.* v. *Walling*, 324 U.S. 490; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Durkin* v. *Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom Mitchell v. Joyce Agency, Inc., 348 U.S. 945; *Goldberg* v. *Roberts* 291 F. 2d 532 (CA–9); *Wirtz* v. *Idaho Sheet Metal Works*, 335 F. 2d 952 (CA–9), affirmed in 383 U.S. 190; Telephone Answering Service v. Goldberg, 290 F. 2d 529 (CA–1).) It is plain, therefore, that the term ''retail or service establishment'' as used in the Act does not encompass establishments in industries lacking a ''retail concept''. Such establishments not having been traditionally regarded as retail or service establishments cannot under any circumstances qualify as a ''retail or service establishment'' within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. Industry usage of the term ''retail'' is not in itself controlling in determining when business transactions are retail sales under the Act. Judicial authority is quite clear that there are certain goods and services which can never be sold at retail. (*Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz* v. *Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

### § 779.317 Partial list of establishments lacking "retail concept."

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

Accounting firms.

Adjustment and credit bureaus and collection agencies (Mitchell v. Rogers d.b.a. Commercial Credit Bureau, 138 F. Supp. 214 (D. Hawaii); Mill v. United States Credit Bureau, 1 WH Cases 878, 5 Labor Cases par. 60,992 (S.D.Calif.).

Advertising agencies including billboard advertising.

Air-conditioning and heating systems contractors.

Aircraft and aeronautical equipment; establishments engaged in the business of dealing in.

Airplane crop dusting, spraying and seeding firms.

Airports, airport servicing firms and fixed base operators.

Ambulance service companies.

Apartment houses.

Armored car companies.

Art; commercial art firms.

Auction houses (Fleming v. Kenton Whse., 41 F. Supp. 255).

Auto-wreckers' and junk dealers' establishments (*Bracy* v. *Luray*, 138 F. 2d 8 (CA–4); *Edwards* v. *South Side Auto Parts* (Mo. App.) 180 SW 2d 1015. (These typically sell for resale.)

Automatic vending machinery; establishments engaged in the business of dealing in.

Banks (both commercial and savings).

Barber and beauty parlor equipment; establishments engaged in the business of dealing in.
Blacksmiths; industrial.
Blue printing and photostating establishments.
Booking agencies for actors and concert artists.
Bottling and bottling equipment and canning machinery; establishments engaged in the business of dealing in.
Broadcasting companies.
Brokers, custom house; freight brokers; insurance brokers, stock or commodity brokers.
Building and loan associations.
Building contractors.
Burglar alarms; establishments engaged in furnishing, installing and repairing for commercial establishments (*Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Calif.)).
Burial associations (*Gilreath* v. *Daniel* (C.A. 8), 19 WH Cases 370).
Butchers' equipment; establishments engaged in the business of dealing in.
Chambers of Commerce.
Chemical equipment; establishments engaged in the business of dealing in.
Clubs and fraternal organizations with a select or restricted membership.
Common and contract carriers; establishments engaged in providing services, fuel, equipment, or other goods or facilities for the operation of such carriers (*Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190, rehearing denied 383 U.S. 963; *Wirtz* v. *Steepleton General Tire Co., Inc.* 383 U.S. 190, rehearing denied 383 U.S. 963; *Boutell* v. *Whaling*).
Common carrier stations and terminals.
Construction contractors.
Contract Post Offices.
Credit companies, including small loan and personal loan companies (*Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290).
Credit rating agencies.
Dentists' offices.
Dentists supply and equipment establishments.
Detective agencies.
Doctors' offices.
Dry cleaners (see 95 Cong. Rec., p. 12503 and § 779.337 (b) of this part).
Drydock companies.
Drydock
Dye houses, commercial (*Walling* v. *Kerr*, 47 F. Supp. 852 (E.D. Pa)).
Duplicating, addressing, mailing, mail listings, and letter stuffing establishments (*Goldberg* v. *Roberts d.b.a. Typing and Mailing Unlimited*, 15 WH Cases 100, 42 L.C. par. 31,126 (CA–9; *Durkin* v. *Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Hanzley* v. *Hooven Letters*, 44 N.Y.S. 2d 398 (City Ct. N.Y. 1943).
Educational institutions (for express exclusion see § 779.337(b)).
Electric and gas utilities (*Meeker Cooperative Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (CA–8); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (CA–10); *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.)).
Electric signs; establishments engaged in making, installing and servicing.
Elevators; establishments engaged in repairing (Cf. *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E.D.N.Y.)).
Employment Agencies (*Yunker* v. *Abbye Employment Agency, Inc.*, 32 N.Y.S. 2d 715 (N.Y.C. Munic. Ct. 1942)).
Engineering firms.
Factors.
Filling station equipment; establishments engaged in the business of dealing in.
Finance companies (*Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290).
Flying schools.
Gambling establishments.
Geological surveys; firms engaged in making.
Heating and air conditioning systems contractors.
Hospital equipment (such as operating instruments, X-ray machines, operating tables, etc.); establishments engaged in the business of dealing in.
Insurance; mutual, stock and fraternal benefit, including insurance brokers, agents, and claims adjustment offices.
Income tax return preparers.
Investment counseling firms.
Jewelers' equipment; establishments engaged in the business of dealing in.
Job efficiency checking and rating; establishments engaged in the business of supplying.
Labor unions.
Laboratory equipment; establishments engaged in the business of dealing in.
Landscaping contractors.
Laundries (see 95 Cong. Rec. p. 12503 and § 779.337 (b) of this part).
Laundry; establishments engaged in the business of dealing in commercial laundry equipment.
Lawyers' offices.
Legal concerns engaged in compiling and distributing information regarding legal developments.
License and legal document service firms.
Loan offices (see credit companies).
Loft buildings or office buildings, concerns engaged in renting and maintenance of (*Kirschbaum* v. *Walling*, 316 U.S. 517; Statement of Senator Holland, 95 Cong. Rec., p. 12505).
Machinery and equipment, including tools—establishments engaged in selling or servicing of construction, mining, manufacturing and industrial machinery, equipment and tools (*Roland Electric Co.* v. *Walling*, 326 U.S. 657; *Guess* v. *Montaque*, 140 F. 2d 500 (CA–4); cf. *Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Calif.)).
Magazine subscription agencies (*Wirtz* v. *Keystone Serv.* (C.A. 5), 418 F. 2d 249).

Medical and dental clinics.
Medical and dental laboratories.
Medical and dental laboratory supplies; establishments engaged in the business of dealing in.
Messenger; firms engaged in furnishing commercial messenger service (*Walling* v. *Allied Messenger Service*, 47 F. Supp. 773 (S.D.N.Y.)).
Newspaper and magazine publishers.
Oil well drilling; companies engaged in contract oil well drilling.
Oil well surveying firms (*Straughn* v. *Schlumberger Well Surveying Corp.*, 72 F. Supp. 511 (S.D. Tex.)).
Packing companies engaged in slaughtering livestock (*Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (CA–10)).
Painting contractors.
Pharmacists' supplies; establishments engaged in the business of dealing in.
Photography, commercial, establishments engaged in.
Plumbers' equipment; establishments engaged in the business of dealing in.
Plumbing contractors.
Press clipping bureaus.
Printers' and lithographers' supplies; establishments engaged in the business of dealing in.
Printing and binding establishments (*Casa Baldridge, Inc.* v. *Mitchell*, 214 F. 2d 703 (CA–1)).
Protection and Shopping services for industry; establishments engaged in supplying (*Durkin* v. *Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom. *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945).
Quarris (*Walling* v. *Partee*, 3 WH Cases 543, 7 Labor Cases, par. 61,721 (M.D. Tenn.)).
Radio and television broadcasting stations and studios.
Ready-mix concrete suppliers.
Real estate companies.
Roofing contractors.
Schools (except schools for mentally or physically handicapped or gifted children): (All now excluded, see § 779.337(b)).
School supply distributors.
Security dealers.
Sheet metal contractors.
Ship equipment, commercial; establishments engaged in the business of dealing in.
Shopping analysts services.
Siding and insulation contractors.
Sign-painting shops.
Special trade contractors (construction industry).
Stamp and coupon redemption stores.
Statistical reporting, business and financial data; establishments engaged in furnishing.
Store equipment; establishments engaged in the business of dealing in.
Tax services.
Telegraph and cable companies.
Telephone companies; (*Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (CA–8)).
Telephone answer service; establishments engaged in furnishing. (*Telephone Answering Service* v. *Goldberg*, 15 WH Cases 67, 4 L.C. par. 31,104 (CA–1)).
Title and abstract companies.
Tobacco auction warehouses (*Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E.D. Ky.); *Walling* v. *Lincoln Loose Leaf Warehouse Co.*, 59 F. Supp. 601 (E.D. Tenn.)).
Toll bridge companies.
Trade associations.
Transportation equipment, commercial; establishments engaged in the business of dealing in.
Transportation companies.
Travel agencies.
Tree removal firms.
Truck stop establishments (*Idaho Sheet Metal Works, Inc.*, v. *Wirtz*, 383 U.S. 190, rehearing denied 383 U.S. 963; *Wirtz* v. *Steepleton General Tire Co., Inc.*, 383 U.S. 190, rehearing denied 383 U.S. 963).
Trust companies.
Undertakers' supplies; establishments engaged in the business of dealing in.
Wagers, establishments accepting, as business in which they are engaged.
Warehouse companies; commercial or industrial (*Walling* v. *Public Quick Freezing and Cold Storage Co.*, 62 F. Supp. 924 (S.D. Fla.)).
Warehouses equipment and supplies; establishments engaged in the business of dealing in.
Waste removal contractors.
Watchmen, guards and detectives for industries; establishments engaged in supplying (*Walling* v. *Sondock*, 132 F. 2d 77 (CA–5); *Walling* v. *Wattam*, 3 WH Cases 726, 8 Labor Cases, par. 62,023 (W.D. Tenn., 1943); *Walling* v. *Lum*, 4 WH Cases 465, 8 Labor Cases, par. 62,185 (S.D. Miss., 1944); *Walling* v. *New Orleans Private Patrol Service* 57 F. Supp. 143 (E.D. La., 1944); *Haley* v. *Central Watch Service*, 4 WH Cases 158, 8 Labor Cases, par. 62,002 (N.D. Ill., 1944)).
Water supply companies (*Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d (863 (CA–9).)
Water well drilling contractors.
Window displays; establishments engaged in the business of dealing in.
Wrecking contractors.

### § 779.318 Characteristics and examples of retail or service establishments.

(a) Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the

Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. (See, however, the discussion of section 13(a)(4) in §§ 779.346 to 779.350.) Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, and other such local establishments.

(b) The legislative history of the section 13(a)(2) exemption for certain retail or service establishments shows that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. A precise line between such articles and those which can never be sold at retail cannot be drawn. But a few characteristics of items like small trucks and farm implements may offer some guidance; their use is very widespread as is that of consumer goods; they are often distributed in stores or showrooms by means not dissimilar to those used for consumer goods; and they are frequently used in commercial activities of limited scope. The list of strictly commercial items whose sale can be deemed retail is very small and a determination as to the application of the retail exemption in specific cases would depend upon the consideration of all the circumstances relevant to the situation. (*Idaho Sheet Metal Works, Inc.* v. *Wirtz* and *Wirtz* v. *Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

[35 FR 5856, Apr. 9, 1970, as amended at 36 FR 14466, Aug. 6, 1971]

### § 779.319 A retail or service establishment must be open to general public.

The location of the retail or service establishment, whether in an industrial plant, an office building, a railroad depot, or a government park, etc., will make no difference in the application of the exemption and such an establishment will be exempt if it meets the tests of the exemption. Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public. An establishment, however, does not have to be actually frequented by the general public in the sense that the public must actually visit it and make purchases of goods or services on the premises in order to be considered as available and open to the general public. A refrigerator repair service shop, for example, is available and open to the general public even if it receives all its orders on the telephone and performs all of its repair services on the premises of its customers.

### § 779.320 Partial list of establishments whose sales or service may be recognized as retail.

Antique shops.
Auto courts.
Automobile dealers' establishments.
Automobile laundries.
Automobile repair shops.
Barber shops.
Beauty shops.
Bicycle shops.
Billiard parlors.
Book stores.
Bowling alleys.
Butcher shops.
Cafeterias.
Cemeteries.
China, glassware stores.
Cigar stores.
Clothing stores.
Coal yards.
Confectionery stores.
Crematories.
Dance halls.
Delicatessen stores.
Department stores.
Drapery stores.
Dress-suit rental establishments.
Drug stores.
Dry goods stores.
Embalming establishments.

Farm implement dealers.
Filling stations.
Floor covering stores.
Florists.
Funeral homes.
Fur repair and storage shops.
Fur shops.
Furniture stores.
Gift, novelty and souvenir shops.
Grocery stores.
Hardware stores.
Hosiery shops.
Hotels.
Household appliance stores.
Household furniture storage and moving establishments.
Household refrigerator service and repair shops.
Infants' wear shops.
Jewelry stores.
Liquor stores.
Luggage stores.
Lumber yards.
Masseur establishments.
Millinery shops.
Musical instrument stores and repair shops.
Newsstands.
Paint stores.
Public parking lots.
Photographic supply and camera shops.
Piano tuning establishments.
Public baths.
Public garages.
Recreational camps.
Reducing establishments.
Restaurants.
Roadside diners.
Scalp-treatment establishments.
Shoe repair shops.
Shoeshine parlors.
Sporting goods stores.
Stationery stores.
Taxidermists.
Theatres.
Tourist homes.
Trailer camps.
Undertakers.
Variety shops.
Watch, clock and jewelry repair establishments.

[36 FR 14466, Aug. 6, 1971]

### § 779.321 Inapplicability of "retail concept" to some types of sales or services of an eligible establishment.

(a) Only those sales or services to which the retail concept applies may be recognized as retail sales of goods or services for purposes of the exemption. The fact that the particular establishment may have a concept of retailability, in that it makes sales of types which may be recognized as retail, is not determinative unless the requisite portion of its annual dollar volume is derived from particular sales of its goods and services which have a concept of retailability. Thus, the mere fact that an establishment is of a type noted in § 779.320 does not mean that any particular sales of such establishment are within the retail concept. As to each particular sale of goods or services, an initial question that must be answered is whether the sales of goods or services of the particular type involved can ever be recognized as retail. The Supreme Court in *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190, confirmed the Department's position that (1) The concept of ''retailability'' must apply to particular sales of the establishment, as well as the establishment or business as a whole, and (2) even as to the establishment whose sales are ''variegated'' and include retail sales, that nonetheless classification of particular sales of goods or services as ever coming within the concept of retailability must be made. Sales of some particular types of goods or services may be decisively classified as nonretail on the ground that such particular types of goods or services cannot ever qualify as retail whatever the terms of sale, regardless of the industry usage or classification.

(b) An establishment is, therefore, not automatically exempt upon a finding that it is of the type to which the retail concept of selling or servicing is applicable; it must meet all the tests specified in the Act in order to qualify for exemption. Thus, for example, an establishment may be engaged in repairing household refrigerators, and in addition it may be selling and repairing manufacturing machinery for manufacturing establishments. The retail concept does not apply to the latter activities. In such case, the exemption will not apply if the annual dollar volume derived from the selling and servicing of such machinery, and from any other sales and services which are not recognized as retail sales or services, and from sales of goods or services for resale exceeds 25 percent of the establishment's total annual dollar volume of sales of goods or services.

(c) Since there is no retail concept in the construction industry, gross receipts from construction activities of

any establishment also engaged in retail selling must be counted as dollar volume from sales not recognized as retail in applying the percentage tests of section 13(a)(2). Also, since construction and the distribution of goods are entirely dissimilar activities performed in industries traditionally recognized as wholly separate and distinct from each other, an employee engaged in construction activities is not employed within the scope of his employer's otherwise exempt retail business in any week in which the employee engages in such construction work, and is therefore (see § 779.308) not employed ''by'' a retail or service establishment within the meaning of the Act in such workweek.

(d) Certain business establishments engage in the retail sale to the general public, as goods delivered to purchasers at a stipulated price, of items such as certain plumbing and heating equipment, electrical fixtures and supplies, and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required, see § 779.355(a)(1) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, will normally be considered as incidental to the retail sale of the goods involved (unless, of course, the transaction between the parties is for a construction job at an overall price for the job, involving no retail sale of goods as such). In determining whether such an installation is incidental to a retail sale or constitutes a nonretail construction activity, it is necessary to consider the general characteristics of the entire transaction. Where one or more of the following conditions are present, the installation will normally be considered a construction activity rather than incidental to a retail sale:

(1) The cost to the purchaser of the installation in relation to the sale price of the goods is substantial;

(2) The installation involves substantial structural changes, extensive labor, planning or the use of specialized equipment;

(3) The goods are being installed in conjunction with the construction of a new home or other structure; or

(4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.

(e) An auxiliary employee of an exempt retail or service establishment performing clerical, maintenance, or custodial work in the exempt establishment which is related to the establishment's construction activities will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

## ''RECOGNIZED'' AS RETAIL ''IN THE PARTICULAR INDUSTRY''

### § 779.322 Second requirement for qualifying as a "retail or service establishment."

If the business is one to which the retail concept is applicable then the second requirement for qualifying as a ''retail or service establishment'' within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or of both) which are recognized as retail sales or services in the particular industry. Under the Act, this requirement is distinct from the requirement that 75 percent of annual dollar volume be from sales of goods or services ''not for resale'' (§ 779.329); many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized as retail in a particular industry. (See *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190.) To determine whether the sales or services of an establishment

are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms ''recognized'' and ''in the particular industry,'' and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.

**§ 779.323 Particular industry.**

In order to determine whether a sale or service is recognized as a retail sale or service in the ''particular industry'' it is necessary to identify the ''particular'' industry to which the sale or service belongs. Some situations are clear and present no difficulty. The sale of clothes, for example, belongs to the clothing industry and the sale of ice belongs to the ice industry. In other situations, a sale or service is not so easily earmarked and a wide area of overlapping exists. Household appliances are sold by public utilities as well as by department stores and by stores specializing in the sale of such goods; and tires are sold by manufacturers' outlets, by independent tire dealers and by other types of outlets. In these cases, a fair determination as to whether a sale or service is recognized as retail in the ''particular'' industry may be made by giving to the term ''industry'' its broad statutory definition as a ''group of industries'' and thus including all industries wherein a significant quantity of the particular product or service is sold. For example, in determining whether a sale of lumber is a retail sale, it is the recognition the sale of lumber occupies in the lumber industry generally which decides its character rather than the recognition such sales occupies in any branch of that industry.

**§ 779.324 Recognition "in."**

The express terms of the statutory provision requires the ''recognition'' to be ''in'' the industry and not ''by'' the industry. Thus, the basis for the determination as to what is recognized as retail ''in the particular industry'' is wider and greater than the views of an employer in a trade or business, or an association of such employers. It is clear from the legislative history and judicial pronouncements that it was not the intent of this provision to delegate to employers in any particular industry the power to exempt themselves from the requirements of the Act. It was emphasized in the debates in Congress that while the views of an industry are significant and material in determining what is recognized as a retail sale in a particular industry, the determination is not dependent on those views alone. (See 95 Cong. Rec. pp. 12501, 12502, and 12510; *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190; *Mitchell* v. *City Ice Co.*, 273 F. 2d 560 (CA–5); *Durkin* v. *Casa Baldrich, Inc.*, 111 F. Supp. 71 (DCPR) affirmed 214 F. 2d 703 (CA–1); see also *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (CA–1).) Such a determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry, would all be relevant in the determination of the question.

**§ 779.325 Functions of the Secretary and the courts.**

It may be necessary for the Secretary in the performance of his duties under the Act, to determine in some instances whether a sale or service is recognized as a retail sale or particular industry. In the exceptional case where the determination cannot be made on the basis of common knowledge or readily accessible information, the Secretary may gather the information needed for the purpose of making such determinations. Available information on usage and practice in the industry is carefully considered in making such determinations, but the ''word-usage of the industry'' does not have controlling force; the Secretary ''cannot be hamstrung by the terminology of a particular trade'' and possesses considerable discretion as the one responsible for the actual administration of the Act. (*Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190; and see 95 Cong. Rec. 12501–12502, 12510.) The responsibility

for making final decisions, of course, rests with the courts. An employer disagreeing with the determinations of the Secretary and claiming exemption has the burden of proving in a court proceeding that the prescribed percentage of the establishment's sales or services are recognized as retail in the industry and that his establishment qualifies for the exemption claimed by him. (See *Wirtz* v. *Steepleton,* cited above, and 95 Cong. Rec. 12510.)

**§ 779.326 Sources of information.**

In determining whether a sale or service is recognized as a retail sale or service in a particular industry, there are available to the Secretary a number of sources of information to aid him in arriving at a conclusion. These sources include: (a) The legislative history of the Act as originally enacted in 1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term ''retail or service establishment'' is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary's experience in the intervening years in interpreting and administering the Act. These sources of information enable the Secretary to lay down certain standards and criteria, as discussed in this subpart, for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries.

**§ 779.327 Wholesale sales.**

A wholesale sale, of course, is not recognized as a retail sale. If an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, it clearly cannot qualify as a retail and service establishment. It must be remembered, however, that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term ''retail or service establishment''. Similarly, a showing that sales of goods or services are not wholesale or are made to the ultimate consumer and are not for resale does not necessarily prove that such sales or services are recognized in the particular industry as retail. (*Wirtz* v. *Steepleton General Tire Co.*, 388 U.S. 190.)

**§ 779.328 Retail and wholesale distinguished.**

(a) The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. What constitutes a small quantity of goods depends, of course, upon the facts in the particular case and the quantity will vary with different commodities and in different trades and industries. Thus, a different quantity would be characteristic of retail sales of canned tomato juice, bed sheets, furniture, coal, etc. The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

(b) The sale of goods or services in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the normal retail price is given is generally regarded as a wholesale sale in most industries. Whether the sale of such a quantity must always involve a discount in order to be considered a wholesale sale depends upon industry practice. If the practice in a particular industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity is a wholesale sale, then the question of whether

the sale of such a quantity will be considered a wholesale sale would be determined without reference to the price. In some industries, the sale of a small quantity at a discount may also be regarded as a wholesale sale, in which case it will be so treated for purposes of the exemption. Generally, as the Supreme Court has recognized (*Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 1900), both the legislative history and common parlance suggest that ''the term retail becomes less apt as the quantity and the price discount increases in a particular transaction.''

(c) In some cases, a purchaser contracts for the purchase of a large quantity of goods or services to be delivered or performed in smaller quantities or jobs from time to time as the occasion requires. In other cases, the purchaser instead of entering into a single contract for the entire amount of goods, or services, receives a series of regular deliveries of performances pursuant to a quotation, bid, estimate, or general business arrangement or understanding. In these situations, if the total quantity of goods or services which is sold is materially in excess of the total quantity of goods or services which might reasonably be purchased by a member of the general consuming public during the same period, it will be treated as a wholesale quantity for purposes of the statutory definition of the term ''retail or service establishment'', in the absence of clear evidence that under such circumstances such a quantity is recognized as a retail quantity in the particular industry. For example, if a food service firm contracts with a college to provide meals for the latter's boarding students for a term, in consideration of payment by the college of a stipulated sum based on the number of students registered or provided with meals, the services are being sold in a wholesale, rather than a retail quantity. If such a contract is entered into as a result of formal bids, as noted in paragraph (d) of this section, this would be an additional reason for nonrecognition of the transaction as a retail sale of such services.

(d) Sales made pursuant to formal bid procedures, such as those utilized by the agencies of Federal, State, and local governments and oftentimes by commercial and industrial concerns involving the issuance by the buyer of a formal invitation to bid on certain merchandise or services for delivery in accordance with prescribed terms and specifications, are not recognized as retail sales.

### § 779.329 Effect of type of customer and type of goods or services.

In some industries the type of goods or services sold or the type of purchaser of goods or services are determining factors in whether a sale or service is recognized as retail in the particular industry. In other industries a sale or service may be recognized as retail regardless of the type of goods or services sold or the type of customer. Where a sale is recognized as retail regardless of the type of customer, its character as such will not be affected by the character of the customer, with reference to whether he is a private individual or a business concern, or by the use the purchaser makes of the purchased commodity. For example, if the sale of a single automobile to anyone for any purpose is recognized as a retail sale in the industry, it will be considered as a retail sale for purposes of the exemption whether the customer be a private individual or an industrial concern or whether the automobile is used by the purchaser for pleasure purposes or for business purposes. If a sale of a particular quantity of coal is recognized in the industry as a retail sale, its character as such will not be affected by the fact that it is sold for the purpose of heating an office building as distinguished from a private dwelling. If the repair of a wash basin is recognized in the industry as a retail service, its character as such will not be affected by the fact that it is a wash basin in a factory building as distinguished from a wash basin in a private dwelling house. It must be remembered that these principles apply only to those sales of goods or services which have a retail concept, that is, where the subject matter is ''retailable.'' See § 779.321. The ''industry-recognition'' question as to whether such sales are recognized as retail in the industry has no relevancy if in fact the goods and services sold are not of a ''retailable'' character, as previously explained. If

the subject of the sale does not come within the concept of retailable items contemplated by the statute, there can be no recognition in any industry of the sale of the goods or services as retail, for purposes of the Act, even though the nomenclature used by the industry members may put a retail label on the transaction. (See *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290.)

SALES NOT MADE FOR RESALE

### § 779.330 Third requirement for qualifying as a "retail or service establishment."

The third requirement for qualifying as a ''retail or service establishment'' within that term's statutory definition is that 75 percent of the retail or service establishment's annual dollar volume must be from sales of goods or of services (or of both) which are not made for resale. At least three-fourths of the total sales of goods or services (or of both) (measured by annual dollar volume) must not be made for resale. Except under the special provision in section 3(n) of the Act, discussed in § 779.335, the requirement that 75 percent of the establishment's dollar volume be from sales of goods or services ''not for resale'' is a separate test and a sale which ''for resale'' cannot be counted toward the required 75 percent even if it is recognized as retail in the particular industry. The prescribed 75 percent must be from sales which are both not for resale and recognized as retail.

### § 779.331 Meaning of sales "for resale."

Except with respect to a specific situation 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 where the seller knows or has reasonable cause to believe that the goods or services will be resold, whether in their original form, or in an altered form, or as a part, component or ingredient of another article. Where the goods or services are sold for resale, it does not matter what ultimately happens to such goods or services. Thus, the fact that the goods are consumed by fire or no market is found for them, and are, therefore, never resold does not alter the character of the sale which is made for resale. Similarly, if at the time the sale is made, the seller has no knowledge or reasonable cause to believe that the goods are purchased for the purpose of resale, the fact that the goods later are actually resold is not controlling. In considering whether there is a sale of goods or services and whether such goods or services are sold 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.'' Thus, under the definition sales by an establishment to a competitor are regarded as sales for resale even though made without profit. (*Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F. 2d 932 (CA–8).) Similarly, sales for distribution by the purchaser for business purposes are sales for resale under the ''other disposition'' language of the definition of ''sale'' even though distributed at no cost to the ultimate recipient. (See *Mitchell* v. *Duplicate Photo Service*, 13 WH Cases 71, 31 L.C. Par. 70,287 (S.D. Cal. 1956) accord, *Mitchell* v. *Sherry Corine Corporation*, 264 F. 2d 831 (CA–4) (sale of meals to airlines for distribution to their passengers).) It should be noted, however, that occasional transfer of goods from the stock of one retail or service establishment to relieve a shortage in another such establishment under the same ownership will not be considered as sales for resale.

### § 779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.

Sale for resale includes the sale of goods which will be resold in their original form, in an altered form, or as a part or ingredient of another article. A sale of goods which the seller knows, or has reasonable cause to believe, will be resold after processing or manufacture is a sale for resale. Thus, sales of parts with the expectation that they will be incorporated in aircraft and that the aircraft will be sold clearly are sales for resale. (*Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388.) Similarly, the sale of lumber to furniture or box

factories, or the sale of textiles to clothing manufacturers, is a sale for resale even though the goods are resold in the form of furniture or clothing. The principle is also illustrated in cases where the article sold becomes a part or an ingredient of another, such as scrap metal in steel, dyes in fabrics, flour in bread and pastries, and salt in food or ice in beverages. (*Mitchell* v. *Douglas Auto Parts Co.*, 11 WH Cases 807, 25 L.C. Par. 68, 119 (N.D. Ill., 1954).) The fact that goods sold will be resold as a part of a service in which they are used or as a part of a building into which they are incorporated does not negate the character of the sale as one ''for resale.'' (*Mitchell* v. *Furman Beauty Supply*, 300 F. 2d 16 (CA–3); *Mayol* v. *Mitchell*, 280 F. 2d 477 (CA–1), cert. denied 364 U.S. 902; *Goldberg* v. *Kleban Eng. Corp.*, 303 F. 2d 855 (CA–5).)

### § 779.333 Goods sold for use as raw materials in other products.

Goods are sold for resale where they are sold for use as a raw material in the production of a specific product to be sold, such as sales of coal for the production of coke, coal gas, or electricity, or sales of liquefied-petroleum-gas for the production of chemicals or synthetic rubber. However, the goods are not considered sold for resale if sold for general industrial or commercial uses, such as coal for use in laundries, bakeries, nurseries, canneries, or for space heating, or ice for use by grocery stores or meat markets in cooling and preserving groceries and meat to be sold. Similarly, ice used for cooling soft drinks while in storage will not be considered sold for resale. On the other hand, ice or ice cubes sold for serving soft drinks or other beverages will be considered as sales for resale.

### § 779.334 Sales of services for resale.

The same principles apply in the case of sales of services for resale. A sale of services where the seller knows or has reasonable cause to believe will be resold is a sale for resale. Where, for example, an establishment reconditions and repairs watches for retail jewelers who resell the services to their own customers, the services constitute a sale for resale. Where a garage repairs automobiles for a secondhand automobile dealer with the knowledge or reasonable cause to believe that the automobile on which the work is performed will be sold, the service performed by the garage is a sale for resale. The services performed by a dental laboratory in the making of artificial teeth for the dentist for the use of his patients is a sale of services (as well as of goods) for resale. The services of a fur repair and storage establishment performed for other establishments who sell these services to their own customers, constitute sales for resale. As in the case of the sale of goods, in certain circumstances, sales of services to a business for a specific use in performing a different service which such business renders to its own customers are in economic effect sales for resale as a part of the service that the purchaser in turn sells to his customers, even though such services are consumed in the process of performance of the latter service. For example, if a storage establishment uses mothproofing services in order to render satisfactory storage services for its customers, the sale of such mothproofing services to that storage establishment will be considered a sale for resale.

### § 779.335 Sales of building materials for residential or farm building construction.

Section 3(n) of the Act, as amended, excludes from the category of sales for resale ''the sale of goods to be used in residential or farm building construction, repair or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.'' Under this section a sale of building materials to a building contractor or a builder for use in residential or farm building, repair or maintenance is not a sale for resale, provided, the sale is otherwise recognized as a bona fide retail sale in the industry. If the sale is not so recognized it will be considered a sale for resale. Thus, only bona fide retail sales of building materials to a building contractor or a builder for the uses described would be taken out of the category of sales for resale. (*Sucrs. De A. Mayol & Co.* v. *Mitchell*, 280 F. 2d 477 (CA–1); *Elder* v. *Phillips & Buttroff Mfg. Co.*, 23 L.C. Par. 67,524 (Tenn., 1958).) The legislative history of the

amendment indicates that it is not the intent of its sponsors to remove from the category of sales for resale such sales, for example, as sales of lumber to a contractor to build a whole residential subdivision. (See 95 Cong. Rec. 12533–12535; Sen. St. ibid; 14877.)

### § 779.336 Sales of building materials for commercial property construction.

Sales of building materials to a contractor or speculative builder for the construction, maintenance or repair of commercial property or any other property not excepted in section 3(n) of the Act, as explained above, will be considered as sales for resale. (See §§ 779.332 and 779.335.) Some employers who are dealers in building materials are also engaged in the business of building contractors or speculative builders. Building materials for the carrying on of the employer's contracting or speculative building business often are supplied by the employer himself from or through his building materials establishment. In the analysis of the sales of the building materials establishment for the purpose of determining the qualification of such establishment as a ''retail or service establishment'' all transfers of stock made by the employer from or through his building materials establishment to his building business for the construction, maintenance or repair of commercial property or any other property not excepted in section 3 (n) of the Act will be considered as sales made by such establishment for resale.

## GENERAL TESTS OF EXEMPTION UNDER SECTION 13(a)(2)

### § 779.337 Requirements of exemption summarized.

(a) An establishment which is a ''retail or service establishment'' within the Act's statutory definition of that term (See discussion in §§ 779.312 to 779.336) must, to qualify as an exempt retail or service establishment under section 13(a)(2) of the Act (See § 779.301), meet both of the following tests:

(1) More than 50 percent of the retail or service establishment's total annual dollar volume of sales must be derived from sales of goods or services (or both) which are made within the State in which the establishment is located; and

(2) Either:

(i) The retail or service establishment must not be in an enterprise of the type described in section 3(s), or

(ii) If the retail or service establishment is in an enterprise of the type described in 3(s), it has an annual volume of sales (exclusive of excise taxes at the retail level which are separately stated) of less than $250,000.

(b) The language of the statute in section 13(a)(2) expressly excludes from the exemption an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4) of the Act. No exemption for these is provided under this section even if the establishment meets the tests set forth in paragraph (a) of this section. (See § 779.338(b).) With respect to laundering and drycleaning establishments, which Congress found to lack a retail concept (See § 779.317) and had provided with a separate exemption in former section 13(a)(3) of the Act, repealed by the 1966 amendments, this exclusion simply clarifies the congressional intent to cover employees in such work under section 3(s)(2) of the present Act and to make sure that no exemption under 13(a)(2) will be construed so as to defeat the purpose of repealing the prior special exemption.

### § 779.338 Effect of 1961 and 1966 amendments.

(a) The 1961 amendments to the Fair Labor Standards Act narrowed the exemption for retail or service establishments by permitting section 13(a)(2) to be applied only to an establishment which was not in a covered enterprise, or (if it was in such an enterprise) which had an annual gross volume of sales of less than $250,000 (exclusive of specified taxes). There were certain exemptions to this general principle. These exceptions were set out in section 13(a)(2)(ii) and (iii). The establishments enumerated therein were exempt whether or not they were in a covered enterprise and regardless of the annual

dollar volume of sales. They were: Hotels, motels, restaurants, motion picture theaters, seasonally operated amusement or recreational establishments, hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. These establishments were exempt if they met the basic 50 percent in State sales test and the 75 percent retail sales test of section 13(a)(2). The 1966 amendments to the Act repealed sections 13(a)(2)(ii) and (iii). Now to be exempt under section 13(a)(2) hotels, motels, and restaurants must meet the same tests as other retail or service establishments (see § 779.337). Seasonal amusement or recreational establishments and motion picture theaters now have special exemptions from both the minimum wage and overtime pay provisions of the Act as provided by the 1966 amendments in sections 13(a)(3) and 13(a)(9) respectively.

(b) Certain establishments which were previously exempt under section 13(a)(2) prior to the 1966 amendments have been specifically excluded from this exemption as a result of the amendments, even though they may still qualify as retail or service establishments under the definition of such an establishment in that section. These are hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. However, such institutions have been recognized as having a retail concept and where the nature of their operations has not changed and where they otherwise satisfy the Act's definition of a ''retail or service establishment'', certain food service employees employed by such institutions will be considered to be exempt from the Act's overtime pay provisions under section 13(b)(18), exemptions for their administrative or executive employees will not be defeated by nonexempt work occupying less than 40 percent of the employee's time, and full-time students may be employed in accordance with the special minimum wage provisions of section 14 of the Act and part 519 of this chapter.

SALES MADE WITHIN THE STATE

### § 779.339 More than 50 percent intrastate sales required.

The first test specified in section 13 (a)(2) is that more than 50 percent of the sales of goods or of services (or of both) of a ''retail or service establishment'' (Measured by annual dollar volume) must be made ''within the State in which the establishment is located''. This limitation means that such establishment must be primarily engaged (more than 50 percent) in selling to or serving customers within its State. If the establishment is engaged to the extent of 50 percent or more in selling to or serving customers outside the State of its location, the requirement is not met and the establishment cannot qualify for exemption.

### § 779.340 Out-of-State customers.

Whether the sale or service 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. Sales made to the casual cash-and-carry customer of a retail or service establishment, 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 establishment is located, if delivery of the goods is made outside the State. It should be noted that sales of goods or services that are conditioned upon acceptance or rejection by an out-of-State source are interstates sales and

not sales made within the State for purposes of section 13(a)(2). For example, a contract entered into in the State where the customer resides for the delivery of a magazine to the customer's residence, is an interstate sale if the contract must be approved by the out-of-State home office of the company publishing the magazine before it becomes effective.

### § 779.341 Sales "made within the State" and "engagement in commerce" distinguished.

Sales to customers located in the same State as the establishment are sales made ''within the State'' even though such sales may constitute engagement in interstate commerce 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 order; or (c) is made to a customer for use in interstate commerce or in production of goods for such commerce.

## COMPUTING ANNUAL DOLLAR VOLUME AND COMBINATION OF EXEMPTIONS

### § 779.342 Methods of computing annual volume of sales.

The tests as to whether an establishment qualifies for exemption under section 13(a)(2) of the Act are specified in terms of the ''annual dollar volume of sales'' of goods or of services (or both) and percentages thereof. The ''annual dollar volume of sales'' of an establishment consists of the gross receipts from all sales of the establishment during a 12-month period. The methods of computing it for purposes of determining whether the establishment qualifies under the tests of the exemption are the same as the methods of calculating whether the annual gross volume of sales or business of an enterprise or an establishment meets the statutory dollar tests for coverage. These are discussed in §§ 779.265 to 779.269. However, for purposes of the exemption tests the specified percentages are based on annual dollar volume before deduction of those taxes which are excluded in determining whether the $250,000 test is met. The exemption tests are in terms of the annual dollar volume of the establishment. This will include dollar volume from transactions with other establishments in the same enterprise, even though such transactions within an enterprise may not be part of the annual gross volume of the enterprise's sales made or business done (see § 779.259).

### § 779.343 Combinations of exemptions.

(a) An employee may be engaged in a particular workweek in two or more types of activities for each of which a specific exemption is provided by the Act. The combined work of the employee during such a workweek may not satisfy the requirements of either exemption. It is not the intent of the Act, however, that an exemption based on the performance of one exempt activity should be defeated by the performance of another activity which has been made the basis of an equivalent exemption under another provision of the Act. Thus, where an employee during a particular workweek is exclusively engaged in performing two or more activities to which different exemptions are applicable, each of which activities considered separately would be an exempt activity under the applicable exemption if it were the sole activity of the employee for the whole workweek in question, as a matter of enforcement policy the employee will be considered exempt during such workweek. If the scope of such exemptions is not the same, the exemption applicable to the employee will be equivalent to that provided by whichever exemption provision is more limited in scope.

(b) In the case of an establishment which sells both goods and services at retail and which qualifies as an exempt establishment under section 13(a)(2), but cannot, as a whole, meet the tests of section 13(a)(4) because it sells services as well as goods, a combination of section 13(a)(2) and 13(a)(4) exemptions may nevertheless be available for employees of the establishment who make or process, on the premises, goods which it sells. Such employees employed by an establishment which, as a whole, meets the tests set forth in section 13(a)(2), will be considered exempt under this combination exemption if the establishment, on the basis of all

its activities other than sales of services, would meet the tests of section 13(a)(4).

(c) Where two or more exemptions are applicable to an employee's work or employment during a workweek and where he may be exempt under a combination of exemptions stated above, the availability of a combination exemption will depend on whether the employee meets all the requirements of each exemption which it is sought to combine.

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

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

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

### § 779.346 Requirements for exemption summarized.

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

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

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

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

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

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

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

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

makes them for the purpose of selling them at other establishments the establishment making the goods is a factory and not a retail establishment.

(b) Where the making or processing of the goods takes place away from the selling establishment, the section 13(a)(4) requirement that both the making or processing and selling take place at the same establishment cannot be met. This will be true even though the place at which the goods are made or processed services the retail selling establishment exclusively. In such a situation, while the selling establishment may qualify for exemption under section 13(a)(2), the separate establishment at which the goods are made or processed will not be exempt. The latter is a manufacturing establishment. For example, a candy kitchen manufacturing candy for sale at separate retail outlets is a manufacturing establishment and not a retail establishment. (*Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (CA–8.))

(c) The fact that goods made or processed on the premises of a bona fide retail establishment are sold by the establishment through outside salesmen (as, for example, department store salesmen taking orders from housewives for draperies) will not defeat the exemption if otherwise applicable. On the other hand, in the case of a factory or similar establishment devoted to making or processing goods, the fact that its goods are sold at retail by outside salesmen provides no ground for recognizing the establishment as a retail establishment or qualifying it for exemption.

### § 779.349 The 85-percent requirement.

The final requirement for the section 13(a)(4) exemption is that more than 85 percent of the establishment's sales of the goods it makes or processes, measured by annual dollar volume, must consist of sales made within the State in which the establishment is located. A retail establishment of the type intended to be exempt under this exemption may also sell goods which it does not make or process; the 85-percent requirement applies only to the sales of goods which are made or processed at the establishment. This must not be confused with the additional test which requires that the establishment, to be exempt, must derive more than 50 percent of its entire annual dollar volume of sales of goods from sales made within the State. (See § 779.339.) In other words, more than 85 percent of the establishment's annual dollar volume of sales of goods made or processed at the establishment, and more than 50 percent of the establishment's total annual dollar volume of sales of all the goods sold by the establishment, must be derived from sales made within the State. An establishment will not lose an otherwise applicable exemption under section 13(a)(4) merely because some of its sales of goods made or processed at the establishment are sales for resale or are not recognized as retail sales in the particular industry. Sales for resale, such as wholesale sales, and other sales not recognized as retail sales in the industry, will be counted in the 25-percent tolerance permitted by the exemption. (Cf. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388.) Thus, for example, a bakery otherwise meeting the tests of 13(a)(4) making and selling baked goods on the premises nevertheless will qualify as an exempt retail establishment even though it engages in the sale of baked goods to grocery stores for resale if such sales, together with other sales not recognized as retail in the industry, do not exceed 25 percent of the total annual dollar volume of the establishment.

### § 779.350 The section 13(a)(4) exemption does not apply to service establishments.

The section 13(a)(4) exemption applies to retail establishments engaged in the selling of goods. It does not apply to service establishments. If the establishment is a service establishment, it must qualify under section 13(a)(2) in order to be exempt. A retail establishment selling goods, however, also may perform services incidental or necessary to the sale of such goods, such as a delivery service by a bakery store or installation of antennas by a radio dealer for his customers, without affecting the character of the establishment as a retail establishment qualified for exemption under section 13(a)(4).

ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

**§ 779.351 Exemption provided.**

Section 13(a)(11) (See § 779.301) exempts from sections 6 and 7 of the Act any employee or proprietor who is engaged in handling telegraphic messages for the public in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), if the conditions specified in section 13(a)(11) are met and the provisions of section 6 and 7 of the Act would not otherwise apply.

**§ 779.352 Requirements for exemption.**

The requirements of the exemption are: (a) The establishment in which the employee or proprietor works must qualify as an exempt retail or service establishment under section 13(a)(2) of the Act; (b) the employee or proprietor must be engaged in handling telegraphic messages for the public pursuant to an agency or contract arrangement with a telegraph company; (c) such employee or proprietor must be one to whom the minimum wage and overtime pay provisions of the Act would not apply in the absence of such handling of telegraphic messages (See *Western Union Tel. Co.* v. *McComb* 165 F. 2d. 65 (CA–6), certiorari denied, 333 U.S. 362); and (d) the exemption applies only where the telegraphic message revenue does not exceed $500 a month. For purposes of this exemption only, in determining whether a retail or service establishment meets the percentage tests contained in section 13(a)(2) of the Act, the receipts from the telegraphic message agency will not be included.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

**§ 779.353 Basis for classification.**

The general principles governing the application of the 13(a)(2) and 13(a)(4) exemptions are explained in detail earlier in the subpart. It is the purpose of the following sections to show how these principles apply to establishments in certain specific industries. In these industries the Divisions have made special studies, held hearings or consulted with representatives of industry and labor, to ascertain the facts. Based upon these facts the following determinations have been made as to which sales or establishments are, and which are not, recognized as retail in the particular industry.

LUMBER AND BUILDING MATERIALS DEALERS

**§ 779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.**

(a) *Section 13(a)(2).* An establishment engaged in selling lumber and building materials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. It must appear that:

(1) The establishment is not in an enterprise described in section 3(s) of the Act or, if it is, its annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) is less than $250,000; and

(2) More than 50 percent of the establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located; and

(3) 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is made from sales which are not for resale and are recognized as retail sales of goods or services in the industry.

These requirements are further explained in §§ 779.301 through 779.343.

(b) *Section 13(a)(4).* An establishment which makes or processes lumber and building materials which it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements (see *Arnold* v. *Kanowsky*, 361 U.S. 388) of that exemption. It must appear that:

(1) The establishment qualifies as an exempt retail establishment under section 13(a)(2) (see paragraph (a) of this section and § 779.350); and

(2) The establishment is recognized as a retail establishment in the industry (see § 779.347 and paragraph (c) of this section); and

(3) The goods which such establishment makes or processes for sale are made or processed at the retail establishment which sells them (see § 779.348); and

(4) More than 85 percent of the annual dollar volume derived by the retail establishment from sales of goods so made or processed therein is made within the State in which the establishment is located (see §§ 779.349, 779.339 through 779.341).

(c) *Establishments recognized as retail in the industry*. An establishment which meets the requirements for exemption under section 13(a)(4) which are stated in paragraphs (b)(1), (3), and (4) of this section is recognized as retail establishment in the industry within the meaning of paragraph (b)(2) of this section if its annual dollar volume of sales of goods made or processed at the establishment does not exceed 50 percent of the annual dollar volume which it derives from sales that are recognized as retail and are not made for resale.

(d) *Establishments lacking a ''retail concept*.'' The exemptions provided by sections 13(a)(2) and 13(a)(4) of the Act do not apply to establishments in an industry in which there is no traditional concept of retail selling or servicing (see § 779.316), such as the establishment of a building contractor (see § 779.317; *Goldberg* v. *Dakota Flooring Co*., 15 WH Cases 305), or a factory (see § 779.347).

### § 779.355 Classification of lumber and building materials sales.

(a) *General*. In determining, for purposes of the section 13(a)(2) and (4) exemptions, whether 75 percent of the annual dollar volume of the establishment's sales which are not for resale and are recognized as retail in the industry, such sales will be considered to include all sales of lumber and building materials by the establishment which meet all the requirements for such classification as previously explained in this subpart, but will not be considered to include the transactions noted in paragraphs (b) and (c) of this section, which do not meet the statutory tests:

(b) *Transactions not recognized as retail sales*. (See §§ 779.314 through 779.329.) Dollar volume derived from the following is not made from sales or services which are recognized as retail in the industry:

(1) Contracts to build, maintain, or repair buildings or other structures, or sales of services involving performance of typical construction activity or any other work recognized as an activity of a contracting business rather than a function of a retail merchant;

(2) Sales of lumber and building materials in which the seller agrees to install them for the purchaser, where the installation is not limited to services that are merely incidental to the sale and delivery of such materials but includes a substantial amount of activity such as construction work which is not recognized as retail (for example, sale and installation of roofing, siding, or insulation). A sale of such materials which would otherwise be recognized as retail (contracts described in paragraph (b)(1) of this section are outside this category) may be so recognized notwithstanding the installation agreement, however, to the extent that the sales value of the materials is segregated and separately identified in the transaction;

(3) Sales in direct carload shipments; that is, where the materials are shipped direct in carload lots from the dealer's supplier to the dealer's customer;

(4) Sales of specialized goods (some examples are logs, ties, pulpwood, telephone poles, and pilings). Such specialized items are of the type which the general consuming public does not ordinarily have occasion to use (cf. § 779.318 and *Mitchell* v. *Raines*, 238 F. 2d 186), and the sales of such items are not recognized as retail in the industry;

(5) Sales made pursuant to formal bid procedures, such as those utilized by the Federal, State, and local governments and their agencies, involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications.

(c) *Sales for resale*. (See §§ 779.330–779.336.) Examples of sales which cannot be counted toward the required 75 percent because they are for resale include:

(1) Sales of lumber and building materials sold to other dealers for resale in the same form;

(2) Sales to industrial concerns for resale in any altered form or as a part or ingredient of other goods;

(3) Sales to contractors or builders for use in the construction, repair, or maintenance of commercial or industrial structures or any other structures not specifically included in section 3(n) of the Act (Sucrs. de Mayal v. Mitchell, 280 F. 2d 477, certiorari denied 364 U.S. 902; and see *Arnold* v. *Kanowsky*, 361 U.S. 388, 394, footnote 10, and §§ 779.335–779.336);

(4) Transfers of goods by an employer, who is a dealer in lumber and building materials and who also acts in the capacity of a building contractor or speculative builder, from or through his building materials establishment to his building business for the construction maintenance, or repair of commercial property or any other property not excepted in section 3(n) of the Act. (See § 779.336.)

### § 779.356 Application of exemptions to employees.

(a) *Employees who may be exempt under sections 13(a)(2) and 13(a)(4).* These exemptions apply on an establishment basis (see §§ 779.302–779.306). Accordingly, where an establishment of a dealer in lumber and building materials qualifies as an exempt retail or service establishment under section 13(a)(2) or as an exempt establishment under section 13(a)(4), as explained in § 779.354, the exemption from the minimum wage and overtime pay requirements of the Act provided by such section will apply, subject to the limitations hereafter noted in this section, to all employees who are employed ''by'' such establishment (see §§ 779.307–779.311) in activities within the scope of its business (§ 779.308) and who are not employed by the employer in performing central office or warehouse work of an organization operating several such establishments (§ 779.310; *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, cert. denied 335 U.S. 854). Neither exemption extends to employees employed in performing the work of a nonexempt establishment (§ 779.311) or such activities as construction work. Employees employed in making and processing of lumber and building materials for sale do not come within the section 13(a)(2) exemption; they are exempt only if employed by an establishment which qualifies as an exempt establishment under section 13(a)(4) as explained in § 779.354 and if their work in the making or processing of such materials is done at such establishment. How duties relating to the processing or manufacturing of such materials affect the application of these exemptions is discussed in further detail in paragraphs (b) and (c) of this section.

(b) *Processing and manufacturing activities.* The performance, in an establishment which sells lumber and building materials at retail, of activities such as cutting lumber to a smaller size or dressing lumber in accordance with a customer's request or assembling window and door frames received in ''knocked-down'' condition, constitutes processing incidental to the sales of such materials. Such activities are not considered manufacturing and will not affect the applicability of the section 13(a)(2) exemption to the establishment or to the employees who perform them. However, whenever lumber is cut or dressed for sale, or fabricated products are manufactured for sale (for example, windows, door frames, benches, pig troughs, pallets, molding, sashes, cabinets, boxes), there is no exemption under section 13(a)(2). Employees performing such manufacturing activities at the establishment are exempt only if all the tests set forth in section 13(a)(4) are met (see pars. (b), (c), and (d) of § 779.354). Employees engaged in such activities at a manufacturing plant, central yard, or other place not qualifying as an exempt establishment under section 13(a)(2) and (4) are not exempt.

(c) *Employees serving exempt and nonexempt operations.* In lumber and building materials establishments which qualify for exemption under section 13(a)(2) but engage in some activities in which their employees are not exempt, such as construction or the making or processing of materials for sale where no exemption under section 13(a)(4) is applicable, there may be auxiliary employees of the establishment whose duties relate to both the exempt sales portion of the business and the non-exempt operations. For example, office workers may keep records of both the retail sales and construction or manufacturing activities; custodial workers

may clean the entire premises, including portions devoted to nonexempt manufacturing; and warehousemen, messengers, and stock clerks may handle material for all departments, including material used in the nonexempt operations. These employees do not qualify for the exemption except when they are primarily engaged in the sales portion of the business and only incidentally perform clerical, custodial, or messenger service for the other operations. As an enforcement policy, such an employee will not be considered to be engaged in nonexempt activities which render him ineligible for exemption under section 13(a)(2) if, in the particular workweek, an insubstantial amount of his time (20 percent or less) is allocable to the clerical, custodial, or messenger services performed by him which relate to such nonexempt operations of the employer.

COAL DEALERS

**§ 779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.**

(a) *General.* A coal dealer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are recognized as retail in the particular industry, sales of coal to the consumer from a dealer's yard storage, where bulk is broken, are recognized as retail if they meet the requirements for such classification as previously explained in this subpart. It has been determined that the following sales do not meet such requirements and are not so recognized even if made from a dealer's yard storage:

(1) Sales where the delivery is made by railroad car or cargo vessel.

(2) Sales in a carload quantity or more for continuous delivery by truck from a dock, mine or public railroad facility.

(3) *Sales of coal at a wholesale price.* A wholesale price is a price comparable to or lower than the establishment's price in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale. If the establishment makes no such sales, the wholesale price is the price comparable to or lower than the price prevailing in the immediate area in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale.

(4) Sales of coal for use in the production of a specific product to be sold in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity.

(b) ''*Sales for resale.*'' In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are not made for resale, ''sales for resale'' will include sales of coal to other dealers, to peddlers, and sales of coal for use in the production of a specific product to be sold, in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity. This is distinguished from sales of coal for use in the general manufacturing or industrial process such as the use in laundries, bakeries, nurseries, canneries, etc., or for space heating, which are not sales made for resale.

ICE MANUFACTURERS AND ICE DEALERS

**§ 779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.**

(a) An establishment engaged in selling ice may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, an establishment making the ice it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) In determining whether the requirements of the 13(a)(2) exemption that 75 percent of the establishment's sales must not be made for resale and must be recognized as retail sales in the industry are met, sales of ice which meet all the requirements for such classification as previously explained in this subpart will be regarded as retail. The following sales have been determined not to qualify under the applicable tests for recognition as retail:

(1) Sales for resale.

(2) Sales of ice for icing railroad cars and for icing cargo trucks. However, sales of ice for the re-icing of cargo trucks are recognized as retail if such sales do not fall into the nonretail categories described in paragraphs (b) (4) and (5) of this section.

(3) Sales of ice in railroad car lots.

(4) Sales of ice of a ton or more.

(5) Sales of ice at a price comparable to that charged by the establishment to dealers or, if no sales are made to dealers by the establishment, at a price comparable to or lower than the prevailing price to dealers in the area.

(c) The legislative history indicates that iceplants making the ice they sell are among the establishments which may qualify as retail establishments under the section 13(a)(4) exemption. It appears that all iceplants which sell at retail are establishments of the same general type, permitting no separate classifications with respect to recognition as retail establishments. Any iceplant which meets the tests of section 13(a)(2) will, therefore, be considered to be recognized as a retail establishment in the industry. Of course, the establishment must also meet all the other tests of section 13(a)(4) to qualify for the exemption.

(d) There are some iceplants which meet the section 13(a)(2) exemption requirements, but do not meet all of the section 13(a)(4) requirements. In such establishments, there may be some employees whose duties relate to both the sales portion of the business and the making or processing of ice. These employees will not qualify for exemption. However, in such establishment, there may be some employees who work primarily for the retail sales portion of the business and also perform incidental clerical, custodial, or messenger service for the manufacturing operation. For example, office workers may keep records of both the manufacturing activities and of the retail sales departments, maintenance workers may clean up in both parts of the establishment, and messengers may perform services for both activities. If these employees spend relatively little time in the work related to the ice manufacturing portion of the business, they will not, as an enforcement policy, be regarded as engaged in the making or processing of ice. Such an auxiliary employee will thus be exempt under section 13(a)(2) in any workweek in which an insubstantial amount of his time (20 percent or less) is allocable to the clerical, messenger, or custodial work of the ice manufacturing operations.

## LIQUEFIED-PETROLEUM-GAS AND FUEL OIL DEALERS

### § 779.359 May qualify as exempt 13(a)(2) establishments.

A liquefied-petroleum-gas or fuel oil dealer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. (It should be noted, however, that employees of certain enterprises engaged in the wholesale or bulk distribution of petroleum products may be partially exempt from the overtime provisions of the Act under section 7(b)(3). This overtime exemption is discussed in a separate bulletin, part 794 of this chapter. Liquefied-petroleum-gas means butane, propane and mixtures of butane and propane gases.

### § 779.360 Classification of liquefied-petroleum-gas sales.

(a) *General*. In determining, under the 13(a)(2) exemption, whether 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, sales to the ultimate consumer of liquefied-petroleum-gas, whether delivered in portable cylinders or in bulk to the customer's storage tanks, are recognized as retail in the industry if they meet all the requirements for such classification as previously explained in this subpart. The following are not recognized as retail:

(1) Sales in single lot deliveries exceeding 1,000 gallons;

(2) Sales made on a competitive bid basis (this term covers sales made pursuant to an invitation to bid, particularly sales to Federal, State and local governments; sales made in a like manner to commercial and industrial concerns and institutions are also included); and

(3) Sales for use in the production of a specific product in which the gas is an essential ingredient or principal raw

material, such as sales of liquefied-petroleum-gas for the production of chemicals and synthetic rubber; and

(4) Sales of liquefied-petroleum-gas for use as truck or bus fuel and the repair and servicing of trucks and buses used in over-the-road commercial transportation (including parts and accessories for such vehicles).

(b) *Sales or repairs of tanks.* Sales or repairs of tanks for the storage of liquefied-petroleum-gas are recognized as retail in the industry, except: (1) Any tank exceeding 1,000 gallons in capacity; (2) any tank sold or repaired on the basis described in paragraph (a) (2) of this section or for the purposes described in paragraph (a)(3) of this section; and (3) sales in quantity larger than involved in the ordinary sales to a farm or household customer.

(c) *Conversion units.* Sales and installation of units for converting pumps, stoves, furnaces and other equipment and appliances to the use of liquefied-petroleum-gas, are recognized as retail sales except: (1) Sales of the installation of such conversion units which involve substantial modification of the appliance or equipment; (2) sales and installation of such units to be used in industrial machinery or equipment; (3) sales and installations made on the basis described in paragraph (a)(2) of this section or in quantity as described in § 779.327; and (4) sales and installation of such units for vehicles mentioned in paragraph (a) (4) of this section.

### § 779.361 Classification of other fuel oil sales.

(a) Sales of fuel oil (as differentiated from sales of butane and propane gases) are classified as retail and nonretail sales as follows:

(1) Retail sales—all sales of grades No. 1, No. 2, and No. 3 of fuel oil direct to housholders for their own domestic uses;

(2) Nonretail sales:

(i) All sales of grades No. 4, No. 5, and No. 6 fuel oil as these heavy oils are ''special purpose'' goods to which the retail sales concept has no application (See § 779.321);

(ii) All sales for resale including such sales to peddlers and other dealers (See §§ 779.331–779.334);

(iii) All sales made pursuant to a formal invitation to bid (See § 779.328(d)).

(b) In some cases the retail or nonretail status of an establishment may turn on sales other than those listed above. In such cases all the facts relative to such sales shall be considered in arriving at a determination. The classification of such sales depends upon whether they are recognized as retail sales. In such cases particular attention shall be given to the quantities involved and the prices charged.

## FEED DEALERS

### § 779.362 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in selling feed may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly an establishment making and processing the feed it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, sales of feed to feeders will generally meet the requirements for such classification as previously explained in this subpart and will ordinarily be considered to be retail sales except for the following which do not meet the requirements and are not recognized as retail: Any sale of feed for shipment by railcar direct to the feeder; and sales made at a quantity discount which results in a price comparable to or lower than the establishment's price to dealers for resale or, if the establishment makes no sales to other dealers, at a price comparable to or lower than the price prevailing in the immediate area in sales by similar establishments to dealers for resale.

(c) The custom grinding and mixing of feed (including the addition of supplements) for feeders from the grain they themselves bring in will be regarded as the performance of a service, and not the making or processing of goods for sale under section 13(a)(4). Such services are recognized as retail

services in the industry and the revenue derived therefrom will be included with the retail receipts of the establishment.

(d) Employees employed in the grinding and mixing of feed for sale (as distinguished from the grinding and mixing services discussed in paragraph (c) of this section) are engaged in the making or processing of goods and are therefore not exempt under section 13(a)(2). In order for these employees to be exempt, the establishment by which they are employed must meet all the requirements of section 13(a)(4), including the requirement that the establishment must be recognized as a retail establishment in the particular industry. The typical small feed mill engaged in selling goods to farmers appears to be recognized as retail in the industry. There are, of course, large mills which are essentially factories which are not so recognized. As an enforcement policy an establishment which qualifies for exemption under section 13(a)(2) will be considered to have met this requirement: (1) If less than 50 percent of its retail sales are composed of feed manufactured at the establishment; or (2) if its sales of feeds manufactured at the establishment do not exceed 2,000 tons a year. In determining these tests for the applicability of the exemption, the computation of the sales of feed manufactured will be made on an annual basis in the same manner as set forth in §§ 779.265 through 779.269 for the computation of sales.

MONUMENT DEALERS

### § 779.363 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in the sale of monuments and memorials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, an establishment making or processing the monuments it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) Monument dealers' establishments may be roughly divided into four types;

(1) Establishments which are engaged exclusively in selling monuments and memorials from designs. They receive their monuments from a manufacturer completely finished and lettered and they then erect the monuments.

(2) Establishments which purchase finished monuments from manufacturers, display them, carve or sand-blast lettering or incidental decoration to order, and set them in cemeteries or elsewhere.

(3) Establishments which purchase finished and semi-finished work. The semifinished work consists of sawed, steeled, or polished granite slabs or sand-rubbed marble. In such a case the establishments will cut ends, tops, or joints on dies and may shape a base.

(4) Establishments which purchase stone in rough form and perform all the fabricating operations in their own plants. In such a case the establishments may saw or line-up the rough stones, machine surface and polish the stone and then perform the other operations necessary to complete the monument. They may finish the monuments for display or on special order and then erect them.

(c) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, the ordinary sale of a single tombstone or monument to the ultimate purchaser will be considered as a retail sale within the meaning of the exemption. If the monument dealer establishment meets all the tests of the 13(a)(2) exemption all employees employed by it will be exempt under that exemption except those employees who are engaged in the making or processing of the goods. However, carving or sandblasting of lettering or incidental decoration or erecting the monuments, is considered processing incidental to the making of retail sales and would not defeat the 13(a)(2) exemption for employees performing such work. Employees who engage in processing semifinished or rough granite or marble or other stone into finished monuments such as the work performed in establishments described in paragraphs (b) (3) and (4) of this section

are engaged in the making or processing of goods and are, for that reason, not exempt under section 13(a)(2). In order for those employees to be exempt the establishment by which they are employed must meet all the requirements of the 13(a)(4) exemption.

(d) One of the requirements of the section 13(a)(4) exemption is that an establishment which makes or processes goods must be recognized as a retail establishment in the industry. Generally an establishment described in paragraph (b)(3) of this section which receives finished stock and in addition receives some semifinished work, including sawed, steeled, or polished granite slabs or sand-rubbed marble, etc., and performs such operations as cutting ends, tops, or joints on the dies, is a type of establishment which is recognized as a retail establishment in the industry. On the other hand, those establishments which characteristically engage in the sawing or lining up of rough stone, or in the machine surfacing and polishing of stone, such as the activities performed in an establishment described in paragraph (b)(4) of this section, are not recognized as retail establishments in the particular industry within the meaning of section 13(a)(4). Therefore, their employees who engage in such processing of monuments are not exempt under this section of the Act.

FROZEN-FOOD LOCKER PLANTS

### § 779.364 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in providing frozen-food locker service to farmers and other private individuals and rendering services thereto may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, a frozen-food locker plant which also engages in slaughtering and dressing livestock or poultry for sale may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) *Activities of frozen-food locker plants.* Frozen-food locker plants provide locker service for the cold storage of frozen meats, fruits, and vegetables and engage in incidental activities such as the cutting of meat, cleaning, packaging or wrapping and quick freezing, of meats, fruits, or vegetables for such locker service. In such establishments lockers are rented principally to farmers and other private individuals for the purpose of storage by them of such goods for their own personal or family use. Storage space and related services may also be provided for business or commercial use such as to hotels, stores or restaurants, or to farmers or other customers who use it to store meat and other goods for future sale. Such locker plants may also engage in such activities as the custom slaughtering and dressing of livestock or poultry and the curing, smoking, or other processing of meat owned by farmers and other private individuals for storage by those customers either in their home freezers or in locker plants for the customers' personal or family use. The custom slaughtering or processing activities of such locker establishments may be performed on the premises of the establishments or at some location away from the establishment.

(c) *Classification of sales.* In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, the receipts from the locker service and the incidental activities mentioned in the first sentence of this section and from the slaughtering, dressing, or other processing of livestock or poultry performed for farmers and other private individuals for their own use, but not where the goods are to be sold to others by the customer, will be counted as receipts from sales of services recognized as retail in the industry. Receipts from commercial storage and activities incidental thereto and from the sale of hides, offal or other byproducts will be counted as receipts from sales of goods or services made for resale or which are not recognized as retail sales of goods or services in the industry.

(d) Some locker plant establishments also include a meat market of the type which slaughters its own livestock or poultry (as distinguished from the slaughtering performed as a service to

customers on the customers' own livestock) and processes such meat for sale by it to the general public. In performing such operations as the slaughtering, curing, and smoking of meat and the rendering of fats for sale, the establishment is making or processing goods that it sells and is not performing retail services for its customers. Employees engaged in these activities in such an establishment, therefore, are not exempt under section 13(a)(2) but may be exempt if the establishment meets the tests of a combination 13(a)(2)–13(a)(4) exemption in accordance with the principles stated in § 779.343. As a general rule, such a meat market which slaughters its own livestock and sells its meat to the general public is a type of establishment which may be recognized as a retail establishment in the industry within the meaning of the 13(a)(4) exemption. Whether a particular establishment, however, is so recognized depends upon the facts of the case. It should be noted that where such slaughtering, curing or smoking is, for any reason, performed away from the premises of the establishment where the meat is sold, the employees engaged in such activities are not employees employed by a retail establishment which ''makes or processes at the retail establishment the goods that it sells'' within the meaning of the 13(a)(4) exemption and cannot, therefore, be exempt under that section.

AUTOMOTIVE TIRE ESTABLISHMENTS

### § 779.365 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in the selling of tires, tubes, accessories and of repair services on tires may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, an establishment engaged in retreading or recapping tires may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b)(1) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not made for resale and are recognized as retail sales in the industry, sales other than those described hereinafter in the subparagraphs of this paragraph may be so counted if they meet all the requirements for such classification as previously explained in this subpart. Not eligible for inclusion in the requisite 75 percent are sales of goods that cannot be the subject of a retail sale because the goods are not of a ''retailable'' type or the sales of such goods lack the ''retail concept'' (see § 779.321). Nor can sales for resale be counted toward the 75 percent. For example, sales of tires, tubes, accessories or services to garages, service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale. Further, the sales of tires, tubes, accessories and tire repair services, including retreading and recapping, which are described in the following paragraphs (b) (2) through (7), are not recognized as retail in the industry.

(2) Sales made pursuant to a formal invitation to bid: Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, State and local governments are typically made in this manner.

(3) Sales to ''national accounts'' as known in the trades; that is, sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(4) Sales to fleet accounts at wholesale prices: As used in this section, a ''fleet account'' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of passenger car tires for resale. If the establishment

makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales, the wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles. (See *Wirtz* v. *Steepleton General Tire*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

(5) Sales of a tire rental service on a mileage basis known in the trade as ''mileage contracts'': This is a leasing arrangement under which a tire dealer agrees to provide and maintain tires or tubes for motor vehicles of a fleet account.

(6) Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

(7) Sales, repair, recapping, or rental of truck or machinery tires suitable for use only on trucks or equipment of a specialized kind that cannot themselves be the subject of a retail sale because their lack of a concept of ''retailability'' as previously explained precludes the recognition of their sale as ''retail;'' to any industry.

### § 779.366 Recapping or retreading tires for sale.

(a) Some automotive tire establishments engage in recapping and retreading work on tires which the establishment expects to sell in their reconditioned form. Such activities are not performed as a service for a customer but constitute manufacturing goods for sale. Employees performing such work may be exempt only if they are employed by an establishment which meets all the requirements of the 13(a)(4) exemption.

(b) For purposes of meeting the retail recognition requirement of section 13(a)(4), an establishment engaged in retreading or recapping of tires which qualifies for exemption under section 13(a)(2) is recognized as a retail establishment in the industry if not more than 50 percent of the annual dollar volume of its sales resulting from its retreading and recapping operations comes from the sale of tires retreaded and recapped for sale.

## COMMERCIAL STATIONERS

### § 779.367 Commercial stationers may qualify as exempt 13(a)(2) establishments.

(a) A commercial stationer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Where the establishment meets these requirements all employees employed by the establishment will be exempt, except any employees who are engaged in the making or processing of goods, such as printing and engraving. The commercial stationer ordinarily has a store on the street level located in the shopping section of the community where other stores are located and many people pass by. He has store clerks who sell over the counter to the consuming public and may have outside salesmen who sell to offices. He makes very few, if any, sales to other dealers for resale. He keeps in stock and displays the various items sold over the counter and by outside salesmen. The number of items in stock typically ranges from 5,000 to 15,000. Primarily, items sold are stationery, pens, pencils, blotters, briefcases, calendars, clocks, greeting cards, thumbtacks, typewriter ribbons, carbon paper, paper clips, ink, commercial envelopes and typewriter paper, filing supplies and similar items. In addition he may also sell filing cabinets, office desks and chairs, other items of office furniture and supplies and equipment generally, as well as standard and portable typewriters and certain other small office machines.

(b) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are recognized as retail sales, in the case of commercial stationery establishments which in general operate as described in § 779.367(a), the sales made which are of ''Retailable'' items and are not for resale will be recognized as retail if they

meet the requirements for such classification as previously explained in this subpart. The following position is adopted for enforcement purposes: All sales other than for resale of stationery, office supplies and equipment, office furniture and office machinery commonly stocked by commercial stationers for sale to individual consumers as well as businesses, including typewriters, adding machines, small duplicating machines, checkwriters, and the like, will be considered to be retail except for the sales set out below:

(1) Sales made on a competitive bid basis. This term covers sales made pursuant to an invitation to bid, particularly sales to Federal, State, and local governments; sales made in a like manner to commercial and industrial concerns and institutions are also included.

(2) Sales made pursuant to a requirements contract or other contractual arrangement involving the sale of a large quantity of goods over a period of time with a substantially lower price structure for the individual deliveries than would prevail for the usual sales of the quantities delivered.

(3) Sales made at quantity discount of 30 percent or more from the price of the ordinary unit of sale.

(4) Sales of school supplies to municipalities, boards of education, or schools in the same manner as the sales of school supply distributors.

(5) Sales of job printing and engraving other than (i) sales of social printing and engraving and (ii) sales of printing and engraving of business envelopes, letterheads, and calling cards.

(6) Sales of specialized machinery and equipment.

### § 779.368 Printing and engraving establishments not recognized as retail.

(a) An establishment which is engaged in printing and engraving is not recognized as a retail establishment for purposes of section 13(a)(4). Therefore, employees of a stationery establishment engaged in printing and/or engraving do not come within the exemption. This fact will not affect the exemption under section 13(a)(2) of employees of stationery establishments who are not engaged in printing or engraving.

(b) In a combined stationery and printing or engraving establishment there are employees who operate the machines in the printing or engraving department and there may be other employees who also perform work primarily or exclusively for that department. There are in addition various employees in such combined establishments whose work relates to the stationery portion of the business but who also perform some work for the printing department. For example, office workers may keep records of both the printing plant and stationery department, maintenance workers may clean up in both departments; and warehousemen, messengers and stock clerks may handle material for both departments. In some establishments these workers spend relatively little time in the work of the printing department. As an enforcement policy an auxiliary employee will not be considered to be engaged in the making or processing of goods for purposes of the exemption under section 13(a)(2) in any workweek in which an insubstantial amount of his time (20 percent or less) is allocable to the clerical, messenger, or custodial work of the printing department.

## FUNERAL HOMES

### § 779.369 Funeral home establishments may qualify as exempt 13(a)(2) establishments.

(a) *General.* A funeral home establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that section. Where the establishment meets these requirements generally all employees employed by the establishment will be exempt except any employees who perform any work in connection with burial insurance operations (see paragraph (b)) or who spend a substantial portion of their workweek in ambulance service operations, as described in paragraph (e) below.

(b) *Burial insurance operations.* There is no retail concept applicable to the insurance business (see § 779.317). Burial associations which enter into burial insurance contracts are generally regulated by the State and the regulations

governing such associations are included in State statutes under Insurance. The contracts issued are very similar in form and content to ordinary life insurance policies. Income received from such operations is nonretail income and employees engaged in such work are not employed in work within the scope of the retail exemption (see § 779.308).

(c) *Accommodation items.* Amounts paid to funeral homes to cover the cost of ''accommodation'' items are part of the gross receipts of the establishment and are included in its annual gross volume of sales made or business done. Such items may include goods or services procured by the funeral home on behalf of the bereaved with or without profit but on its own credit or through cash payment by it, such as telegrams, long distance calls, newspaper notices, flowers, livery service, honoraria to participating personnel, transportation by common carrier, clothing for the deceased, and transcripts of necessary forms. For the purposes of determining the applicability of the retail or service establishment exemption, receipts of the funeral home in reimbursement for such services are considered derived from sales or services recognized as retail in the industry. Cash advances made as a convenience to a bereaved family are not included in computing the gross volume of sales made of business done when repaid. Of course, if interest is charged it would be included in the gross volume of sales and nonretail income.

(d) *Nonretail services.* Calling for and preparing bodies and crematory service for other funeral homes, burial insurance operations, and ambulance or livery transportation service (as distinguished from the use of ambulances or other vehicles as a necessary part of the undertaking, funeral, or burial services of the establishment), are some examples of a funeral home providing goods or services which will be ''resold'' or which are not recognized as retail.

(e) *Ambulance service.* The typical ambulance service establishment, engaged exclusively or nearly so in providing a specialized form of transportation for sick, injured, aged, or handicapped persons, is a part or branch of the transportation industry. Since there is no traditional retail concept in the transportation industry, such ambulance service establishments cannot qualify for the section 13(a)(2) exemption (see § 779.317). Income from the same typical ambulance services would be considered nonretail in applying the 25 percent tolerance for nonretail income in a funeral home. If an establishment engaged in a combination of funeral home and ambulance services meets all the tests for exemption under section 13(a)(2), as applied to the combined sales of both types of services, those of its employees who are engaged in the funeral home's activities and functions will be exempt as employees of a retail or service establishment. This exemption, however, does not apply to any employee regularly engaged in nonexempt ambulance transportation activities in any workweek when he devotes a substantial amount of his working time to such nonexempt work. More than 20 percent of the employee's working time in the workweek will, for enforcement purposes, be considered substantial.

(f) *Out-of-State sales.* An arrangement with a funeral home to embalm and ship human remains to a point outside the State for burial is not a sale within the State. The reverse situation where an out-of-State funeral director ships the remains to a funeral home to arrange for local interment also is not a sale within the State.

(g) *Work for more than one establishment.* Employees performing central office, supply, or warehouse functions for more than one funeral home establishment are not within the exemption (see § 779.310). However, where certain mortuaries may operate more than one exempt establishment and where employees such as embalmers employed by an exempt funeral home may be called upon in a given workweek to perform for another exempt establishment or establishments in the same enterprise work which is a part of the funeral home services sold by that establishment or establishments to customers, such employees do not lose the exemption where at all times during the workweek the employee is employed by one or the other of such exempt establishments either inside or outside the

establishment in the activities within the scope of its own exempt business (see § 779.311(b)). In addition, where an establishment offering complete funeral home services also has outlying chapels where only the funeral services of the deceased persons are conducted, employees of the main establishment who are otherwise exempt do not lose the exemption by virtue of the activities which they may perform in connection with the funeral services held at the chapel. These activities are in such a case part of their employment by the exempt main establishment.

CEMETERIES

### § 779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

(a) *General.* A cemetery may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that section, including the requirement that the retail or service establishment be open to the general public. So long as a cemetery is open to any persons of a particular religion rather than merely the members of a specific organization or place of worship, it will be considered for enforcement purposes to be ''open to the general public.''

(b) *Annual dollar volume.* As used in the Act, annual gross volume means the gross receipts from all the business activities of the establishment during a 12-month period (see §§ 779.265 through 779.269). Sums received from the following types of transactions are part of the annual gross volume of sales made or business done:

(1) Sales of lots or plots.

(2) Annual tax or assessment levied on lot owners, and

(3) Gifts or bequests.

Interest from any trust funds for permanent or current maintenance is also included in the annual gross volume of sales made or business done. The allocation of the gross receipts to any trust funds or other accounts of the establishment does not affect the annual gross volume.

(c) *Nonretail sales or income.* Sales of lots or plots to a burial society or a fraternal organization for the use of the members are sales for resale and as such may not be counted as part of the 75 percent of annual dollar volume of sales of goods or services which is not for resale and recognized as retail in the industry under section 13(a)(2). Such sales are counted as part of the annual gross volume in the period in which the transaction between the cemetery and the burial society or fraternal organization is completed. Any interest from trust funds or other investments also is not recognized as retail receipts under section 13(a)(2).

AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

### § 779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).

(a) *General.* The specific exemption from the provisions of sections 6 and 7 of the Act that was provided in section 13(a)(19) prior to the 1966 amendments for employees of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed. However, some such establishments may qualify for exemption from both the minimum wage and overtime pay provisions of the Act under section 13(a)(2) as retail or service establishments. These are establishments whose annual dollar volume is smaller than the amount specified in section 13(a)(2) or in section 3(s)(1) and which meet all the other requirements of section 13(a)(2) (see § 779.337). (Such establishments which do not qualify for exemption under section 13(a)(2) may have certain employees who are exempt only from the overtime pay provisions of the Act under section 13(b)(10). Section 13(b)(10) is applicable not only to automobile, truck, and farm implement dealers but also to dealers in trailers and aircraft. The section 13(b)(10) exemption is discussed in § 779.372 below.)

(b) *Application of the 75-percent test.* In determining whether, under the section 13(a)(2) exemption, 75 percent of an automobile, truck, or farm implement establishment's sales of goods or services are not for resale and are recognized as retail, the requirements for such classification, including the existence of a retail concept, as explained

previously in this subpart, and the specific applications in the industry of these requirements in accordance with the following principles, will govern the classification of sales made by such establishments. The sales of goods or services described in paragraph (c) of this section and in paragraphs (e)(1) through (5) of this section may not be counted toward the required 75 percent. Such sales do not qualify as retail because they either are for resale, are outside the retail concept, or have been determined to lack the requisite recognition as retail sales or services. Other sales of goods or services by the dealer can qualify if they meet the requirements previously explained.

(c) *Nonretail automobile and truck sales and servicing.* None of the following sales of automobiles, trucks, automotive parts, accessories, servicing and repair work will be considered as retail:

(1) *Sales for resale.* For example, sales of new or used automobiles and trucks, tires, accessories or services, to service stations, repair shops and automobile or truck dealers, where these establishments resell the various items or where they use them in repairing customers' vehicles or in reconditioning used cars for resale, are sales for resale. (Note that a ''sale'' for purposes of the Act need not be for profit under section 3(k) it includes any ''exchange * * * or other disposition''.) However, internal transfers of such items between departments within the dealer's establishment, such as transfers of parts from the parts department to the service department of an automobile dealer's establishment, will not be considered sales for resale. Such transfers from one department to another will be disregarded in computing the establishment's sales for determining the applicability of this exemption.

(2) *Sales made pursuant to a formal invitation to bid.* Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, State, and local governments are typically made in this manner.

(3) *Fleet sales.* Sales in a fleet quantity for business purposes (a sale of five or more cars or trucks at a time, for example); and sales to fleet accounts as described in paragraphs (c)(3) (i) and (ii) of this section. (As here used, a ''fleet account'' is a customer operating five or more automobiles or trucks for business purposes.)

(i) *Automobiles and trucks.* Sales and term leases of automobiles and trucks to national fleet accounts as designated by the various automotive manufacturers, at fleet discounts, and sales and term leases to other fleet accounts at discounts equivalent to those provided in sales to national fleet owners are not recognized as retail.

(ii) *Automotive parts and accessories.* Sales of parts and accessories to fleet accounts at wholesale prices are not recognized as retail. Wholesale prices are prices equivalent to, or less than, those typically charged on sales for resale.

(4) Sales and term leases of specialized heavy motor vehicles or bodies (16,000 pounds and over gross vehicle weight) and of tires, parts, and accessories designed for use on such specialized equipment. The following is a partial list illustrating the types of items of equipment not considered to qualify as subjects of retail sale:

(i) Single unit trucks, including:

Armored (money carrying).
Buses (integral).
Coal.
Drilling.
Dump.
Hook and ladder (fire department).
Chemical wagons (fire department).
Garbage.
Mixer.
Refrigerator.
Special public utility.
Steel haulers.
Street-cleaning.
Tank.
Wrecker.

(ii) Full trailers and semitrailers (tractors and semitrailer and truck and trailer combinations), including:

Auto carrier.
Coal.
Dump.
Garbage.
House carrier.
Low bed carry all.
Pole (lumber).

Refrigerator.
Tank.
Van.

(5) Sales of servicing and repair work peculiar to the servicing and repair of specialized vehicles referred to in paragraph (c)(4) of this section, or performed under a fleet maintenance arrangement on trucks and other automotive vehicles whereby the establishment undertakes to maintain a customer's fleet at a price below the prevailing retail prices.

(6) Sales to motor carriers of services, fuel, equipment, or other goods or facilities by establishments commonly referred to as truck stops. Such establishments, which are physically laid out and specially equipped to meet the highway needs of the motor transportation industry, offer a variety of services to truckers on a ''one-stop'' basis, and provide services principally to motor carriers and their crews. They are an integral part of the interstate transportation industry and are not within the traditional retail establishments (see paragraphs (c) (4) and (5) of this section).

(7) Sales of diesel fuel (and LP gas) for use as truck or bus fuel and the repair and servicing of trucks and buses used in over-the-road commercial transportation (including parts and accessories for such vehicles) are specialized goods and services ''which can never be sold at retail * * * whatever the terms of the sale.'' (*Idaho Sheet Metal Works, Inc.* v. *Wirtz,* 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz* v. *Steepleton General Tire Company, Inc.,* 383 U.S. 190, 202, rehearing denied 383 U.S. 963.) Sales of these items are nonretail whether made by truck stops or other establishments (see paragraphs (c) (4) and (5) of this section).

(d) *Nonspecialized truck parts, accessories and services.* Sales of parts and accessories which are of the type used by small trucks engaged in local transportation or by farm vehicles and are not nonretail under paragraph (c)(6) of this section will be tested under paragraphs (b) and (c)(3) (ii) of this section, even when made on occasion for use in larger vehicles. Likewise, repairs and servicing of a minor nature (such as tire repair, battery recharging, cleaning of fuel lines, or minor electrical rewiring) performed on any type vehicle will be considered retail in nature unless nonretail under paragraph (c)(6) of this section or unless a fleet maintenance arrangement as in paragraph (c)(5) of this section is present.

(e) *Farm implement sales.* Sales of farm machinery, such as equipment necessary for plowing, planting, thinning, weeding, fertilizing, irrigating, and harvesting of crops, and raising of livestock on the farm, and the repair work thereon, will be considered as retail (whether sold to farmers or nonfarmers) when they satisfy the tests referred to in paragraph (b) of this section. The following, which fail to satisfy these tests, must be classified as nonretail:

(1) *Sales for resale.* For example, sales of new or used machinery, parts, accessories or services to service stations, repair shops and other dealers, where these establishments resell these items or where they use them in repairing customers' farm implements or in reconditioning used farm implements for resale, are sales for resale. However, this does not apply to internal transfers of such items between departments within the dealer's establishment. Transfers of parts from the parts department to the service department of a farm implement dealer's establishment will not be considered sales for resale, and will be disregarded in computing the establishment's sales for determining the applicability of the section 13(a)(2) exemption.

(2) *Sales made pursuant to formal invitation to bid.* Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to Federal, State and local governments are typically made in this manner.

(3) Sales of specialized equipment not ordinarily used by farmers, such as:

Bulldozers.
Scrapers.
Land levelers.
Graders.
Cotton ginning machinery.
Canning and packing equipment.

(4) Sales of junk.

(5) *Sales of machinery or equipment which are sold ''installed'', where the installation involves construction work.* Installations which require extensive planning, labor and use of specialized equipment ordinarily constitute construction work. In such cases the cost of installation ordinarily is substantial in relation to the cost of the goods installed.

(f) *Quantity sales to farmers.* It should be noted that the concept of fleet sales discussed in paragraphs (c)(3) and (5) of this section is not applied to sales to farmers, even though the farmer uses five or more vehicles on his farm.

(g) *Particular activities which lack a retail concept.* Any receipts derived from warehousing, construction, including water well drilling, or manufacturing activities performed by the automobile, truck, or farm implement dealer are not receipts from retail sales. These activities and the manufacturing of farm implements are not retail activities.

### § 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, trailers, farm implements, or aircraft. Section 13(b)(10) states that the provisions of section 7 shall not apply with respect to ''any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.'' This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate purchaser. If these tests are met by an establishment the exemption will be available for salesmen, partsmen, and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. An explanation of the term ''employed by'' is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership (H. Rept. No. 1366, 89th Cong., second session, page 42; Sen. Rept. No. 1487, 89th Cong., second session, page 32). However, the salesman, partsman, or mechanic, to qualify for exemption, must be ''primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft.'' (H. Rept. No. 2004, 89th Cong., second session, pp. 7, 19.)

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships which qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in aircraft and trailers.

(c) ''*Salesman, partsman, or mechanic.*'' (1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, farm implement, or aircraft mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such. This includes mechanical work required for safe operation, as a vehicle, farm implement, or aircraft. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who performs nonmechanical repair work is not exempt. When employed by an establishment qualifying under section 13(b)(10) which sells and services trailers, mechanics primarily engaged in servicing the trailers for their use and operation as such may qualify for the exemption. ''Trailers'' include a wide variety of non-powered vehicles used for industrial, commercial, or personal transport or travel on the highways by attaching the vehicle to the rear of a separate powered vehicle. Mechanics servicing mobile homes for operation and use as a trailer, if and to the extent that they are operated as such on their own suspension systems would appear to be performing work within the purview of the exemption provided for mechanics in section 13(b)(10) to the same extent as mechanics servicing automobiles, ordinary travel, boat, or camping trailers, trucks, and truck or tractor trailers. On the other hand, there is no indication in the statutory language or the legislative history of any intent to provide exemption for mechanics whose work is directed to the habitability as a residence of a dwelling to be used as such on a fixed site in a particular locality, merely because the home is so designed that it may be moved to another location over the highways more readily than the traditional types of residential structures. Accordingly, servicemen checking, servicing, or repairing the plumbing, electrical, heating, air conditioning, or butane gas systems, the doors, windows, and other structural features of mobile homes to make them habitable or more habitable as residences are, while so engaged, not deemed to qualify as ''mechanic(s) * * * servicing * * * trailers'' within the meaning of section 13(b)(10). (*Snell* v. *Quality Mobile Home Brokers*, 424 F. 2d 233 (C.A. 4); *Schultz* v. *Louisiana Trailer Sales, Inc.* 428 F. 2d 61 (C.A. 5) certiorari denied, 400 U.S. 902.)

(4) Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

(d) *Primarily engaged*. As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

[35 FR 5856, Apr. 9, 1970, as amended at 38 FR 7549, Mar. 23, 1973]

OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

### § 779.381 Establishments within special exceptions or exemptions.

(a) As stated in § 779.338, the special exceptions provided in the 1961 amendments for hotels, motels, restaurants, hospitals, institutions for the sick, the aged, the mentally ill or defective, and schools for physically or mentally handicapped or gifted children have

been removed. Seasonally operated amusement or recreational establishments and motion picture theaters also no longer are specifically exempt under section 13(a)(2), but have specific exemptions set out for them in sections 13(a)(3) and 13(a)(9) of the Act as amended in 1966.

(b) Hotels, motels, and restaurants continue to be eligible for exemption under section 13(a)(2), but must meet all the requirements of that section for exemption in the same manner as other retail or service establishments. However, a special overtime exemption is provided for such establishments, regardless of size, in the first part of section 13(b)(8). Hospitals, residential care establishments, and schools for physically or mentally handicapped or gifted children are specifically excluded by the Act from consideration for exemption under section 13(a)(2); however, residential care establishments are exempt from the overtime pay requirements of the Act under the second part of section 13(b)(8) as long as overtime premium of not less than one and one-half times the employee's regular rate of pay is paid to him for time worked in excess of 48 hours in the workweek. In addition, section 7(j) of the amended Act provides a special overtime arrangement for hospital employees whereby overtime pay is due an employee after 8 hours in a day or 80 hours in a 14-day work period rather than on the basis of the 7-day workweek as is normally required by the Act. This provision, though, requires an agreement or understanding on the part of both the employer and the employee prior to the performance of the work. See § 778.601 of this chapter.

(c) The amendments of 1966 also repealed the exemption from both the minimum wage and overtime pay provisions which was in the Act for certain food service employees employed by retail or service establishments that were not exempt under section 13(a)(2). This exemption (formerly found in section 13(a)(20) is now an exemption from the overtime provisions only and is set out in section 13(b)(18). Those establishments now excluded by the Act from consideration for exemption under section 13(a)(2) (hospitals, residential care establishments, etc.) may utilize this exemption where they meet the Act's definition of retail or service establishment in the last sentence of section 13(a)(2) and the conditions set out in section 13(b)(18). Likewise, the special exemption for any employee of a retail or service establishment primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed by the 1966 amendments. In its stead the overtime exemption set out in section 13(b)(10) and previously discussed in § 779.372 was provided for certain employees of any nonmanufacturing establishment primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate consumer.

(d) A special exemption from the overtime pay requirements is also included in the amended Act for bowling establishments which do not meet the tests under section 13(a)(2) for exemption as a retail or service establishment. Section 13(b)(19) states that the overtime pay requirements of the Act shall not apply with respect to "any employee of a bowling establishment if such employee receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed." Unlike the overtime pay exemption in section 13(b)(18), this exemption is not dependent upon the establishment meeting the definition of retail or service establishment.

HOTELS AND MOTELS

### § 779.382 May qualify as exempt 13(a)(2) establishments.

A hotel or motel establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). In determining whether an establishment is a retail or service establishment within the meaning of section 13(a)(2) the dollar volume received from the leasing or rental of space to other than transient members of the general public cannot be counted as derived from retail sales of goods or services. Therefore, receipts from tenants who are not transient

guests (see § 779.383(c)) must be included in the 25 percent tolerance provided for sales for resale or sales not recognized as retail.

### § 779.383 "Hotel" and "motel" exemptions under section 13(b)(8).

(a) *General.* A hotel or motel establishment may qualify for exemption from the Act's overtime pay requirements, even if it is in an enterprise described in section 3(s) and is not exempt under section 13(a)(2) because it exceeds the monetary test for exemption under that section. The first part of section 13(b)(8) provides that the overtime provisions of section 7 of the Act shall not apply with respect to ''any employee employed by an establishment which is a hotel, motel * * *.'' The 13(b)(8) exemption is applicable irrespective of the annual dollar volume of sales of a hotel or motel establishment or of the enterprise of which it is a part.

(b) *Definition of ''hotel''.* The term *hotel* as used in section 13(b)(8) means an establishment known to the public as a hotel, which is primarily engaged in providing lodging or lodging and meals for the general public. Included are hotels operated by membership organizations and open to the general public and apartment hotels which provide accommodations for transients. However, an establishment whose income is primarily from providing a permanent place of residence or from providing residential facilities complete with bedrooms and kitchen for leased periods longer than 3 months would not be considered a hotel within the meaning of the Act. An apartment or residential hotel is not considered a hotel for purposes of section 13(b)(8) unless more than half of its annual dollar volume is derived from providing transient guests representative of the general public with lodging or lodging and meals. (See paragraph (c) of this section.) Establishments in which lodging accommodations are not available to the public are not included. Also excluded from the category of hotels are rooming and boarding houses, and private residences commonly known as tourist homes. Resort or other hotels even if they operate seasonally are regarded as hotel. (See Cong. Rec., August 25, 1966, pages 19729–19732; Cong Rec., August 26, 1966, pages 19907–19911.)

(c) *''Transient guests''.* In determining who are ''transient guests'' within the meaning of § 779.382 and paragraph (b) of this section, as a general rule the Department of Labor would consider as transient a guest who is free to come and go as he pleases and who does not sojourn in the establishment for a specified time or permanently. A transient is one who is entertained from day to day without any express contract or lease and whose stay is indefinite although to suit his convenience it may extend for several weeks or a season.

(d) *Definition of ''motel''.* The term *motel* as used in section 13(b)(8) means an establishment which provides services similar to that of a ''hotel'' described in paragraph (b) of this section, but which caters mostly to the motoring public, providing it with motor car parking facilities either adjacent to the room or cabin rented or at some other easily accessible place. Included in the term ''motel'' are those establishments known to the public as motor hotels, motor lodges, motor courts, motor inns, tourist courts, tourist lodges and the like.

(e) *Hotel and motel establishments engaged in other activities.* The primary function of a hotel or motel is to provide lodging facilities to the public. In addition, most hotels or motels provide food for their guests and many sell alcoholic beverages. These establishments also may engage in some minor revenue producing activities; such as, the operation of valet services offering cleaning and laundering service for the garments of their guests, news stands, hobby shops, the renting out of their public rooms for meetings, lectures, dances, trade exhibits and weddings. The exception provided for ''hotels'' and ''motels'' in section 13(b)(8) will not be defeated simply because a ''hotel'' or a ''motel'' engages in all or some of these activities, if it is primarily engaged in providing lodging facilities, food and drink to the public.

MOTION PICTURE THEATERS

**§ 779.384 May qualify as exempt establishments.**

Section 13(a)(9) of the Act as amended in 1966 exempts from the minimum wage and overtime pay requirements ''any employee employed by an establishment which is a motion picture theater.'' This exemption will be applicable irrespective of the annual dollar volume of sales of such establishment or of the enterprise of which it is a part. A motion picture theater may also qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if the establishment meets all requirements of the exemption, discussed above in §§ 779.337 to 779.341. The term ''motion picture theater'' as used in section 13(a)(9) means a commercially operated theater primarily engaged in the exhibition of motion pictures with or without vaudeville presentations. It includes ''drive-in motion picture theaters'' commonly known as ''open air'' or ''drive-in'' theaters, but does not include such incidental exhibition of motion pictures as those offered to passengers on aircraft. ''Legitimate theaters'' primarily engaged in exhibiting stage productions are not ''motion picture theaters.''

SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

**§ 779.385 May qualify as exempt establishments.**

An amusement or recreational establishment operating on a seasonal basis may qualify as an exempt establishment under section 13(a)(3) of the Act, added by the 1966 amendments, even if it does not meet all the requirements of the 13(a)(2) exemption. Section 13(a)(3) exempts from the minimum wage and overtime pay requirements of the Act ''any employee employed by an establishment which is an amusement or recreational establishment, if (a) it does not operate for more than seven months in any calendar year or (b) during the preceding calendar year, its average receipts for any 6 months of the year were not more than 33 1/3 percentum of its average receipts for the other 6 months of such year''. ''Amusement or recreational establishments'' as used in section 13(a)(3) are establishments frequented by the public for its amusement or recreation and which are open for 7 months or less a year or which meet the seasonal receipts test provided in clause (B) of the exemption. Typical examples of such are the concessionaires at amusement parks and beaches. (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., 1st Sess., p. 10.)

RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

**§ 779.386 Restaurants may qualify as exempt 13(a)(2) establishments.**

(a) A restaurant may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). It should be noted that a separate exemption from the overtime pay provisions of the Act only is provided in section 13(b)(18) for certain food service employees employed by establishments other than restaurants if the establishment meets the definition of a retail or service establishment as defined in the last sentence of section 13(a)(2). Privately owned and operated restaurants conducted as separate and independent business establishments in industrial plants, office buildings, government installations, hospitals, or colleges, such as were involved in *McComb* v. *Factory Stores*, 81 F. Supp. 403 (N.D. Ohio) continue to be exempt under section 13(a)(2) where the tests of the exemption are met (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., first session, p. 10). However, they would not be met if the food service is carried on as an activity of the larger, nonretail establishment in which the facility is located and there is no independent, separate and distinct place of business offering the restaurant service to individual customers from the general public, who purchase the meals selected by them directly from the establishment which serves them. An establishment serving meals to individuals, pursuant to a contract with an organization or person paying for such meals because the latter has assumed a contractual obligation to

furnish them to the individuals concerned, is selling to such organization or firm, and the sales are for resale within the meaning of section 13(a)(2). See also § 779.387.

### § 779.387 "Restaurant" exemption under section 13(b) (8).

(a) As amended in 1966, the Act, in section 13(b) (8), exempts from its overtime pay provisions ''any employee employed by an establishment which is a * * * restaurant''. The term *restaurant* as used in section 13(b)(8) of the Act means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for immediate consumption on the premises. This includes such establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term ''restaurant'' does not include drinking establishments, such as bars or cocktail lounges, whose sales of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages. Certain food or beverage service employees of establishments such as bars and cocktail lounges, however, may be exempt under section 13(b)(18).

(b) Not all places where food is served for immediate consumption on the premises are ''restaurant'' establishments within the meaning of section 13(b)(8). Such service is sometimes provided as an incidental activity of an establishment of another kind, rather than by an establishment possessing the physical and functional characteristics of a separate place of business engaged in restaurant operations. In such event, the establishment providing the meal service is not an establishment ''which is'' a restaurant as section 13(b)(8) requires for exemption. Further, not every place which serves meals, even if it should qualify as a separate food service establishment, possesses the characteristics of a ''restaurant.'' The meals served by restaurants are characteristically priced, offered, ordered, and served for consumption by and paid for by the customer on an individual meal basis. A restaurant functions principally, and not merely incidentally, to meet the immediate needs and desires of the individual customer for refreshment at the particular time that he visits the establishment for the purpose. A separate transaction to accommodate these needs and desires takes place on the occasion of each such visit. A ''restaurant'', therefore, is to be distinguished from an establishment offering meal service on a boarding or term basis or providing such service only as an incident to the operation of an enterprise of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for such operation. Accordingly, a boarding house is not a ''restaurant'' within the meaning of section 13(b)(8), nor are the dining facilities of a boarding school, college or university which serve its students and faculty, nor are the luncheon facilities provided for private and public day school students, nor are other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

### § 779.388 Exemption provided for food or beverage service employees.

(a) A special exemption is provided in section 13(b)(18) of the Act for certain food or beverage service employees of retail or service establishments. This section excludes from the overtime pay provisions in section 7 of the Act, ''any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs.'' This is an employee exemption, intended to apply to employees engaged in the named activities for such establishments as ''drug stores, department stores, bowling alleys, and the like.'' (S. Rept. No. 1487, 89th Cong., second session, p. 32.)

(b) The 13(b)(18) exemption will apply only if the following two tests are met:

(1) The employee must be an employee of a retail or service establishment (as defined in section 13(a)(2) of the Act); and

(2) The employee must be employed primarily in connection with the specified food or beverage service activities. If both of the above criteria are met, the employee is exempt from the overtime pay provisions of the Act.

(c) The establishment by which the employee is employed must be a ''retail or service establishment.'' This term is defined in section 13(a)(2) of the Act and the definition is quoted in § 779.24; the application of the definition is considered at length earlier in this subpart. In accordance with this definition, the establishment will be a ''retail or service establishment'' for purposes of section 13(b) (18) if 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(d) If the establishment comes within the above definition it is immaterial that the establishment is in an enterprise or part of an enterprise described in section 3(s). Thus section 13(b)(18) will be applicable regardless of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part. It should also be noted that it is not required that the establishment make more than 50 percent of its annual dollar volume of sales within the State in which it is located. The establishment by which the employee is employed, provided it qualifies as a ''retail or service establishment,'' may be a drug store, department store, cocktail lounge, night club, and the like.

(e) This exemption does not apply to employees of the ordinary bakery or grocery store who handle, prepare or sell food or beverages for human consumption since such food or beverages are not prepared or offered for consumption ''on the premises, or by such services as catering, banquet, box lunch, or curb or counter service * * *.''

(f) If the establishment by which the employee is employed is a ''retail or service establishment,'' as explained above, he will be exempt under section 13(b)(18) provided he is employed primarily in connection with the preparation or offering of food or beverages for human consumption either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. An employee employed in the actual preparation or serving of the food or beverages or in activities closely related and directly essential to the preparation and serving will be regarded as engaged in the described activities. The exemption, therefore, extends not only to employees actually cooking, packaging or serving food or beverages, but also to employees such as cashiers, hostesses, dishwashers, busboys, and cleanup men. Also, where the food or beverages are served away from the establishment, the exemption extends to employees of the retail or service establishment who make ready the serving place, serve the food, clean up, and transport the equipment, food and beverages to and from the serving place.

(g) For the exemption to apply, the employee must be engaged ''primarily'' in performing the described activities. A sales clerk in a drug store, department store or other establishment, who as an incident to his other duties, occasionally prepares or otherwise handles food or beverages for human consumption on the premises will not come within the scope of this exemption. The exemption is intended for employees who devote all or most of their time to the described food or beverage service activities. For administrative purposes this exemption will not be considered defeated for an employee in any workweek in which he devotes more than one-half of his time worked to such activities.

## Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments

GENERAL PRINCIPLES

### § 779.400 Purpose of subpart.

The 1966 amendments to the Act changed certain existing provisions and added other provisions pertaining to exemptions from the requirements of

sections 6 and 7 with respect to certain employees. This subpart deals with those exemptions provisions of interest to retail or service enterprises or establishments.

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

### § 779.401 Statutory provision.

Section 13(a)(1) of the Act provides that the provisions of sections 6 and 7 shall not apply with respect to:

> Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

### § 779.402 "Executive" and "administrative" employees defined.

The terms ''executive'' and ''administrative'' as used in section 13(a)(1) of the Act are defined and delimited in subpart A of part 541 of this chapter and explained in subpart B of that part. These regulations are applicable under the amended section 13(a)(1) in determining which employees are bona fide executive or administrative employees. The clause that is enclosed in parentheses in section 13(a)(1) and which reads ''including any employee employed in the capacity of academic administrative personnel for teacher in elementary or secondary schools'' was added by the 1966 amendments to the Act. This clause will not have any affect in the application of the regulations to retail or service establishments. The Act and the regulations point out the fact that an executive or administrative employee of a retail or service establishment may devote up to 40 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative activities and still qualify as a bona fide executive or administrative employee. However, in other types of establishments such a tolerance is limited to 20 percent, except where special provisions are made in part 541 of this chapter.

### § 779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.

The up-to-40 percent tolerance for nonexecutive or nonadministrative duties discussed in the preceding section, does not apply to executive or administrative employees of an establishment other than a ''retail or service establishment.'' For example, an executive or administrative employee of a central office or a central warehouse of a chain store system is not an employee of a ''retail or service establishment,'' and therefore must still devote not more than 20 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative duties in order to qualify as a bona fide executive or administrative employee under section 13(a)(1), except where special provisions are made in the regulations issued under that section of the Act.

### § 779.404 Other section 13(a)(1) employees employed in covered enterprises.

The ''professional'' employee or the ''outside salesman'' employed by a retail or service establishment in a covered enterprise, in order to qualify as a bona fide ''professional employee'' or as an ''outside salesman,'' must meet all the requirements set forth in the regulations issued and found in part 541, subpart A of this chapter, and further explained in subpart B thereof. The up-to-40 percent tolerance discussed in § 779.403 for ''administrative and executive employees'' of a retail or service establishment does not apply to the ''professional employee'' or the ''outside salesman.''

STUDENTS, LEARNERS, AND HANDICAPPED WORKERS

## § 779.405 Statutory provisions.

Section 13(a)(7) of the Act provides that the provisions of sections 6 and 7 shall not apply to:

Any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 14.

Section 14 of the Act provides, in pertinent part, as follows:

LEARNERS, APPRENTICES, STUDENTS, AND HANDICAPPED WORKERS

SEC. 14. (a) The Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students, regardless of age but in compliance with applicable child labor laws, on a part-time basis in retail or service establishments (not to exceed twenty hours in any workweek) or on a part-time or a full-time basis in such establishments during school vacations, under special certificates issued pursuant to regulations of the Secretary, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6, except that the proportion of student hours of employment to total hours of employment of all employees in any establishment may not exceed (1) such proportion for the corresponding month of the 12-month period preceding May 1, 1961, (2) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered by this Act for the first time on or after the effective date of the Fair Labor Standards Amendments of 1966, such proportion for the corresponding month of the 12-month period immediately prior to such date, or (3) in the case of a retail or service establishment coming into existence after May 1, 1961, or a retail or service establishment for which records of student hours worked are not available, a proportion of student hours of employment to total hours of employment of all employees based on the practice during the 12-month period preceding May 1, 1961, in (A) similar establishments of the same employer in the same general metropolitan area in which the new establishment is located, (B) similar establishments of the same employer in the same or nearby counties if the new establishment is not in a metropolitan area, or (C) other establishments of the same general character operating in the community or the nearest comparable community. Before the Secretary may issue a certificate under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

* * * * *

(d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals * * * whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severly impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term ''work activities centers'' shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is

so severe as to make their productive capacity inconsequential.

### § 779.406 "Student-learners".

(a) *Applicable regulations.* In accordance with section 14 of the Act regulations have been issued to provide for employment under special certificates of student-learners at wages lower than the minimum wage applicable under section 6 of the Act. These regulations are set forth in part 520 of this chapter and govern the issuance of special certificates for student-learners in covered employments generally as well as such employments in retail or service establishments.

(b) *Definitions.* The regulations in § 520.2 of this chapter define ''student-learners'' and ''bona fide vocational training program'' as follows:

(1) A *student-learner* is defined as ''a student who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program.''

(2) A *bona fide vocational training program* is defined as ''one authorized and approved by a State board of vocational education or other recognized educational body and provides for part-time employment training which may be scheduled for a part of the workday or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college or university.''

### § 779.407 Learners other than "student-learners".

Regulations have been issued in accordance with the authority in section 14 of the Act to provide for employment under special certificates of learners at wages lower than the minimum wage applicable under section 6 of the Act. Part 522 of this chapter contains the general regulations for learners and those for learners in particular industries. General learner regulations are set forth in §§ 522.1 to 522.11 of this chapter.

### § 779.408 "Full-time students".

The 1961 Amendments added to section 14 of the Act, the authority to issue special certificates for the employment of ''full-time students,'' under certain specified conditions, at wages lower than the minimum wage applicable under section 6. The student, to qualify for a special certificate must attend school full time and his employment must be outside of his school hours and his employment must be in a retail or service establishment. In addition, the student's employment must not be of the type ordinarily given to a full-time employee. ''The purpose of this provision,'' as made clear in the legislative history, ''is to provide employment opportunities for students who desire to work part time outside of their school hours without the displacement of adult workers'' (S. Rept. 145, 87th Cong., first session, p. 29). The application of this provision was amplified by the 1966 Amendments to provide for the employment of full-time students regardless of age but in compliance with applicable child labor laws in retail or service establishments and in agriculture (not to exceed 20 hours in any workweek) or on a part-time or a full-time basis during school vacations at a wage rate not less than 85 percent of the applicable minimum wage (H. Rept. 1366, 89th Cong., second session, pp. 34 and 35). Regulations authorizing the issuance of certificates under this provision of the Act are published in part 519 of this chapter.

### § 779.409 Handicapped workers.

Regulations have been issued under the authority in section 14 of the Act to provide for employment under special certificate of handicapped workers at wages lower than the minimum wage applicable under section 6 of the Act. These regulations are set forth in part 524 of this chapter. In these regulations handicapped workers are defined as individuals whose earning capacity is impaired by age or physical or mental deficiency or injury for the work they are to perform.

EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS

**§ 779.410 Statutory provision.**

Section 7 of the Act provides, in subsection (i):

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than 1 month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

There are briefly set forth in §§ 779.411 to 779.421 some guiding principles for determining whether an employee's employment and compensation meet the conditions set forth in section 7(i).

**§ 779.411 Employee of a "retail or service establishment".**

In order for an employee to come within the exemption from the overtime pay requirement provided by section 7(i) for certain employees receiving commissions, the employee must be employed by a retail or service establishment. The term ''retail or service establishment'' is defined in section 13(a)(2) of the Act. The definition is set forth in § 779.24; its application is considered at length in subpart D of this part. As used in section 7(i), as in other provisions of the Act, the term ''retail or service establishment'' means an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

**§ 779.412 Compensation requirements for overtime pay exemption under section 7(i).**

An employee of a ''retail or service establishment'' who is paid on a commission basis or whose pay includes compensation representing commissions need not be paid the premium compensation prescribed by section 7(a) for overtime hours worked in a workweek, provided the following conditions are met:

(a) The ''regular rate'' of pay of such employee must be more than one and one-half times the minimum hourly rate applicable to him under section 6, and

(b) More than half his compensation for a ''representative period'' (not less than one month) must represent commissions on goods or services.

**§ 779.413 Methods of compensation of retail store employees.**

(a) Retail or service establishment employees are generally compensated (apart from any extra payments for overtime or other additional payments) by one of the following methods:

(1) Straight salary or hourly rate: Under this method of compensation the employee receives a stipulated sum paid weekly, biweekly, semimonthly, or monthly or a fixed amount for each hour of work.

(2) Salary plus commission: Under this method of compensation the employee receives a commission on all sales in addition to a base salary (see paragraph (a)(1) of this section).

(3) Quota bonus: This method of compensation is similar to paragraph (a)(2) of this section except that the commission payment is paid on sales over and above a predetermined sales quota.

(4) Straight commission without advances: Under this method of compensation the employee is paid a flat percentage on each dollar of sales he makes.

(5) Straight commission with ''advances,'' ''guarantees,'' or ''draws.'' This method of compensation is similar to paragraph (a)(4) of this section except that the employee is paid a fixed weekly, biweekly, semimonthly, or monthly ''advance,'' ''guarantee,'' or ''draw.'' At periodic intervals a settlement is made at which time the payments already made are supplemented by any additional amount by which his commission earnings exceed the amounts previously paid.

(b) The above listing in paragraph (a) of this section which reflects the typical methods of compensation is not, of

course, exhaustive of the pay practices which may exist in retail or service establishments. Although typically in retail or service establishments commission payments are keyed to sales, the requirement of the exemption is that more than half the employee's compensation represent commissions ''on goods or services,'' which would include all types of commissions customarily based on the goods or services which the establishment sells, and not exclusively those measured by ''sales'' of these goods or services.

### § 779.414 Types of employment in which this overtime pay exemption may apply.

Section 7(i) was enacted to relieve an employer from the obligation of paying overtime compensation to certain employees of a retail or service establishment paid wholly or in greater part on the basis of commissions. These employees are generally employed in so-called ''big ticket'' departments and those establishments or parts of establishments where commission methods of payment traditionally have been used, typically those dealing in furniture, bedding and home furnishings, floor covering, draperies, major appliances, musical instruments, radios and television, men's clothing, women's ready to wear, shoes, corsets, home insulation, and various home custom orders. There may be other segments in retailing where the proportionate amount of commission payments would be great enough for employees employed in such segments to come within the exemption. Each such situation will be examined, where exemption is claimed, to make certain the employees treated as exempt from overtime compensation under section 7(i) are properly within the statutory exclusion.

### § 779.415 Computing employee's compensation for the representative period.

(a) In determining for purposes of section 7(i) whether more than half of an employee's compensation ''represents commissions on goods or services'' it is necessary first to total all compensation paid to or on behalf of the employee as remuneration for his employment during the period. All such compensation in whatever form or by whatever method paid should be included, whether calculated on a time, piece, incentive or other basis, and amounts representing any board, lodging or other facilities furnished should be included in addition to cash payments, to the extent required by section 3(m) of the Act and part 531 of this chapter. Payments excludable from the employee's ''regular rate'' under section 7(e) may be excluded from this computation if, but only if, they are payments of a kind not made as compensation for his employment during the period. (See part 778 of this chapter.)

(b) In computing the employee's total compensation for the representative period it will in many instances become clear whether more than half of it represents commissions. Where this is not clear, it will be necessary to identify and total all portions of the compensation which represent commissions on the goods or services that the retail or service establishment sells. In determining what compensation ''represents commissions on goods or services'' it is clear that any portion of the compensation paid, as a weekly, biweekly, semimonthly, monthly, or other periodic salary, or as an hourly or daily rate of pay, does not ''represent commissions'' paid to the employee. On the other hand, it is equally clear that an employee paid entirely by commissions on the goods or services which the retail or service establishment sells will, in any representative period which may be chosen, satisfy the requirement that more than half of his compensation represents commissions. The same will be true of an employee receiving both salary and commission payments whose commissions always exceed the salary. If, on the other hand, the commissions paid to an employee receiving a salary are always a minor part of his total compensation it is clear that he will not qualify for the exemption provided by section 7(i).

### § 779.416 What compensation "represents commissions."

(a) Employment arrangements which provide for a commission on goods or services to be paid to an employee of a

retail or service establishment may also provide, as indicated in § 779.413, for the payment to the employee at a regular pay period of a fixed sum of money, which may bear a more or less fixed relationship to the commission earnings which could be expected, on the basis of experience, for an average period of the same length. Such periodic payments, which are variously described in retail or service establishments as ''advances,'' ''draws,'' or ''guarantees,'' are keyed to a time base and are usually paid at weekly or other fixed intervals which may in some instances be different from and more frequent than, the intervals for payment of any earnings computed exclusively on a commission basis. They are normally smaller in amount than the commission earnings expected for such a period and if they prove to be greater, a deduction of the excess amount from commission earnings for a subsequent period, if otherwise lawful, may or may not be customary under the employment arrangement. A determination of whether or to what extent such periodic payments can be considered to represent commissions may be required in those situations where the employment arrangement is that the employee will be paid the stipulated sum, or the commission earnings allocable to the same period, whichever is the greater amount. The stipulated sum can never represent commissions, of course, if it is actually paid as a salary. If, however, it appears from all the facts and circumstances of the employment that the stipulated sum is not so paid and that it actually functions as an integral part of a true commission basis of payment, then such compensation may qualify as compensation which ''represents commissions on goods or services'' within the meaning of clause (2) of the section 7(i) exemption.

(b) The express statutory language of section 7(i), as amended in 1966, provides that ''In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee'' which may be paid to the employee. Thus an employee who is paid a guarantee or draw against commissions computed in accordance with a bona fide commission payment plan or formula under which the computed commissions vary in accordance with the employee's performance on the job will qualify for exemption provided the conditions of 7(i)(1) are met as explained in § 779.419. Under a bona fide commission plan all of the computed commissions will be counted as compensation representing commissions even though the amount of commissions may not equal or exceed the guarantee or draw in some workweeks. The exemption will also apply in the case of an employee who is paid a fixed salary plus an additional amount of earned commissions if the amount of commission payments exceeds the total amount of salary payments for the representative period.

(c) A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment consituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

### § 779.417 The "representative period" for testing employee's compensation.

(a) Whether compensation representing commissions constitutes most of an employee's pay, so as to satisfy the exemption condition contained in clause (2) or section 7(i), must be determined by testing the employee's compensation for a ''representative period'' of not less than 1 month. The Act does not define a representative period, but plainly contemplates a period which can reasonably be accepted by

the employer, the employee, and disinterested persons as being truly representative of the compensation aspects of the employee's employment on which this exemption test depends. A representative period within the meaning of this exemption may be described generally as a period which typifies the total characteristics of an employee's earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation.

(b) To this end the period must be as recent a period, of sufficient length (see paragraph (c) of this section) to fully and fairly reflect all such factors, as can practicably be used. Thus, as a general rule, if a month is long enough to reflect the necessary factors, the most recent month for which necessary computations can be made prior to the payday for the first workweek in the current month should be chosen. Similarly, if it is necessary to use a period as long as a calendar or fiscal quarter year to fully represent such factors, the quarterly period used should ordinarily be the one ending immediately prior to the quarter in which the current workweek falls. If a period longer than a quarter year is required in order to include all the factors necessary to make it fully and fairly representative of the current period of employment for purposes of section 7(i), the end of such period should likewise be at least as recent as the end of the quarter year immediately preceding the quarter in which the current workweek falls. Thus, in the case of a representative period of 6 months or of 1 year, recomputation each quarter would be required so as to include in it the most recent two quarter-years or four quarter-years, as the case may be. The quarterly recomputation would tend to insure that the period used reflects any gradual changes in the characteristics of the employment which could be important in determining the ratio between compensation representing commissions and other compensation in the current employment situation of the employee.

(c) The representative period for determining whether more than half of an employee's compensation represents commissions cannot, under the express terms of section 7(i), be less than 1 month. The period chosen should be long enough to stabilize the measure of the balance between the portions of the employee's compensation which respectively represent commissions and other earnings, against purely seasonal or plainly temporary changes. Although the Act sets no upper limit on the length of the period, the statutory intent would not appear to be served by any recognition of a period in excess of 1 year as representative for purposes of this exemption. There would seem to be no employment situation in a retail or service establishment in which a period longer than a year would be needed to represent the seasonal and other fluctuations in commission compensation.

(d) Accordingly, for each employee whose exemption is to be tested in any workweek under clause (2) of section 7(i), an appropriate representative period or a formula for establishing such a period must be chosen and must be designated and substantiated in the employer's records (see § 516.16 of this chapter). When the facts change so that the designated period or the period established by the designated formula is no longer representative, a new representative period or formula therefor must be adopted which is appropriate and sufficient for the purpose, and designated and substantiated in the employer's records. Although the period selected and designated must be one which is representative with respect to the particular employee for whom exemption is sought, and the appropriateness of the representative period for that employee will always depend on his individual earning pattern, there may be situations in which the factors affecting the proportionate relationship between total compensation and compensation representing commissions will be substantially identical for a group or groups of employees in a particular occupation or department of a retail or service establishment or in the establishment as a whole. Where this can be demonstrated to be a fact, and is substantiated by pertinent information in the employer's records, the same representative period or formula for establishing such a period may

properly be used for each of the similarly situated employees in the group.

### § 779.418 Grace period for computing portion of compensation representing commissions.

Where it is not practicably possible for the employer to compute the commission earnings of the employee for all workweeks ending in a prior representative period in time to determine the overtime pay obligations, if any, for the workweek or workweeks immediately following, 1 month of grace may be used by the retail or service establishment. This month of grace will not change the length of the current period in which the prior period is used as representative. It will merely allow an interval of 1 month between the end of the prior period and the beginning of the current period in order to permit necessary computations for the prior period to be made. For example, assume that the representative period used is the quarter-year immediately preceding the current quarter, and commissions for the prior period cannot be computed in time to determine the overtime pay obligations for the workweeks included in the first pay period in the current quarter. By applying a month of grace, the next earlier quarterly period may be used during the first month of the current quarter; and the quarter-year immediately preceding the current quarter will then be used for all workweeks ending in a quarter-year period which begins 1 month after the commencement of the current quarter. Thus, a January 1–March 31 representative period may be used for purposes of section 7(i) in a quarterly period beginning May 1 and ending July 31, allowing the month of April for necessary commission computations for the representative period. Once this method of computation is adopted it must be used for each successive period in like manner. The prior period used as representative must, of course, as in other cases, meet all the requirements of a representative period as previously explained.

### § 779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.

(a) If more than half of the compensation of an employee of a retail or service establishment for a representative period as previously explained represents commissions on goods or services, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when his hours of work exceed the maximum number specified in section (a). This additional condition is that his ''regular rate'' of pay for such workweek must be more than one and one-half times the minimum hourly rate applicable to him from the minimum wage provisions of section 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee in that particular workweek.

(b) The meaning of the ''regular rate'' of pay under the Act is well established. As explained by the Supreme Court of the United States, it is ''the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed'' and ''by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments.'' (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419.) It is a rate per hour, computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate (*Overnight Motor Co.* v. *Missel*, 316 U.S. 572). By definition (Act, section 7(e), the ''regular rate'' as used in section 7 of the Act includes ''all remuneration paid to, or on behalf of, the employee'' except payments expressly excluded by the seven numbered clauses of section 7(e). The computation of the regular rate for purposes of the Act is explained in part 778 of this chapter. The ''regular rate'' is not synonymous with the ''basic rate'' which may be established by agreement or

understanding of the parties to the employment agreement under the provisions of section 7(g)(3) of the Act; that section, like section 7(i), merely provides an exemption from the general requirement of overtime compensation based on the regular rate contained in section 7(a), if certain prescribed conditions are met (in section 7(g)(3) these include payment of overtime compensation on a basic rate established and authorized in accordance with its terms). The requirement of section 7(i) with respect to the ''regular rate'' of pay of an employee who may come within the exemption which it provides is a simple one: ''the regular rate of pay of such employee,'' when employed ''for a workweek in excess of the applicable workweek specified'' in section 7(a), must be ''in excess of one and one-half times the minimum hourly rate applicable to him under section 6.'' The employee's ''regular rate'' of pay must be computed, in accordance with the principles discussed above, on the basis of his hours of work in that particular workweek and the employee's compensation attributable to such hours. The hourly rate thus obtained must be compared with the applicable minimum rate of pay of the particular employee under the provisions of section 6 of the Act. If the latter rate is $1.60 an hour, for example, then the employee's regular rate must be *more* than $2.40 an hour if the exemption is to apply.

### § 779.420 Recordkeeping requirements.

The records which must be kept with respect to employees for whom the overtime pay exemption under section 7(i) is taken are specified in § 516.16 of this chapter.

### § 779.421 Basic rate for computing overtime compensation of nonexempt employees receiving commissions.

The overtime compensation due employees of a retail or service establishment who do not meet the exemption requirements of section 7(i) may be computed under the provisions of section 7(g)(3) of the Act if the employer and employee agree to do so under the conditions there provided. Section 7(g)(3) permits the use of a basic rate established, pursuant to agreement or understanding in advance of the work, in lieu of the regular rate for the purpose of computing overtime compensation. The use of such a basic rate for employees of a retail or service establishment compensated wholly or partly by commissions is authorized under the conditions set forth in part 548 of this chapter.

## Subpart F—Other Provisions Which May Affect Retail Enterprises

GENERAL

### § 779.500 Purpose of subpart.

In Subpart A of this part, reference was made to a number of regulations which discuss provisions of the Act, such as general coverage, overtime compensation, joint employment, hours worked, and methods of payment of wages, which are applicable to others as well as to retailers and their employees. (See § 779.6.) In addition to those provisions, the act contains other provisions of interest to retailers and their employees. It is the purpose of this subpart to focus attention on several of the more significant provisions in these categories.

EQUAL PAY PROVISIONS

### § 779.501 Statutory provisions.

Section 6(d) of the Act provides:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Official interpretations of the Department of Labor with respect to the provisions of section 6(d) are found in part 800 of this chapter.

CHILD LABOR PROVISIONS

### § 779.502 Statutory provisions; regulations in part 1500 of this title.

(a) The Act's prohibitions in relation to employment of child labor, which may have application to retailers, are found in section 12(a) and section 12(c). Section 12(a) reads as follows:

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

Section 12(c) provides:

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(b) ''Oppressive child labor'' is defined by the Act, for purposes of the foregoing provisions, in the language set forth in § 779.505.

(c) Sections 570.1 to 570.129 of this chapter contain applicable regulations and a detailed discussion of the child labor provisions of the Act. Although those sections offer guidance for all including retailers, there are set forth in §§ 779.503 through 779.508 pertinent provisions and a brief discussion of the standards which are of particular interest to those in the retail field.

### § 779.503 The retailer and section 12(a).

Section 12(a) prohibits certain shipments or deliveries for shipment by ''producers,'' ''manufacturers'' ''or dealers.'' These terms having appeared in this section prior to the 1961 amendments are defined and described in § 570.105 of this chapter, and said definitions remain unchanged. It should be noted that the term ''manufacturer'' as used in section 12(a) includes retailers who, in addition to retail selling, engage in such manufacturing activities as the making of slipcovers or curtains, the baking of bread, the making of candy, or the making of window frames. Further, the term ''dealers'' refers to anyone who deals in goods including persons engaged in buying, selling, trading, distributing, delivering, etc. ''Dealers,'' therefore, as used in section 12(a) include retailers. Therefore, where a retailer's business unit is covered under the Act and he is a producer, manufacturer or dealer within the meaning of this section, the retailer must comply with the requirements of section 12(a). If a retailer's business unit which is covered under the Act is exempt as a retail or service establishment under section 13 of the Act from the monetary requirements of the Act, the requirements of the child labor provisions must still be met. Thus, retail or service establishments, in covered enterprises, doing less than $250,000 annually, must comply with the child labor requirements even if they are exempt from minimum wage and overtime provisions under section 13(a)(2) of the Act.

### § 779.504 The retailer and section 12(c).

Section 12(c) was amended in 1961 to prohibit the employment of oppressive child labor in any enterprise engaged in commerce or in the production of goods for commerce. Thus, employers in every enterprise which is covered under the Act must comply with section 12(c) of the child labor provisions of the Act. As stated in § 779.503, compliance with this provision is necessary even though the employers in a particular establishment or establishments of a covered enterprise are exempt from the requirement of compensating employees in accordance with sections 6 and 7 of the Act.

### § 779.505 "Oppressive child labor" defined.

Section 3(1) of the Act defines oppressive child labor as follows:

''Oppressive child labor'' means a condition of employment under which (1) any employee under the age of 16 years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of 16 years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of 16 and 18 years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

### § 779.506 Sixteen-year minimum.

The Act sets a 16-year minimum for employment in manufacturing or mining occupations. Furthermore, this age minimum is applicable to employment in all other occupations unless otherwise provided by regulation or order issued by the Secretary.

### § 779.507 Fourteen-year minimum.

(a) *Prohibited occupations.* With respect to employment in occupations other than manufacturing and mining, the Secretary is authorized to issue regulations or orders lowering the age minimum to 14 years where he finds that such employment is confined to periods which will not interfere with the minors' schooling and to conditions which will not interfere with their health and well-being. Pursuant to this authority, the Secretary permits the employment of 14- and 15-year-old children in a limited number of occupations where the work is performed outside school hours and is confined to other specified limits. Under the provisions of Child Labor Regulations, subpart C (§§ 570.31 through 570.38 of this chapter), employment of minors in this age group is not permitted in the following occupations:

(1) Manufacturing, mining, or processing occupations including occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed;

(2) Occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(3) The operation of motor vehicles or service as helpers on such vehicles;

(4) Public messenger service;

(5) Occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary;

(6) Occupations in connection with (i) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (ii) warehousing and storage; (iii) communications and public utilities; and (iv) construction (including demolition and repair). Office and sales work performed in connection with the occupations specified in this subparagraph is permitted if such work is not performed on trains or any

other media of transportation or at the actual site of construction operations.

(b) *Permissible occupations; conditions.* Employment of 14- and 15-year-olds in all occupations other than those in paragraph (a) of this section is permitted by the regulation under certain conditions specified in the regulation. The permissible occupations for minors between 14 and 16 years of age in retail, food service, and gasoline service establishments are listed in § 570.34. The periods and conditions of employment for such minors are set out in § 570.35.

### § 779.508 Eighteen-year minimum.

To protect young workers from hazardous employment, the Act provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to health or well-being of minors 16 and 17 years of age. These occupations may be found in §§ 570.51 through 570.68 of this chapter. Of particular interest to retailers are §§ 570.52, 570.58, 570.62 and 570.63 of this chapter pertaining to the occupations of motor-vehicle driver and outside helper, and occupations involving the operation of power-driven hoisting apparatus, bakery machines, and paper products machines.

## DRIVER OR DRIVER'S HELPER MAKING LOCAL DELIVERIES

### § 779.509 Statutory provision.

Section 13(b)(11) exempts from the provisions of section 7 of the Act:

> Any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a).

This is an exemption from the overtime pay requirements only.

### § 779.510 Conditions that must be met for section 13(b)(11) exemption.

In order that an employee be exempt from the overtime provisions of the Act under section 13(b)(11) he must be employed as a driver or driver's helper making local deliveries, and, he must be compensated for such employment on a trip rate basis or other delivery payment plan, and such plan must be found by the Secretary to have the general purpose and effect of reducing the hours worked by the driver or driver's helper to, or below, the maximum workweek applicable to him under section 7(a) of the Act. If all the preceding conditions are not met the exemption is inapplicable.

### § 779.511 "Finding by Secretary."

As stated in § 779.510, before the section 13(b)(11) exemption may be claimed, the Secretary must find that the trip rate basis of compensation, or other delivery payment plan used to compensate a driver or a driver's helper making local deliveries, has the general purpose and effect of reducing the hours worked by these employees to, or below, the maximum workweek applicable to them under section 7(a) of the Act. The conditions under which such findings may be made, amended, or revoked, and the procedure for obtaining such a finding are set forth in the regulations in part 551 of this chapter.

## RECORDS TO BE KEPT BY EMPLOYERS

### § 779.512 The recordkeeping regulations.

Every employer who is subject to any of the provisions of the Act is required to maintain certain records. The recordkeeping requirements are set forth in regulations which have been published in subparts A and B of part 516 of this chapter. Subpart A contains the requirements applicable to all employers employing covered employees, including the general requirements relating to the posting of notices, the preservation and location of records and similar general provisions. Subpart A also contains the requirements relating to the records which must be kept for exempt executive, administrative, and professional employees and outside salesmen. Subpart B deals with information and data which must be kept with respect to employees who are subject to other exemptions and provisions of the Act.

### § 779.513 Order and form of records.

No particular order or form of records is prescribed by the regulations. However, the records which the employer keeps must contain the information and data required by the specific sections of the regulations which are applicable. In addition, where the employer claims an exemption from the minimum wage or overtime or other requirements of the Act, he should also maintain those records which serve to support his claim for exemption, such as records of sales, purchases, and receipts.

### § 779.514 Period for preserving records.

Basic records, such as payroll records, certificates issued or required under the Act, and employment agreements and other basic records must be preserved for at least 3 years. Supplementary records such as time and earnings cards or sheets, wage rate tables, work time schedules, or order, shipping and billing records, and similar records need be preserved for only 2 years.

### § 779.515 Regulations should be consulted.

This discussion in subpart F of this part is intended only to indicate the general requirements of the recordkeeping regulations. Each employer subject to any provision of the Act should consult the regulations to determine what records he must maintain and the period for which they must be preserved.

# PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

## Subpart A—Introductory

Sec.
780.0 Purpose of interpretative bulletins in this part.
780.1 General scope of the Act.
780.2 Exemptions from Act's requirements.
780.3 Exemptions discussed in this part.
780.4 Matters not discussed in this part.
780.5 Significance of official interpretations.
780.6 Basic support for interpretations.
780.7 Reliance on interpretations.
780.8 Interpretations made, continued, and superseded by this part.
780.9 Related exemptions are interpreted together.
780.10 Workweek standard in applying exemptions.
780.11 Exempt and nonexempt work during the same workweek.
780.12 Work exempt under another section of the Act.

## Subpart B—General Scope of Agriculture

INTRODUCTORY

780.100 Scope and significance of interpretative bulletin.
780.101 Matters discussed in this subpart.
780.102 Pay requirements for agricultural employees.
780.103 ''Agriculture'' as defined by the Act.
780.104 How modern specialization affects the scope of agriculture.
780.105 ''Primary'' and ''secondary'' agriculture under section 3(f).

EXEMPTION FOR ''PRIMARY'' AGRICULTURE GENERALLY

780.106 Employment in ''primary'' agriculture is farming regardless of why or where work is performed.

FARMING IN ALL ITS BRANCHES

780.107 Scope of the statutory term.
780.108 Listed activities.
780.109 Determination of whether unlisted activities are ''farming.''

CULTIVATION AND TILLIAGE OF THE SOIL

780.110 Operations included in ''cultivation and tillage of the soil.''

DAIRYING

780.111 ''Dairying'' as a farming operation.

AGRICULTURAL OR HORTICULTURAL COMMODITIES

780.112 General meaning of ''agricultural or horticultural commodities.''
780.113 Seeds, spawn, etc.
780.114 Wild commodities.
780.115 Forest products.
780.116 Commodities included by reference to the Agricultural Marketing Act.

''PRODUCTION, CULTIVATION, GROWING, AND HARVESTING'' OF COMMODITIES

780.117 ''Production, cultivation, growing.''
780.118 ''Harvesting.''

RAISING OF LIVESTOCK, BEES, FUR-BEARING ANIMALS, OR POULTRY

780.119 Employment in the specified operations generally.

780.120 Raising of ''livestock.''
780.121 What constitutes ''raising'' of livestock.
780.122 Activities relating to race horses.
780.123 Raising of bees.
780.124 Raising of fur-bearing animals.
780.125 Raising of poultry in general.
780.126 Contract arrangements for raising poultry.
780.127 Hatchery operations.

PRACTICES EXEMPT UNDER ''SECONDARY'' MEANING OF AGRICULTURE GENERALLY

780.128 General statement on ''secondary'' agriculture.
780.129 Required relationship of practices to farming operations.

PRACTICES PERFORMED ''BY A FARMER''

780.130 Performance ''by a farmer'' generally.
780.131 Operations which constitute one a ''farmer.''
780.132 Operations must be performed ''by'' a farmer.
780.133 Farmers' cooperative as a ''farmer.''

PRACTICES PERFORMED ''ON A FARM''

780.134 Performance ''on a farm'' generally.
780.135 Meaning of ''farm.''
780.136 Employment in practices on a farm.

''SUCH FARMING OPERATIONS''—OF THE FARMER

780.137 Practices must be performed in connection with farmer's own farming.
780.138 Application of the general principles.
780.139 Pea vining.
780.140 Place of performing the practice as a factor.

''SUCH FARMING OPERATIONS''—ON THE FARM

780.141 Practices must relate to farming operations on the particular farm.
780.142 Practices on a farm not related to farming operations.
780.143 Practices on a farm not performed for the farmer.

PERFORMANCE OF THE PRACTICE ''AS AN INCIDENT TO OR IN CONJUNCTION WITH'' THE FARMING OPERATIONS

780.144 ''As an incident to or in conjunction with'' the farming operations.
780.145 The relationship is determined by consideration of all relevant factors.
780.146 Importance of relationship of the practice to farming generally.
780.147 Practices performed on farm products—special factors considered.

PRACTICES INCLUDED WHEN PERFORMED AS PROVIDED IN SECTION 3(f)

780.148 ''Any'' practices meeting the requirements will qualify for exemption.
780.149 Named practices as well as others must meet the requirements.

PREPARATION FOR MARKET

780.150 Scope and limits of ''preparation for market.''
780.151 Particular operations on commodities.

SPECIFIED DELIVERY OPERATIONS

780.152 General scope of specified delivery operations.
780.153 Delivery ''to storage.''
780.154 Delivery ''to market.''
780.155 Delivery ''to carriers for transportation to market.''

TRANSPORTATION OPERATIONS NOT MENTIONED IN SECTION 3(f)

780.156 Transportation of farm products from the fields or farm.
780.157 Other transportation incident to farming.

OTHER UNLISTED PRACTICES WHICH MAY BE WITHIN SECTION 3(f)

780.158 Examples of other practices within section 3(f) if requirements are met.
780.159 Forest products.

## Subpart C—Agriculture as It Relates to Specific Situations

FORESTRY OR LUMBERING OPERATIONS

780.200 Inclusion of forestry or lumbering operations in agriculture is limited.
780.201 Meaning of ''forestry or lumbering operations.''
780.202 Subordination to farming operations is necessary for exemption.
780.203 Performance of operations on a farm but not by the farmer.
780.204 Number of employees engaged in operations not material.

NURSERY AND LANDSCAPING OPERATIONS

780.205 Nursery activities generally.
780.206 Planting and lawn mowing.
780.207 Operations with respect to wild plants.
780.208 Forest and Christmas tree activities.
780.209 Packing, storage, warehousing, and sale of nursery products.

HATCHERY OPERATIONS

780.210 The typical hatchery operations constitute ''agriculture.''
780.211 Contract production of hatching eggs.
780.212 Hatchery employees working on farms.

780.213 Produce business.
780.214 Feed sales and other activities.
780.215 Meaning of forestry or lumbering operations.
780.216 Nursery activities generally and Christmas tree production.
780.217 Forestry activities.

## Subpart D—Employment in Agriculture That Is Exempted From the Minimum Wage and Overtime Pay Requirements Under Section 13(a)(6)

STATUTORY PROVISIONS

780.300 Statutory exemptions in section 13(a) (6).
780.301 Other pertinent statutory provisions.
780.302 Basic conditions of section 13(a) (6) (A).
780.303 Exemption applicable on employee basis.
780.304 ''Employed by an employer.''
780.305 500 man-day provision.
780.306 Calendar quarter of the preceding calendar year defined.
780.307 Exemption for employer's immediate family.
780.308 Definition of immediate family.
780.309 Man-day exclusion.
780.310 Exemption for local hand harvest laborers.
780.311 Basic conditions of section 13(a) (6) (C).
780.312 ''Hand harvest laborer'' defined.
780.313 Piece rate basis.
780.314 Operations customarily * * * paid on a piece rate basis * * *.
780.315 Local hand harvest laborers.
780.316 Thirteen week provision.
780.317 Man-day exclusion.
780.318 Exemption for nonlocal minors.
780.319 Basic conditions of exemption.
780.320 Nonlocal minors.
780.321 Minors 16 years of age or under.
780.322 Is employed on the same farm as his parent or persons standing in the place of his parent.
780.323 Exemption for range production of livestock.
780.324 Requirements for the exemption to apply.
780.325 Principally engaged.
780.326 On the range.
780.327 Production of livestock.
780.328 Meaning of livestock.
780.329 Exempt work.
780.330 Sharecroppers and tenant farmers.
780.331 Crew leaders and labor contractors.
780.332 Exchange of labor between farmers.

## Subpart E—Employment in Agriculture of Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

780.400 Statutory provisions.
780.401 General explanatory statement.
780.402 The general guides for applying the exemption.
780.403 Employee basis of exemption under section 13(b) (12).
780.404 Activities of the employer considered in some situations.

THE IRRIGATION EXEMPTION

780.405 Exemption is direct and does not mean activities are agriculture.
780.406 Exemption is from overtime only.
780.407 System must be nonprofit or operated on a share-crop basis.
780.408 Facilities of system must be used exclusively for agricultural purposes.
780.409 Employment ''in connection with the operation or maintenance'' is exempt.

## Subpart F—Employment or Agricultural Employees in Processing Shade-Grown Tobacco; Exemption From Minimum Wage and Overtime Pay Requirements Under Section 13(a) (14)

INTRODUCTORY

780.500 Scope and significance of interpretative bulletin.
780.501 Statutory provision.
780.502 Legislative history of exemption.
780.503 What determines the application of the exemption.

REQUIREMENTS FOR EXEMPTION

780.504 Basic conditions of exemption.

SHADE-GROWN TOBACCO

780.505 Definition of ''shade-grown tobacco.''
780.506 Dependence of exemption on shade-grown tobacco operations.
780.507 ''Such tobacco.''
780.508 Application of the exemption.
780.509 Agriculture.
780.510 ''Any agricultural employee.''
780.511 Meaning of ''agricultural employee.''
780.512 ''Employed in the growing and harvesting.''
780.513 What employment in growing and harvesting is sufficient.
780.514 ''Growing'' and ''harvesting.''

EXEMPT PROCESSING

780.515 Processing requirements of section 13(a) (14).
780.516 ''Prior to the stemming process.''

780.517 ''For use as Cigar-wrapper tobacco.''
780.518 Exempt processing operations.
780.519 General scope of exempt operations.
780.520 Particular operations which may be exempt.
780.521 Other processing operations.
780.522 Nonprocessing employees.

## Subpart G—Employment in Agriculture and Livestock Auction Operations Under the Section 13(b)(13) Exemption

INTRODUCTORY

780.600 Scope and significance of interpretative bulletin.
780.601 Statutory provision.
780.602 General explanatory statement.

REQUIREMENTS FOR EXEMPTION

780.603 What determines application of exemption.
780.604 General requirements.
780.605 Employment in agriculture.
780.606 Interpretation of term ''agriculture.''
780.607 ''Primarily employed'' in agriculture.
780.608 ''During his workweek.''
780.609 Workweek unit in applying the exemption.
780.610 Workweek exclusively in exempt work.
780.611 Workweek exclusively in agriculture.
780.612 Employment by a ''farmer.''
780.613 ''By such farmer.''
780.614 Definition of a farmer.
780.615 Raising of livestock.
780.616 Operations included in raising livestock.
780.617 Adjunct livestock auction operations.
780.618 ''His own account''—''in conjunction with other farmers.''
780.619 Work ''in connection with'' livestock auction operations.
780.620 Minimum wage for livestock auction work.

EFFECT OF EXEMPTION

780.621 No overtime wages in exempt week.

## Subpart H—Employment by Small Country Elevators Within Area of Production; Exemption From Overtime Pay Requirements Under Section 13(b)(14)

INTRODUCTORY

780.700 Scope and significance of interpretative bulletin.
780.701 Statutory provision.
780.702 What determines application of the exemption.
780.703 Basic requirements for exemption.

ESTABLISHMENT COMMONLY RECOGNIZED AS A COUNTRY ELEVATOR

780.704 Dependence of exemption on nature of employing establishment.
780.705 Meaning of ''establishment.''
780.706 Recognition of character of establishment.
780.707 Establishments ''commonly recognized'' as country elevators.
780.708 A country elevator is located near and serves farmers.
780.709 Size and equipment of a country elevator.
780.710 A country elevator may sell products and services to farmers.
780.711 Exemption of mixed business applies only to country elevators.

EMPLOYMENT OF ''NO MORE THAN FIVE EMPLOYEES''

780.712 Limitation of exemption to establishments with five or fewer employees.
780.713 Determining the number of employees generally.
780.714 Employees employed ''in such operations'' to be counted.
780.715 Counting employees ''employed in the establishment.''

EMPLOYEES ''EMPLOYED * * * BY'' THE COUNTRY ELEVATOR ESTABLISHMENT

780.716 Exemption of employees ''employed * * * by'' the establishment.
780.717 Determining whether there is employment ''by'' the establishment.
780.718 Employees who may be exempt.
780.719 Employees not employed ''by'' the elevator establishment.

EMPLOYMENT ''WITHIN THE AREA OF PRODUCTION''

780.720 ''Area of production'' requirement of exemption.

WORKWEEK APPLICATION OF EXEMPTION

780.721 Employment in the particular workweek as test of exemption.
780.722 Exempt workweeks.
780.723 Exempt and nonexempt employment.
780.724 Work exempt under another section of the Act.

## Subpart I—Employment in Ginning of Cotton and Processing of Sugar Beets, Sugar-Beet Molasses, Sugarcane, or Maple Sap Into Sugar or Syrup; Exemption From Overtime Pay Requirements Under Section 13(b)(15)

INTRODUCTORY

780.800 Scope and significance of interpretative bulletin.
780.801 Statutory provisions.

780.802 What determines application of the exemption.
780.803 Basic conditions of exemption; first part, ginning of cotton.

GINNING OF COTTON FOR MARKET

780.804 ''Ginning'' of cotton.
780.805 Ginning of ''cotton.''
780.806 Exempt ginning limited to first processing.
780.807 Cotton must be ginned ''for market.''

EMPLOYEES ''ENGAGED IN'' GINNING

780.808 Who may qualify for the exemption generally.
780.809 Employees engaged in exempt operations.
780.810 Employees not ''engaged in'' ginning.

COUNTY WHERE COTTON IS GROWN IN COMMERCIAL QUANTITIES

780.811 Exemption dependent upon place of employment generally.
780.812 ''County.''
780.813 ''County where cotton is grown.''
780.814 ''Grown in commercial quantities.''
780.815 Basic conditions of exemption; second part, processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.
780.816 Processing of specific commodities.
780.817 Employees engaged in processing.
780.818 Employees not engaged in processing.
780.819 Production must be of unrefined sugar or syrup.

**Subpart J—Employment in Fruit and Vegetable Harvest Transportation; Exemption From Overtime Pay Requirements Under Section 13(b)(16)**

INTRODUCTORY

780.900 Scope and significance of interpretative bulletin.
780.901 Statutory provisions.
780.902 Legislative history of exemption.
780.903 General scope of exemption.
780.904 What determines the exemption.
780.905 Employers who may claim exemption.

EXEMPT OPERATIONS ON FRUITS OR VEGETABLES

780.906 Requisites for exemption generally.
780.907 ''Fruits or vegetables.''
780.908 Relation of employee's work to specified transportation.
780.909 ''Transportation.''
780.910 Engagement in transportation and preparation.
780.911 Preparation for transportation.
780.912 Exempt preparation.
780.913 Nonexempt preparation.
780.914 ''From the farm.''
780.915 ''Place of first processing.''
780.916 ''Place of * * * first marketing.''
780.917 ''Within the same State.''

EXEMPT TRANSPORTATION OF FRUIT OR VEGETABLE HARVEST EMPLOYEES

780.918 Requisites for exemption generally.
780.919 Engagement ''in transportation'' of harvest workers.
780.920 Workers transported must be fruit or vegetable harvest workers.
780.921 Persons ''employed or to be employed'' in fruit or vegetable harvesting.
780.922 ''Harvesting'' of fruits or vegetables.
780.923 ''Between the farm and any point within the same State.''

**Subpart K—Employment of Homeworkers in Making Wreaths; Exemption From Minimum Wage, Overtime Compensation, and Child Labor Provisions Under Section 13(d)**

INTRODUCTORY

780.1000 Scope and significance of interpretative bulletin.
780.1001 General explanatory statement.

REQUIREMENTS FOR EXEMPTION

780.1002 Statutory requirements.
780.1003 What determines the application of the exemption.
780.1004 General requirements.
780.1005 Homeworkers.
780.1006 In or about a home.
780.1007 Exemption is inapplicable if wreath-making is not in or about a home.
780.1008 Examples of places not considered homes.
780.1009 Wreaths.
780.1010 Principally.
780.1011 Evergreens.
780.1012 Other evergreens.
780.1013 Natural evergreens.
780.1014 Harvesting.
780.1015 Other forest products.
780.1016 Use of evergreens and forest products.

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

SOURCE: 37 FR 12084, June 17, 1972, unless otherwise noted.

## Subpart A—Introductory

### § 780.0 Purpose of interpretative bulletins in this part.

It is the purpose of the interpretative bulletins in this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of the provisions of the Fair Labor Standards Act of 1938, as amended, which exempt certain employees from the minimum wage or overtime pay requirements, or both, when employed in agriculture or in certain related activities or in certain operations with respect to agricultural or horticultural commodities.

### § 780.1 General scope of the Act.

The Fair Labor Standards 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. These requirements are applicable, except where exemptions are provided, to employees in those workweeks when they are engaged in interstate or foreign commerce or in the production of goods for such commerce or are employed in enterprises so engaged within the meaning of definitions set forth in the Act. 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, 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.

### § 780.2 Exemptions from Act's requirements.

The Act provides a number of specific exemptions from the general requirements described in § 780.1. Some are exemptions from the overtime provisions only. Others are from the child labor 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 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). Conditions specified in the language of the Act are ''explicit prerequisites to exemption'' (*Arnold* v. *Kanowsky*, 361 U.S. 388). ''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'' (*Phillips* v. *Walling*, 334 U.S. 490; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Arnold* v. *Kanowsky*, 361 U.S. 388).

### § 780.3 Exemptions discussed in this part.

(a) The specific exemptions which the Act provides for employment in agriculture and in certain operations more or less closely connected with the agricultural industry are discussed in this part 780. These exemptions differ substantially in their terms, scope, and methods of application. Each of them is therefore separately considered in a subpart of this part which, together with this subpart A, constitutes the official interpretative bulletin of the Department of Labor with respect to that exemption. Exemptions from minimum wages and overtime pay and the subparts in which they are considered include the section 13(a)(6) exemptions for employees on small farms, family members, local hand harvest laborers, migrant hand harvest workers under 16, and range production employees discussed in subpart D of this part, and the section 13(a)(14) exemption for agricultural employees processing shade-grown tobacco discussed in subpart F of this part.

(b) Exemptions from the overtime pay provisions and the subparts in which these exemptions are discussed

include the section 13(b)(12) exemption (agriculture and irrigation) discussed in subpart E of this part, the section 13(b)(13) exemption (agriculture and livestock auction operations) discussed in subpart G of this part, the section 13(b)(14) exemption (country elevators) discussed in subpart H of this part, the section 13(b)(15) exemption (cotton ginning and sugar processing) discussed in subpart I of this part, and the section 13(b)(16) exemption (fruit and vegetable harvest transportation) discussed in subpart J of this part.

(c) An exemption in section 13(d) of the Act from the minimum wage, overtime pay, and child labor provisions for certain homeworkers making holly and evergreen wreaths is discussed in subpart K of this part.

### § 780.4 Matters not discussed in this part.

The application of provisions of the Fair Labor Standards Act other than the exemptions referred to in § 780.3 is not considered in this part 780. Interpretative bulletins published elsewhere in the Code of Federal Regulations deal with such subjects as the general coverage of the Act (part 776 of this chapter) and of the child labor provisions (subpart G of part 1500 of this title which includes a discussion of the exemption for children employed in agriculture outside of school hours), partial overtime exemptions provided for industries of a seasonal nature under sections 7(c) and 7(d) (part 526 of this chapter) and for industries with marked seasonal peaks of operations under section 7(d) (part 526 of this chapter), methods of payment of wages (part 531 of this chapter), computation and payment of overtime compensation (part 778 of this chapter), and hours worked (part 785 of this chapter). Regulations on recordkeeping are contained in part 516 of this chapter and regulations defining exempt administrative, executive, and professional employees, and outside salesmen are contained in part 541 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.

### § 780.5 Significance of official interpretations.

The regulations in this part contain the 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 reexamination of an interpretation, that it is incorrect.

### § 780.6 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 bulletin 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. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950; 15 FR 3290; Secretary's Order 13–71, May 4, 1971, FR; Secretary's Order 15–71, May 4, 1971, FR). Interpretative rules under the Act as amended in 1966 are also authorized by section 602 of the Fair Labor Standards Amendments of 1966 (80 Stat. 830), which provides: ''On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.'' 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 bulletin where it appears that they will contribute to a better understanding of the interpretations.

### § 780.7 Reliance on interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. 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). Some of the interpretations in this part are interpretations of exemption provisions as they appeared in the original Act before amendment in 1949, 1961, and 1966, which have remained unchanged because they are consistent with the amendments. These interpretations may be said to have congressional sanction because ''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; accord, *Maneja* v. *Waialua*, 349 U.S. 254.)

### § 780.8 Interpretations made, continued, and superseded by this part.

On and after publication of this part 780 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 this part 780. 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 Amendments of 1966 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 in the consideration of the exemptions 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 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.

### § 780.9 Related exemptions are interpreted together.

The interpretations contained in the several subparts of this part 780 consider separately a number of exemptions which affect employees who perform activities in or connected with agriculture and its products. These exemptions deal with related subject matter and varying degrees of relationships between them were the subject of consideration in Congress before their enactment. Together they constitute an expression in some detail of existing Federal policy on the lines to be drawn in the industries connected with agriculture and agricultural products between those employees to whom the pay provisions of the Act are to be applied and those whose exclusion in

whole or in part from the Act's requirements has been deemed justified. The courts have indicated that these exemptions, because of their relationship to one another, should be construed together insofar as possible so that they form a consistent whole. Consideration of the language and history of a related exemption or exemptions is helpful in ascertaining the intended scope and application of an exemption whose effect might otherwise not be clear (*Addison* v. *Holly Hill*, 322 U.S. 607; *Maneja* v. *Waialua*, 349 U.S. 254; *Bowie* v. *Gonzales* (C.A. 1), 117 F. 2d 11). In the interpretations of the several exemptions discussed in the various subparts of this part 780, effect has been given to these principles and each exemption has been considered in its relation to others in the group as well as to the combined effect of the group as a whole.

### § 780.10 Workweek standard in applying exemptions.

The workweek is the unit of time to be taken as the standard in determining the applicability of an exemption. An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week. If in any workweek an employee does only exempt work, he is exempt from the wage and hour 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 1 workweek and not in the next. But the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is upon the employer.

### § 780.11 Exempt and nonexempt work during the same workweek.

Where an employee in the same workweek performs work which is exempt under one section of the Act and also engages in work to which the Act applies but is not exempt under some other section of the Act, he is not exempt that week, and the wage and hour requirements of the Act are applicable (see *Mitchell* v. *Hunt*, 263 F. 2d 913; *Mitchell* v. *Maxfield*, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 69, 781; *Jordan* v. *Stark Bros. Nurseries*, 45 F. Supp. 769; *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n*, 80 F. Supp. 953, affirmed 181 F. 2d 697; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880–883). On the other hand, an employee who performs exempt activities during a workweek will not lose the exemption by virtue of the fact that he performs other activities outside the scope of the exemption if the other activities are not covered by the Act.

### § 780.12 Work exempt under another section of the Act.

The combination (tacking) of exempt work under one exemption with exempt work under another exemption is permitted. For instance, the overtime pay requirements are not considered applicable to an employee who does work within section 13(b)(12) for only part of a workweek if all of the covered work done by him during the remainder of the workweek is within one or more equivalent exemptions under other provisions of the Act. If the scope of such exemptions is not the same, however, the exemption applicable to the employee is equivalent to that provided by whichever exemption provision is more limited in scope. For instance, an employee who devotes part of a workweek to work within section 13(b)(12) and the remainder to work exempt under section 7(c) must receive the minimum wage and must be paid time and one-half for his overtime work during that week for hours over 10 a day or 50 a week, whichever provides the greater compensation. 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. The availability of a combination exemption depends on whether the employee meets all the requirements of each exemption which is sought to combine.

## Subpart B—General Scope of Agriculture

INTRODUCTORY

### § 780.100 Scope and significance of interpretative bulletin.

Subpart A of this part 780, this subpart B and subparts C, D, and E of this

part together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of sections 3(f), 13(a)(6), and 13(b)(12) of the Fair Labor Standards Act of 1938, as amended. Section 3(f) defines ''agriculture'' as the term is used in the Act. Section 13(a)(6) provides exemption from the minimum wage and overtime pay provisions of the Act for certain employees employed in ''agriculture,'' as so defined. Section 13(b)(12) provides an overtime exemption for any employee employed in agriculture. As appears more fully in subpart A of this part 780, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

### § 780.101 Matters discussed in this subpart.

Section 3(f) defines ''agriculture'' as this term is used in the Act. Those principles and rules which govern the interpretation of the meaning and application of the Act's definition of ''agriculture'' in section 3(f) and of the terms used in it are set forth in this subpart B. Included is a discussion of the application of the definition in section 3(f) to the employees of farmers' cooperative associations. In addition, the official interpretations of section 3(f) of the Act and the terms which appear in it are to be taken into consideration in determining the meaning intended by the use of like terms in particular related exemptions which are provided by the Act.

### § 780.102 Pay requirements for agricultural employees.

Section 6(a)(5) of the Act provides that any employee employed in agriculture must be paid at least $1.30 an hour beginning February 1, 1969. However, there are certain exemptions provided in the Act for agricultural workers, as previously mentioned. (See §§ 780.3 and 780.4.)

### § 780.103 "Agriculture" as defined by the Act.

Section 3(f) of the Act defines ''agriculture'' as follows:

> ''Agriculture'' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

### § 780.104 How modern specialization affects the scope of agriculture.

The effect of modern specialization on agriculture has been discussed by the U.S. Supreme Court as follows:

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill. In this way functions which are necessary to the total economic process of supplying an agricultural produce become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is

carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a powerplant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture (see *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755 cf. *Maneja* v. *Waialua,* 349 U.S. 254).

### § 780.105 "Primary" and "secondary" agriculture under section 3(f).

(a) Section 3(f) of the Act contains a very comprehensive definition of the term ''agriculture.'' The definition has two distinct branches (see *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755). One has relation to the primary meaning of agriculture; the other gives to the term a somewhat broader secondary meaning for purposes of the Act (*NLRB* v. *Olaa Sugar Co.,* 242 F. 2d 714).

(b) First, there is the primary meaning. This includes farming in all its branches. Listed as being included ''among other things'' in the primary meaning are certain specific farming operations such as cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry. If an employee is employed in any of these activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm. (*Farmers Reservoir Co.* v. *McComb,* supra; *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398.)

(c) Then there is the secondary meaning of the term. The second branch includes operations other than those which fall within the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with ''such'' farming operations (*Farmers Reservoir Co.* v. *McComb,* supra; *NLRB* v. *Olaa Sugar Co.,* 242 F. 2d 714; *Maneja* v. *Waialua,* 349 U.S. 254).

(d) Employment not within the scope of either the primary or the secondary meaning of ''agriculture'' as defined in section 3(f) is not employment in agriculture. In other words, employees not employed in farming or by a farmer or on a farm are not employed in agriculture.

EXEMPTION FOR ''PRIMARY'' AGRICULTURE GENERALLY

### § 780.106 Employment in "primary" agriculture is farming regardless of why or where work is performed.

When an employee is engaged in direct farming operations included in the primary definition of ''agriculture,'' the purpose of the employer in performing the operations is immaterial. For example, where an employer owns a factory and a farm and operates the farm only for experimental purposes in connection with the factory, those employees who devote all their time during a particular workweek to the direct farming operations, such as the growing and harvesting of agricultural commodities, are considered as employed in agriculture. It is also immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field. Similarly, the mere fact that production takes place in a city or on industrial premises, such as in hatcheries, rather than in the country or on premises possessing the normal characteristics of a farm makes no difference (see *Jordan* v. *Stark Brothers Nurseries,* 45 F. Supp. 769; *Miller Hatcheries* v. *Boyer,* 131 F. 2d 283; *Damutz* v. *Pinchbeck,* 158 F. 2d 882).

FARMING IN ALL ITS BRANCHES

### § 780.107 Scope of the statutory term.

The language ''farming in all its branches'' includes all activities, whether listed in the definition or not, which constitute farming or a branch thereof under the facts and circumstances.

### § 780.108 Listed activities.

Section 3(f), in defining the practices included as ''agriculture'' in its statutory secondary meaning, refers to the

activities specifically listed in the earlier portion of the definition (the ''primary'' meaning) as ''farming'' operations. They may therefore be considered as illustrative of ''farming in all its branches'' as used in the definition.

### § 780.109 Determination of whether unlisted activities are "farming."

Unlike the specifically enumerated operations, the phrase ''farming in all its branches'' does not clearly indicate its scope. In determining whether an operation constitutes ''farming in all its branches,'' it may be necessary to consider various circumstances such as the nature and purpose of the operations of the employer, the character of the place where the employee performs his duties, the general types of activities there conducted, and the purpose and function of such activities with respect to the operations carried on by the employer. The determination may involve a consideration of the principles contained in § 780.104. For example, fish farming activities fall within the scope of the meaning of ''farming in all its branches'' and employers engaged in such operations would be employed in agriculture. On the other hand, so-called ''bird dog'' operations of the citrus fruit industry consisting of the purchase of fruit unsuitable for packing and of the transportation and sale of the fruit to canning plants do not qualify as ''farming'' and, consequently, employees engaged in such operations are not employed in agriculture. (See *Chapman* v. *Durkin*, 214 F. 2d 360 cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363 cert. denied, 348 U.S. 897.) However, employees gathering the fruit at the groves are considered agricultural workers because they are engaged in harvesting operations. (For exempt transportation, see subpart J of this part.)

## CULTIVATION AND TILLAGE OF THE SOIL

### § 780.110 Operations included in "cultivation and tillage of the soil."

''Cultivation and tillage of the soil'' includes all the operations necessary to prepare a suitable seedbed, eliminate weed growth, and improve the physical condition of the soil. Thus, grading or leveling land or removing rock or other matter to prepare the ground for a proper seedbed or building terraces on farmland to check soil erosion are included. The application of water, fertilizer, or limestone to farmland is also included. (See in this connection §§ 780.128 *et seq.* Also see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755.) Other operations such as the commercial production and distribution of fertilizer are not included within the scope of agriculture. (*McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755.)

## DAIRYING

### § 780.111 "Dairying" as a farming operation.

''Dairying'' includes the work of caring for and milking cows or goats. It also includes putting the milk in containers, cooling it, and storing it where done on the farm. The handling of milk and cream at receiving stations is not included. Such operations as separating cream from milk, bottling milk and cream, or making butter and cheese may be considered as ''dairying'' under some circumstances, or they may be considered practices under the ''secondary'' meaning of the definition when performed by a farmer or on a farm, if they are not performed on milk produced by other farmers or produced on other farms. (See the discussions in §§ 780.128 *et seq.*)

## AGRICULTURAL OR HORTICULTURAL COMMODITIES

### § 780.112 General meaning of "agriculture or horticultural commodities."

Section 3(f) of the Act defines as ''agriculture'' the ''production, cultivation, growing, and harvesting'' of ''agricultural or horticultural commodities,'' and employees employed in such operations are engaged in agriculture. In general, within the meaning of the Act, ''agricultural or horticultural commodities'' refers to commodities resulting from the application of agricultural or horticultural techniques. Insofar as the term refers to products of the soil, it means commodities that are planted and cultivated by man.

Among such commodities are the following: Grains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products. Thus, employees engaged in growing wheat, corn, hay, onions, carrots, sugar cane, seed, or any other agricultural or horticultural commodity are engaged in ''agriculture.'' In addition to such products of the soil, however, the term includes domesticated animals and some of their products such as milk, wool, eggs, and honey. The term does not include commodities produced by industrial techniques, by exploitation of mineral wealth or other natural resources, or by uncultivated natural growth. For example, peat humus or peat moss is not an agricultural commodity. *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 f(2d) 209 (C.A.4).

### § 780.113 Seeds, spawn, etc.

Seeds and seedlings of agricultural and horticultural plants are considered ''agricultural or horticultural commodities.'' Thus, since mushrooms and beans are considered ''agricultural or horticultural commodities,'' the spawn of mushrooms and bean sprouts are also so considered and the production, cultivation, growing, and harvesting of mushroom spawn or bean sprouts is ''agriculture'' within the meaning of section 3(f).

### § 780.114 Wild commodities.

Employees engaged in the gathering or harvesting of wild commodities such as mosses, wild rice, burls and laurel plants, the trapping of wild animals, or the appropriation of minerals and other uncultivated products from the soil are not employed in ''the production, cultivation, growing, and harvesting of agricultural or horticultural commodities.'' However, the fact that plants or other commodities actually cultivated by men are of a species which ordinarily grows wild without being cultivated does not preclude them from being classed as ''agricultural or horticultural commodities.'' Transplanted branches which were cut from plants growing wild in the field or forest are included within the term. Cultivated blueberries are also included.

### § 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not ''agricultural or horticultural commodities.'' Christmas trees, whether wild or planted, are also not so considered. It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.160 through 780.164 which discuss the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute ''agriculture.'' For a discussion of the exemption in section 13(a)(13) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

[74 FR 26014, May 29, 2009]

### § 780.116 Commodities included by reference to the Agricultural Marketing Act.

(a) Section 3(f) expressly provides that the term ''agricultural or horticultural commodities'' shall include the commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141–1141j). Section 15(g) of that Act provides: ''As used in this act, the term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producers of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum resin, as defined in the Naval Stores Act, approved March 3, 1923'' (7 U.S.C. 91–99). As defined in the Naval Stores Act, '''gum spirits of turpentine' means spirits of turpentine made from gum (oleoresin) from a living tree'' and '''gum rosin' means rosin remaining after the distillation of gum spirits of turpentine.'' The production of these commodities is therefore within the definition of ''agriculture.''

(b) Since the only oleoresin included within section 15(g) of the Agricultural Marketing Act is that derived from a living tree, the production of oleoresin from stumps or any sources other than living trees is not within section 3(f). If turpentine or rosin is produced in any manner other than the processing of crude gum from living trees, as by digging up pine stumps and grinding them or by distilling the turpentine with steam from the oleoresin within or extracted from the wood, the production of the turpentine or rosin is not included in section 3(f).

(c) Similarly, the production of gum turpentine or gum rosin is not included when these are produced by anyone other than the original producer of the crude gum from which they are derived. Thus, if a producer of turpentine or rosin from oleoresin from living trees makes such products not only from oleoresin produced by him but also from oleoresin delivered to him by others, he is not producing a product defined as an agricultural commodity and employees engaged in his production operations are not agricultural employees. (For an explanation of the inclusion of the word ''production'' in section 3(f), see § 780.117(b).) It is to be noted, however, that the production of gum turpentine and gum rosin from crude gum (oleoresin) derived from a living tree is included within section 3(f) when performed at a central still for and on account of the producer of the crude gum. But where central stills buy the crude gum they process and are the owners of the gum turpentine and gum rosin that are derived from such crude gum and which they market for their own account, the production of such gum turpentine and gum rosin is not within section 3(f).

''PRODUCTION, CULTIVATION, GROWING, AND HARVESTING'' OF COMMODITIES

### § 780.117 "Production, cultivation, growing."

(a) The words ''production, cultivation, growing'' describe actual raising operations which are normally intended or expected to produce specific agricultural or horticultural commodities. The raising of such commodities is included even though done for purely experimental purposes. The ''growing'' may take place in growing media other than soil as in the case of hydroponics. The words do not include operations undertaken or conducted for purposes not concerned with obtaining any specific agricultural or horticultural commodity. Thus operations which are merely preliminary, preparatory or incidental to the operations whereby such commodities are actually produced are not within the terms ''production, cultivation, growing''. For example, employees of a processor of vegetables who are engaged in buying vegetable plants and distributing them to farmers with whom their employer has acreage contracts are not engaged in the ''production, cultivation, growing'' of agricultural or horticultural commodities. The furnishing of mushroom spawn by a canner of mushrooms to growers who supply the canner with mushrooms grown from such spawn does not constitute the ''growing'' of mushrooms. Similarly, employees of the employer who is engaged in servicing insecticide sprayers in the farmer's orchard and employees engaged in such operations as the testing of soil or genetics research are not included within the terms. (However, see §§ 780.128, et seq., for possible exemption on other grounds.) The word ''production,'' used in conjunction with ''cultivation, growing, and harvesting,'' refers, in its natural and unstrained meaning, to what is derived and produced from the soil, such as any farm produce. Thus, ''production'' as used in section 3(f) does not refer to such operations as the grinding and processing of sugarcane, the milling of wheat into flour, or the making of cider from apples. These operations are clearly the processing of the agricultural commodities and not the production of them (*Bowie* v. *Gonzalez*, 117 F. 2d 11).

(b) The word ''production'' was added to the definition of ''agriculture'' in order to take care of a special situation—the production of turpentine and gum rosins by a process involving the tapping of living trees. (See S. Rep. No. 230, 71st Cong., second sess. (1930); H.R. Rep. No. 2738, 75th Cong., third sess. p. 29 (1938).) To insure the inclusion of this process within the definition, the

word ''production'' was added to section 3(f) in conjunction with the words ''including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended'' (*Bowie* v. *Gonzalez,* 117 F. 2d 11). It is clear, therefore, that ''production'' is not used in section 3(f) in the artificial and special sense in which it is defined in section 3(j). It does not exempt an employee merely because he is engaged in a closely related process or occupation directly essential to the production of agricultural or horticultural commodities. To so construe the term would render unnecessary the remainder of what Congress clearly intended to be a very elaborate and comprehensive definition of ''agriculture.'' The legislative history of this part of the definition was considered by the U.S. Supreme Court in reaching these conclusions in *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755.

### § 780.118 "Harvesting."

(a) The term ''Harvesting'' as used in section 3(f) includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position (*Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398; *NLRB* v. *Olaa Sugar Co.,* 242 F. 2d 714). Examples include the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery. Employees engaged on a plantation in gathering sugarcane as soon as it has been cut, loading it, and transporting the cane to a concentration point on the farm are engaged in ''Harvesting'' (*Vives* v. *Serralles,* 145 F. 2d 552).

(b) The combining of grain is exempt either as harvesting or as a practice performed on a farm in conjunction with or as an incident to farming operations. (See in this connection *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398.) ''Harvesting'' does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession. For example, the processing of sugarcane into raw sugar (*Bowie* v. *Gonzalez,* 117 F. 2d 11, and see *Maneja* v. *Waialua,* 349 U.S. 254), or the vining of peas are not included. For a further discussion on vining employees, see § 780.139. While transportation to a concentration point on the farm may be included, ''harvesting'' never extends to transportation or other operations off the farm. Off-the-farm transportation can only be ''agriculture'' when performed by the farmer as an incident to his farming operations (*Chapman* v. *Durkin,* 214 F. 2d 360 cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin,* 214 F. 2d 363 cert. denied 348 U.S. 897). For further discussion of this point, see §§ 780.144 through 780.147; §§ 780.152 through 780.157.

## RAISING OF LIVESTOCK, BEES, FUR-BEARING ANIMALS, OR POULTRY

### § 780.119 Employment in the specified operations generally.

Employees are employed in the raising of livestock, bees, fur-bearing animals or poultry only if their operations relate to animals of the type named and constitute the ''raising'' of such animals. If these two requirements are met, it makes no difference for what purpose the animals are raised or where the operations are performed. For example, the fact that cattle are raised to obtain serum or virus or that chicks are hatched in a commercial hatchery does not affect the status of the operations under section 3(f).

### § 780.120 Raising of "livestock."

The meaning of the term ''livestock'' as used in section 3(f) is confined to the ordinary use of the word and includes only domestic animals ordinarily raised or used on farms. That Congress did not use this term in its generic sense is supported by the specific enumeration of activities, such as the raising of fur-bearing animals, which would be included in the generic meaning of the word. The term includes the following animals, among others: Cattle (both dairy and beef cattle), sheep, swine, horses, mules, donkeys, and goats. It does not include such animals as albino and other rats, mice, guinea pigs, and hamsters, which are ordinarily used by laboratories for research purposes (*Mitchell* v. *Maxfield,* 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 68, 781). Fish are not ''livestock'' (*Dunkly*

v. *Erich*, 158 F. 2d 1), but employees employed in propagating or farming of fish may qualify for exemption under section 13(a)(6) or 13(b)(12) of the Act as stated in § 780.109 as well as under section 13(a)(5), as explained in part 784 of this chapter.

### § 780.121 What constitutes "raising" of livestock.

The term ''raising'' employed with reference to livestock in section 3(f) includes such operations as the breeding, fattening, feeding, and general care of livestock. Thus, employees exclusively engaged in feeding and fattening livestock in stock pens where the livestock remains for a substantial period of time are engaged in the ''raising'' of livestock. The fact that the livestock is purchased to be fattened and is not bred on the premises does not characterize the fattening as something other than the ''raising'' of livestock. The feeding and care of livestock does not necessarily or under all circumstances constitute the ''raising'' of such livestock, however. It is clear, for example, that animals are not being ''raised'' in the pens of stockyards or the corrals of meat packing plants where they are confined for a period of a few days while en route to slaughter or pending their sale or shipment. Therefore, employees employed in these places in feeding and caring for the constantly changing group of animals cannot reasonably be regarded as ''raising'' livestock (*NLRB* v. *Tovrea Packing Co.*, 111 F. 2d 626, cert. denied 311 U.S. 668; *Walling* v. *Friend*, 156 F. 2d 429). Employees of a cattle raisers' association engaged in the publication of a magazine about cattle, the detection of cattle thefts, the location of stolen cattle, and apprehension of cattle thieves are not employed in raising livestock and are not engaged in agriculture.

### § 780.122 Activities relating to race horses.

Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture. For this purpose, a training track at a racetrack is not a farm. Where a farmer is engaged in both the raising and commercial racing of race horses, the activities performed off the farm by his employees as an incident to racing, such as the training and care of the horses, are not practices performed by the farmer in his capacity as a farmer or breeder as an incident to his raising operations. Employees engaged in the feeding, care, and training of horses which have been used in commercial racing and returned to a breeding or training farm for such care pending entry in subsequent races are employed in agriculture.

### § 780.123 Raising of bees.

The term ''raising of * * * bees'' refers to all of those activities customarily performed in connection with the handling and keeping of bees, including the treatment of disease and the raising of queens.

### § 780.124 Raising of fur-bearing animals.

(a) The term ''fur-bearing animals'' has reference to animals which bear fur of marketable value and includes, among other animals, rabbits, silver foxes, minks, squirrels, and muskrats. Animals whose fur lacks marketable value, such as albino and other rats, mice, guinea pigs, and hamsters, are not ''fur-bearing animals'' which within the meaning of section 3(f).

(b) The term ''raising'' of fur-bearing animals includes all those activities customarily performed in connection with breeding, feeding and caring for fur-bearing animals, including the treatment of disease. Such treatment of disease has reference only to disease of the animals being bred and does not refer to the use of such animals or their fur in experimenting with disease or treating diseases in others. The fact that muskrats or other fur-bearing animals are propagated in open water or marsh areas rather than in pens does not prevent the raising of such animals from constituting the ''raising of fur-

bearing animals.'' Where wild fur-bearing animals propagate in their native habitat and are not raised as above described, the trapping or hunting of such animals and activities incidental thereto are not included within section 3(f).

### § 780.125 Raising of poultry in general.

(a) The term ''poultry'' includes domesticated fowl and game birds. Ducks and pigeons are included. Canaries and parakeets are not included.

(b) The ''raising'' of poultry includes the breeding, hatching, propagating, feeding, and general care of poultry. Slaughtering, which is the antithesis of ''raising,'' is not included. To constitute ''agriculture,'' slaughtering must come within the secondary meaning of the term ''agriculture.'' The temporary feeding and care of chickens and other poultry for a few days pending sale, shipment or slaughter is not the ''raising'' of poultry. However, feeding, fattening and caring for poultry over a substantial period may constitute the ''raising'' of poultry.

### § 780.126 Contract arrangements for raising poultry.

Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not ''raising of poultry'' and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in ''secondary'' agriculture (see §§ 780.137 *et seq.* and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553).

### § 780.127 Hatchery operations.

Hatchery operations incident to the breeding of poultry, whether performed in a rural or urban location, are the ''raising of poultry'' (*Miller Hatcheries* v. *Boyer*, 131 F. 2d 283). The application of section 3(f) to employees of hatcheries is further discussed in §§ 780.210 through 780.214.

## PRACTICES EXEMPT UNDER ''SECONDARY'' MEANING OF AGRICULTURE GENERALLY

### § 780.128 General statement on "secondary" agriculture.

The discussion in §§ 780.106 through 780.127 relates to the direct farming operations which come within the ''primary'' meaning of the definition of ''agriculture.'' As defined in section 3(f) ''agriculture'' includes not only the farming activities described in the ''primary'' meaning but also includes, in its ''secondary'' meaning, ''any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market or to carriers for transportation to market.'' The legislative history makes it plain that this language was particularly included to make certain that independent contractors such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included within the definition of agricultural employees (see *Bowie* v. *Gonzalez*, 117 F. 2d 11; 81 Cong. Rec. 7876, 7888).

### § 780.129 Required relationship of practices to farming operations.

To come within this secondary meaning, a practice must be performed either by a farmer or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed. In addition, the practice must be performed ''as an incident to or in conjunction

with'' the farming operations. No matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the ''secondary'' meaning of ''agriculture.'' Thus, employees employed by commission brokers in the typical activities conducted at their establishments, warehouse employees at the typical tobacco warehouses, shop employees of an employer engaged in the business of servicing machinery and equipment for farmers, plant employees of a company dealing in eggs or poultry produced by others, employees of an irrigation company engaged in the general distribution of water to farmers, and other employees similarly situated do not generally come within the secondary meaning of ''agriculture.'' The inclusion of industrial operations is not within the intent of the definition in section 3(f), nor are processes that are more akin to manufacturing than to agriculture (see *Bowie* v. *Gonzales,* 117 F. 2d 11; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. 2d 52; *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398; *Maneja* v. *Waialua,* 349 U.S. 254; *Mitchell* v. *Budd,* 350 U.S. 473).

PRACTICES PERFORMED ''BY A FARMER''

### § 780.130 Performance "by a farmer" generally.

Among other things, a practice must be performed by a farmer or on a farm in order to come within the secondary portion of the definition of ''agriculture.'' No precise lines can be drawn which will serve to delimit the term ''farmer'' in all cases. Essentially, however, the term is an occupational title and the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a ''farmer'' is engaged in order to qualify for the title. If this test is met, it is immaterial for what purpose he engages in farming or whether farming is his sole occupation. Thus, an employer's status as a ''farmer'' is not altered by the fact that his only purpose is to obtain products useful to him in a nonfarming enterprise which he conducts. For example, an employer engaged in raising nursery stock is a ''farmer'' for purposes of section 3(f) even though his purpose is to supply goods for a separate establishment where he engages in the retail distribution of nursery products. The term ''farmer'' as used in section 3(f) is not confined to individual persons. Thus an association, a partnership, or a corporation which engages in actual farming operations may be a ''farmer'' (see *Mitchell* v. *Budd,* 350 U.S. 473). This is so even where it operates ''what might be called the agricultural analogue of the modern industrial assembly line'' (*Maneja* v. *Waialua,* 349 U.S. 254).

### § 780.131 Operations which constitute one a "farmer."

Generally, an employer must undertake farming operations of such scope and significance as to constitute a distinct activity, for the purpose of yielding a farm product, in order to be regarded as a ''farmer.'' It does not necessarily follow, however, that any employer is a ''farmer'' simply because he engages in some actual farming operations of the type specified in section 3(f). Thus, one who merely harvests a crop of agricultural commodities is not a ''farmer'' although his employees who actually do the harvesting are employed in ''agriculture'' in those weeks when exclusively so engaged. As a general rule, a farmer performs his farming operations on land owned, leased, or controlled by him and devoted to his own use. The mere fact, therefore, that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer so engaged as a ''farmer.'' Such an employer would stand, in packing or handling the product, in the same relationship to the produce as if it were from the fields or groves of an independent grower. One who engaged merely in practices which are incidental to farming is not a ''farmer.'' For example, a company which merely prepares for market, sells, and ships flowers and plants grown and cultivated on farms by affiliated corporations is not a ''farmer.'' The fact that one has suspended actual farming operations during a period in

which he performs only practices incidental to his part or prospective farming operations does not, however, preclude him from qualifying as a ''farmer.'' One otherwise qualified as a farmer does not lose his status as such because he performs farming operations on land which he does not own or control, as in the case of a cattleman using public lands for grazing.

### § 780.132 Operations must be performed "by" a farmer.

''Farmer'' includes the employees of a farmer. It does not include an employer merely because he employs a farmer or appoints a farmer as his agent to do the actual work. Thus, the stripping of tobacco, i.e., removing leaves from the stalk, by the employees of an independent warehouse is not a practice performed ''by a farmer'' even though the warehouse acts as agent for the tobacco farmer or employs the farmer in the stripping operations. One who merely performs services or supplies materials for farmers in return for compensation in money or farm products is not a ''farmer.'' Thus, a person who provides credit and management services to farmers cannot qualify as a ''farmer'' on that account. Neither can a repairman who repairs and services farm machinery qualify as a ''farmer'' on that basis. Where crops are grown under contract with a person who provides a market, contributes counsel and advice, make advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

### § 780.133 Farmers' cooperative as a "farmer."

(a) The phrase ''by a farmer'' covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative association, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed ''by a farmer'' but for farmers. Therefore, employees of a farmers' cooperative association are not generally engaged in any practices performed ''by a farmer'' within the meaning of section 3(f) (*Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Goldberg* v. *Crowley Ridge Ass'n.*, 295 F. 2d 7; *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, 181 F. 2d 697). The legislative history of the Act supports this interpretation. Statutes usually cite farmers' cooperative associations in express terms if it is intended that they be included. The omission of express language from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives.

(b) It is possible that some farmers' cooperative associations may themselves engage in actual farming operations to an extent and under circumstances sufficient to qualify as a ''farmer.'' In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed in ''agriculture.''

## PRACTICES PERFORMED ''ON A FARM''

### § 780.134 Performance "on a farm" generally.

If a practice is not performed by a farmer, it must, among other things, be performed ''on a farm'' to come within the secondary meaning of ''agriculture'' in section 3(f). Any practice which cannot be performed on a farm, such as ''delivery to market,'' is necessarily excluded, therefore, when performed by someone other than a farmer (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Chapman* v. *Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897). Thus, employees of an alfalfa dehydrator engaged in hauling chopped or unchopped alfalfa away from the farms to the dehydrating plant are not employed in a practice performed ''on a farm.''

### § 780.135 Meaning of "farm."

A ''farm'' is a tract of land devoted to the actual farming activities included in the first part of section 3(f). Thus, the gathering of wild plants in the woods for transplantation in a nursery is not an operation performed ''on a farm.'' (For a further discussion, see § 780.207.) The total area of a tract operated as a unit for farming purposes is included in the ''farm,'' irrespective of the fact that some of this area may not be utilized for actual farming operations (see *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; In re Princeville Canning Co., 14 WH Cases 641 and 762). It is immaterial whether a farm is situated in the city or in the country. However, a place in a city where no primary farming operations are performed is not a farm even if operated by a farmer (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

### § 780.136 Employment in practices on a farm.

Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed ''on a farm.'' Whether such employees are engaged in ''agriculture'' depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141 through 780.147; that is, whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§ 780.104 through 780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed ''on a farm'' for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed ''on a farm'' so long as such work is done entirely on farms save for an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within section 3(f). For example, airport employees such as mechanics, loaders, and office workers employed by a crop dusting firm would not be agriculture employees (*Wirtz* v. *Boyls dba Boyls Dusting and Spraying Service* 230 F. Supp. 246, aff'd per curiam 352 F. 2d 63; *Tobin* v. *Wenatchee Air Service*, 10 WH Cases 680, 21 CCH Lab Cas. Paragraph 67,019 (E.D. Wash.)).

## ''SUCH FARMING OPERATION''—OF THE FARMER

### § 780.137 Practices must be performed in connection with farmer's own farming.

''Practices * * * performed by a farmer'' must be performed as an incident to or in conjunction with ''such farming operations'' in order to constitute ''agriculture'' within the secondary meaning of the term. Practices performed by a farmer in connection with his nonfarming operations do not satisfy this requirement (see *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Mitchell* v. *Budd*, 350 U.S. 473). Furthermore, practices performed by a farmer can meet the above requirement only in the event that they are performed in connection with the farming operations of the same farmer who performs the practices. Thus, the requirement is not met with respect to employees engaged in any practices performed by their employer in connection with farming operations that are not his own (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Mitchell* v. *Hunt*, 263 F. 2d 913; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Bowie* v. *Gonzalez*, 117 F. 2d 11). The processing by a farmer of commodities of

other farmers, if incident to or in conjunction with farming operations, is incidental to or in conjunction with the farming operations of the other farmers and not incidental to or in conjunction with the farming operations of the farmer doing the processing (*Mitchell* v. *Huntsville Nurseries*, supra; *Farmers Reservoir Co.* v. *McComb*, supra; *Bowie* v. *Gonzalez*, supra).

### § 780.138 Application of the general principles.

Some examples will serve to illustrate the above principles. Employees of a fruit grower who dry or pack fruit not grown by their employer are not within section (f). This is also true of storage operations conducted by a farmer in connection with products grown by someone other than the farmer. Employees of a grower-operator of a sugarcane mill who transport cane from fields to the mill are not within section 3(f), where such cane is grown by independent farmers on their land as well as by the mill operator (*Bowie* v. *Gonzalez*, 117 F. 2d 11). Employees of a tobacco grower who strip tobacco (i.e., remove the leaves from the stalk) are not agricultural employees when performing this operation on tobacco not grown by their employer. On the other hand, where a farmer rents some space in a warehouse or packinghouse located off the farm and the farmer's own employees there engage in handling or packing only his own products for market, such operations by the farmers are within section 3(f) if performed as an incident to or in conjunction with his farming operations. Such arrangements are distinguished from those where the employees are not actually employed by the farmer. The fact that a packing shed is conducted by a family partnership, packing products exclusively grown on lands owned and operated by individuals constituting the partnership, does not alter the status of the packing activity. Thus, if in a particular case an individual farmer is engaged in agriculture, a family partnership which performs the same operations would also be engaged in agriculture. (*Dofflemeyer* v. *NLRB*, 206 F. 2d 813.) However, an incorporated association of farmers that does not itself engage in farming operations is not engaged in agriculture though it processes at its packing shed produce grown exclusively by the farmer members of the association. (*Goldberg* v. *Crowley Ridge and Fruit Growers Association*, 295 F. 2d 7 (C.A. 8).)

### § 780.139 Pea vining.

Vining employees of a pea vinery located on a farm, who vine only the peas grown on that particular farm, are engaged in agriculture. If they also vine peas grown on other farms, such operations could not be within section 3(f) unless the farmer-employer owns or operates the other farms and vines his own peas exclusively. However, the work of vining station employees in weeks in which the stations vine only peas grown by a canner on farms owned or leased by him is considered part of the canning operations. As such, the cannery operations, including the vining operations, are within section 3(f) only if the canners can crops which he grows himself and if the canning operations are subordinate to the farming operations.

### § 780.140 Place of performing the practice as a factor.

So long as the farming operations to which a farmer's practice pertains are performed by him in his capacity as a farmer, the status of the practice is not necessarily altered by the fact that the farming operations take place on more than one farm or by the fact that some of the operations are performed off his farm (*NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714). Thus, where the practice is performed with respect to products of farming operations, the controlling consideration is whether the products were produced by the farming operations of the farmer who performs the practice rather than at what place or on whose land he produced them. Ordinarily, a practice performed by a farmer in connection with farming operations conducted on land which he owns or leases will be considered as performed in connection with the farming operations of such farmer in the absence of facts indicating that the farming operations are actually those of someone else. Conversely, a contrary conclusion will ordinarily be justified

if such farmer is not the owner or a bona fide lessee of such land during the period when the farming operations take place. The question of whose farming operations are actually being conducted in cases where they are performed pursuant to an agreement or arrangement, not amounting to a bona fide lease, between the farmer who performs the practice and the landowner necessarily involves a careful scrutiny of the facts and circumstances surrounding the arrangement. Where commodities are grown on the farm of the actual grower under contract with another, practices performed by the latter on the commodities, off the farm where they were grown, relate to farming operations of the grower rather than to any farming operations of the contract purchaser. This is true even though the contract purports to lease the land to the latter, give him the title to the crop at all times, and confer on him the right to supervise the growing operations, where the facts as a whole show that the contract purchaser provides a farm market, cash advances, and advice and counsel but does not really perform growing operations (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

''SUCH FARMING OPERATIONS''—ON THE FARM

**§ 780.141 Practices must relate to farming operations on the particular farm.**

''Practices * * * performed * * * on a farm'' must be performed as an incident to or in conjunction with ''such farming operations'' in order to constitute ''agriculture'' within the secondary meaning of the term. No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all of such commodities are the products of that farm. Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agriculture if the practice is performed upon any commodities that have been produced elsewhere than on such farm (see *Mitchell* v. *Hunt*, 263 F. 2d 913). The construction by an independent contractor of granary on a farm is not connected with ''such'' farming operations if the farmer for whom it is built intends to use the structure for storing grain produced on other farms. Nor is the requirement met with respect to employees engaged in any other practices performed on a farm, but not by a farmer, in connection with farming operations that are not conducted on that particular farm. The fact that such a practice pertains to farming operations generally or to those performed on a number of farms, rather than to those performed on the same farm only, is sufficient to take it outside the scope of the statutory language. Area soil surveys and genetics research activities, results of which are made available to a number of farmers, are typical of the practices to which this principle applies and which are not within section 3(f) under this provision.

**§ 780.142 Practices on a farm not related to farming operations.**

Practices performed on a farm in connection with nonfarming operations performed on or off such farm do not meet the requirement stated in § 780.141. For example, if a farmer operates a gravel pit on his farm, none of the practices performed in connection with the operation of such gravel pit would be within section 3(f). Whether or not some practices are performed in connection with farming operations conducted on the farm where they are performed must be determined with reference to the purpose of the farmer for whom the practice is performed. Thus, land clearing operations may or may not be connected with such farming operations depending on whether or not the farmer intends to devote the cleared land to farm use.

**§ 780.143 Practices on a farm not performed for the farmer.**

The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted. Thus, where such an employer other than the farmer performs certain work on a farm solely for himself in furtherance of his own enterprise, the practice

cannot ordinarily be regarded as performed in connection with farming operations conducted on the farm. For example, it is clear that the work of employees of a utility company in trimming and cutting trees for power and communications lines is part of a nonfarming enterprise outside the scope of agriculture. When a packer of vegetables or dehydrator of alfalfa buys the standing crop from the farmer, harvests it with his own crew of employees, and transports the harvested crop to his off-the-farm packing or dehydrating plant, the transporting and plant employees, who are not engaged in ''primary'' agriculture as are the harvesting employees (see *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714), are clearly not agricultural employees. Such an employer cannot automatically become an agricultural employer by merely transferring the plant operations to the farm so as to meet the ''on a farm'' requirement. His employees will continue outside the scope of agriculture if the packing or dehydrating is not in reality done for the farmer. The question of for whom the practices are performed is one of fact. In determining the question, however, the fact that prior to the performance of the packing or dehydrating operations, the farmer has relinquished title and divested himself of further responsibility with respect to the product, is highly significant.

PERFORMANCE OF THE PRACTICE ''AS AN INCIDENT TO OR IN CONJUNCTION WITH'' THE FARMING OPERATIONS

### § 780.144 "As an incident to or in conjunction with" the farming operations.

In order for practices other than actual farming operations to constitute ''agriculture'' within the meaning of section 3(f) of the Act, it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm, as explained in §§ 780.129 through 780.143. They must also be performed ''as an incident to or in conjunction with'' these farming operations. The line between practices that are and those that are not performed ''as an incident to or in conjunction with'' such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. Industrial operations (*Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398) and processes that are more akin to manufacturing than to agriculture (*Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Budd*, 350 U.S. 473) are not included. This is also true when on-the-farm practices are performed for a farmer. As to when practices may be regarded as performed for a farmer, see § 780.143.

### § 780.145 The relationship is determined by consideration of all relevant factors.

The character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances in the light of the pertinent language and intent of the Act. The result will not depend on any mechanical application of isolated factors or tests. Rather, the total situation will control (*Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Budd*, 350 U.S. 473). Due weight should be given to any available criteria which may indicate whether performance of such a practice may properly be considered an incident to farming within the intent of the Act. Thus, the general relationship, if any, of the practice to farming as evidenced by common understanding, competitive factors, and the prevalence of its performance by farmers (see § 780.146), and similar pertinent matters should be considered. Other factors to be considered in determining whether a practice may be properly regarded as incidental to or in conjunction with the farming operations of a particular farmer or farm include the size of the operations and respective sums invested in land, buildings and equipment for the regular farming operations and in plant and equipment for performance of the practice, the amount of the payroll for each type of work, the number of employees and the amount of time they spend in each of

the activities, the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations, the amount of revenue derived from each activity, the degree of industrialization involved, and the degree of separation established between the activities. With respect to practices performed on farm products (see § 780.147) and in the consideration of any specific practices (see §§ 780.148–780.158 and 780.205–780.214), there may be special factors in addition to those above mentioned which may aid in the determination.

### § 780.146 Importance of relationship of the practice to farming generally.

The inclusion of incidental practices in the definition of agriculture was not intended to include typical factory workers or industrial operations, and the sponsors of the bill made it clear that the erection and operation on a farm by a farmer of a factory, even one using raw materials which he grows, ''would not make the manufacturing * * * a farming operation'' (see 81 Cong. Rec. 7658; *Maneja* v. *Waialua*, 349 U.S. 254). Accordingly, in determining whether a given practice is performed ''as an incident to or in conjunction with'' farming operations under the intended meaning of section 3(f), the nature of the practice and the circumstances under which it is performed must be considered in the light of the common understanding of what is agricultural and what is not, or the facts indicating whether performance of the practice is in competition with agricultural or with industrial operations, and of the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations (see *Bowie* v. *Gonzales*, 117 F. 2d 11; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Vives* v. *Seralles*, 145 F. 2d 552; *Mitchell* v. *Hunt*, 263 F. 2d 913; *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398; *Mitchell* v. *Budd*, 350 U.S. 473; *Maneja* v. *Waialua*, supra). Such an inquiry would appear to have a direct bearing on whether a practice is an ''established'' part of agriculture. The fact that farmers raising a commodity on which a given practice is performed do not ordinarily perform such a practice has been considered a significant indication that the practice is not ''agriculture'' within the secondary meaning of section 3(f) (*Mitchell* v. *Budd*, supra; *Maneja* v. *Waialua*, supra). The test to be applied is not the proportion of those performing the practice who produce the commodities on which it is performed but the proportion of those producing such commodities who perform the practice (*Maneja* v. *Waialua*, supra). In *Mitchell* v. *Budd*, supra, the U.S. Supreme Court found that the following two factors tipped the scales so as to take the employees of tobacco bulking plants outside the scope of agriculture: Tobacco farmers do not ordinarily perform the bulking operation; and, the bulking operation is a process which changes tobacco leaf in many ways and turns it into an industrial product.

### § 780.147 Practices performed on farm products—special factors considered.

In determining whether a practice performed on agricultural or horticultural commodities is incident to or in conjunction with the farming operations of a farmer or a farm, it is also necessary to consider the type of product resulting from the practice—as whether the raw or natural state of the commodity has been changed. Such a change may be a strong indication that the practice is not within the scope of agriculture (*Mitchell* v. *Budd*, 350 U.S. 473); the view was expressed in the legislative debates on the Act that it marks the dividing line between processing as an agricultural function and processing as a manufacturing operation (*Maneja* v. *Waialua*, 349 U.S. 254, citing 81 Cong. Rec. 7659–7660, 7877–7879). Consideration should also be given to the value added to the product as a result of the practice and whether a sales organization is maintained for the disposal of the product. Seasonality of the operations involved in the practice would not be very helpful as a test to distinguish between operations incident to agriculture and operations of commercial or industrial processors who handle a similar volume of the same seasonal crop. But the length of the period during which the practice is performed might cast some light on whether the operations are

conducted as a part of agriculture or as a separate undertaking when considered together with the amount of investment, payroll, and other factors. In some cases, the fact that products resulting from the practice are sold under the producer's own label rather than under that of the purchaser may furnish an indication that the practice is conducted as a separate business activity rather than as a part of agriculture.

PRACTICES INCLUDED WHEN PERFORMED AS PROVIDED IN SECTION 3(f)

### § 780.148 "Any" practices meeting the requirements will qualify for exemption.

The language of section 3(f) of the Act, in defining the ''secondary'' meaning of ''agriculture,'' provides that any practices performed by a farmer or on a farm as an incident to or in conjunction with such (his or its) farming operations are within the definition. The practices which may be exempt as ''agriculture'' if so performed are stated to include forestry or lumbering operations, preparation for market, and delivery to storage or to market or to carriers for transportation to market. The specification of these practices is illustrative rather than limiting in nature. The broad language of the definition clearly includes all practices thus performed and not merely those named (see *Maneja* v. *Waialua,* 349 U.S. 254).

### § 780.149 Named practices as well as others must meet the requirements.

The specific practices named in section 3(f) must, like any others, be performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, for this condition applies to ''any'' practices brought within the secondary meaning of agriculture as defined in that section of the Act. Thus the preparation for market, by a farmer's employees on a farm of animals to be sold at a livestock auction is not within section 3(f) if animals from other farmers and other farms are also handled. The practice is not performed as an incident to or in conjunction with ''such'' farming operations, that is, the operations of the farmer by whom, or of the farm on which, the livestock is raised (*Mitchell* v. *Hunt,* 263 F. 2d 913).

PREPARATION FOR MARKET

### § 780.150 Scope and limits of "preparation for market."

''Preparation for market'' is also named as one of the practices which may be included in ''agriculture.'' The term includes the operations normally performed upon farm commodities to prepare them for the farmer's market. The farmer's market normally means the wholesaler, processor, or distributing agency to which the farmer delivers his products. ''Preparation for market'' clearly has reference to activities which precede ''delivery to market.'' It is not, however, synonymous with ''preparation for sale.'' The term must be treated differently with respect to various commodities. It is emphasized that ''preparation for market,'' like other practices, must be performed ''by a farmer or on a farm as an incident to or in conjunction with such farming operations'' in order to be within section 3(f).

### § 780.151 Particular operations on commodities.

Subject to the rules heretofore discussed, the following activities are, among others, activities that may be performed in the ''preparation for market'' of the indicated commodities and may come within section 3(f):

(a) *Grain, seed, and forage crops.* Weighing, binning, stacking, drying, cleaning, grading, shelling, sorting, packing, and storing.

(b) *Fruits and vegetables.* Assembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing. (See In the Matter of J. J. Crosetti, 29 LRRM 1353, 98 NLRB 268; In the Matter of Imperial Garden Growers, 91 NLRB 1034, 26 LRRM 1632; *Lenroot* v. *Hazelhurst Mercantitle Co.,* 59 F. Supp. 595; *North Whittier Heights Citrus Ass'n* v. *NLRB,* 109 F.2d 76; *Dofflemeyer* v. *NLRB,* 206 F.2d 813.)

(c) *Peanuts and nuts (pecans, walnuts, etc.).* Grading, cracking, shelling, cleaning, sorting, packing, and storing.

(d) *Eggs.* Handling, cooling, grading, candling, and packing.

(e) *Wool.* Grading and packing.

(f) *Dairy products*. Separating, cooling, packing, and storing.

(g) *Cotton*. Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

(h) *Nursery stock*. Handling, sorting, grading, trimming, bundling, storing, wrapping, and packing. (See *Jordan* v. *Stark Brothers Nurseries*, 45 F. Supp. 769; *Mitchell* v. *Huntsville Nurseries*, 267 F.2d 286.)

(i) *Tobacco*. Handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading.

(j) *Livestock*. Handling and loading.

(k) *Poultry*. Culling, grading, cooping, and loading.

(l) *Honey*. Assembling, extracting, heating, ripening, straining, cleaning, grading, weighing, blending, packaging, and storing.

(m) *Fur*. Removing the pelt, scraping, drying, putting on boards, and packing.

SPECIFIED DELIVERY OPERATIONS

**§ 780.152 General scope of specified delivery operations.**

Employment in ''secondary'' agriculture, under section 3(f), includes employment in ''delivery to storage or to market or to carriers for transportation to market'' when performed by a farmer as an incident to or in conjunction with his own farming operations. To the extent that such deliveries may be accomplished without leaving the farm where the commodities delivered are grown, the exemption extends also to employees of someone other than the farmer who raised them if they are performing such deliveries for the farmer. However, normally such deliveries require travel off the farm, and where this is the case, only employees of a farmer engaged in making them can come within section 3(f). Such employees would not be engaged in agriculture in any workweek when they delivered commodities of other farmers, however, because such deliveries would not be performed as an incident to or in conjunction with ''such'' farming operations, as explained previously. If the ''delivery'' trip is within section 3(f) the necessary return trip to the farm is also included.

**§ 780.153 Delivery "to storage."**

The term ''delivery to storage'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market. The fact that the commodities have been subjected to some other practice ''by a farmer or on a farm as an incident to or in conjunction with such farming operations'' does not preclude the inclusion of ''delivery to storage'' within section 3(f). The same is true with respect to ''delivery to market'' and ''delivery to carriers for transporation to market.''

**§ 780.154 Delivery "to market."**

The term ''delivery * * * to market'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to market. It ordinarily refers to the initial journey of the farmer's products from the farm to the market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler or processor to which the farmer delivers his products. Delivery to market ends with the delivery of the commodities at the receiving platform of such a farmer's market (*Mitchell* v. *Budd*, 350 U.S. 473). When the delivery involves travel off the farm (which would normally be the case) the delivery must be performed by the employees employed by the farmer in order to constitute an agricultural practice. Delivery by an independent contractor for the farmer or a group of farmers or by a ''bird-dog'' operator who has purchased the commodities on the farm from the farmer is not an agricultural practice (see *Chapman* v. *Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897). However, in the case of fruits or vegetables, the Act provides a special overtime pay exemption for intrastate transportation of the freshly harvested commodities from the farm to a place of first marketing or first processing, which may apply to employees engaged in such transportation regardless of whether

they are employed by the farmer. See subpart J of this part 780, discussing the exemption provided by section 13(b)(16).

### § 780.155 Delivery "to carriers for transportation to market."

The term ''delivery * * * to carriers for transportation to market'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, and poultry to any carrier (including carriers by truck, rail, water, etc.) for transportation by such carrier to market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler, or processor to which the farmer delivers his products. As in the case of ''delivery to market,'' when it involves travel off the farm (as would normally be the case) the delivery must be performed by the farmer's own employees in order to constitute an agricultural practice. Employees of the carrier who transport to market the commodities which are delivered to it are not within the scope of agriculture.

TRANSPORTATION OPERATIONS NOT MENTIONED IN SECTION 3(f)

### § 780.156 Transportation of farm products from the fields or farm.

Transportation of farm products from the fields where they are grown or from the farm to other places may be within the ''secondary'' meaning of agriculture, regardless of whether the transportation is included as ''delivery to storage or to market or to carriers for transportation to market'': *Provided only*, That it is performed by a farmer or on a farm as an incident to or in conjunction with the farming operations of that farmer or that farm. Of course, any transportation operations which are part of, and not subsequent to, the ''primary'' farming operations are also within section 3(f). These principles have been recognized by the courts in the following cases, among others: *Maneja* v. *Waialua,* 349 U.S. 254; *NLRB* v. *Olaa Sugar Co.,* 242 F. 2d 714; *Bowie* v. *Gonzales,* 117 F. 2d 11; *Calaf* v. *Gonzales,* 127 F. 8d 934; *Vives* v. *Serralles,* 145 F. 2d 552; *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398. If not performed by the farmer, transportation beyond the limits of the farm is not within section 3(f), even when performed by a purchaser of the unharvested commodities who has harvested the crop. The scope of section 3(f) includes the harvesting employees but does not extend to the employees transporting the commodities off the farm (*Chapman* v. *Durkin,* 214 F. 2d 360, cert. denied, 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin,* 214 F. 2d 363, cert. denied, 348 U.S. 897).

### § 780.157 Other transportation incident to farming.

(a) Transportation by a farmer or on a farm as an incident to or in conjunction with the farming operations of the farmer or of that farm is within the scope of agriculture even though things other than farm commodities raised by the farmer or on the farm are being transported. As previously indicated, transportation of commodities raised by other farmers or on other farms would not be within section 3(f). The definition of agriculture clearly covers the transportation by the farmer, as an incident to or in conjunction with his farming activities, of farm implements, supplies, and fieldworkers to and from the fields, regardless of whether such transportation involves travel on or off the farm and regardless of the method used. The Supreme Court of the United States so held in *Maneja* v. *Waialua,* 349 U.S. 254. Transportation of fieldworkers to or from the farm by persons other than the farmer does not come within section 3(f). However, under section 13(b)(16) of the Act, discussed in subpart J of this part 780, an overtime pay exemption is provided for transportation, whether or not performed by the farmer, of fruit or vegetable harvest workers to and from the farm, within the same State where the farm is located. In the case of transportation to the farm of materials or supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment, etc., would be incidental to the farmer's actual farming operations. Thus, truckdrivers employed by a

farmer to haul feed to the farm for feeding pigs are engaged in ''agriculture.''

(b) With respect to the practice of transporting farm products from farms to a processing establishment by employees of a person who owns both the farms and the establishment, such practice may or may not be incident to or in conjunction with the employer's farming operations depending on all the pertinent facts. For example, the transportation is clearly incidental to milling operations, rather than to farming, where the employees engaged in it are hired by the mill, carried on its payroll, do no agricultural work on the farms, and report for and end their daily duties at the mill where the transportation vehicles are kept (*Calaf* v. *Gonzales*, 127 F. 2d 934). On the other hand, a different result is reached where the facts show that the transportation workers are farm employees whose work is closely integrated with harvesting and other direct farming operations (*NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; and see *Vives* v. *Serralles*, 145 F. 2d 552). The method by which the transportation is accomplished is not material (*Maneja* v. *Waialua*, 349 U.S. 254).

OTHER UNLISTED PRACTICES WHICH MAY BE WITHIN SECTION 3(f)

### § 780.158 Examples of other practices within section 3(f) if requirements are met.

(a) As has been noted above, the term ''agriculture'' includes other practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations conducted by such farmer or on such farm in addition to the practices listed in section 3(f). The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work. Section 3(f) includes, for example, secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm. (*Damutz* v. *Pinchbeck*, 66 F. Supp. 667, aff'd. 158 F. 2d 882). Employees of a farmer who repair the mechanical implements used in farming, as a subordinate and necessary task incident to their employer's farming operations, are within section 3(f). It makes no difference that the work is done by a separate labor force in a repair shop maintained for the purpose, where the size of the farming operations is such as to justify it. Only employees engaged in the repair of equipment used in performing agricultural functions would be within section 3(f), however; employees repairing equipment used by the employer in industrial or other nonfarming activities would be outside the scope of agriculture. (*Maneja* v. *Waialua*, 349 U.S. 254.) The repair of equipment used by other farmers in their farming operations would not qualify as an agricultural practice incident to the farming operations of the farmer employing the repair workers.

(b) The following are other examples of practices which may qualify as ''agriculture'' under the secondary meaning in section 3(f), when done on a farm, whether done by a farmer or by a contractor for the farmer, so long as they do not relate to farming operations on any other farms: The operation of a cook camp for the sole purpose of feeding persons engaged exclusively in agriculture on that farm; artificial insemination of the farm animals; custom corn shelling and grinding of feed for the farmer; the packing of apples by portable packing machines which are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed; the culling, catching, cooping, and loading of poultry; the threshing of wheat; the shearing of sheep; the gathering and baling of straw.

(c) It must be emphasized with respect to all practices performed on products for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Mitchell* v. *Hunt*, 263

F. 2d 913; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880; *Lenroot* v. *Hazelhurst Mercantile Co.*, 153 F. 2d 153; *Jordan* v. *Stark Bros. Nurseries*, 45 F. Supp. 769).

### § 780.159 Forest products.

Trees grown in forests and the lumber derived therefrom are not agricultural or horticultural commodities, for the purpose of the FLSA. (*See* § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within sec. 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.200 through 780.209 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute agriculture. For a discussion of the exemption in sec. 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

[73 FR 77238, Dec. 18, 2008. Redesignated at 74 FR 26014, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 26014, May 29, 2009, § 780.115 was redesignated as § 780.159 and newly designated § 780.159 was suspended, effective June 29, 2009.

## Subpart C—Agriculture as It Relates to Specific Situations

FORESTRY OR LUMBERING OPERATIONS

### § 780.200 Inclusion of forestry or lumbering operations in agriculture is limited.

Employment in forestry or lumbering operations is expressly included in agriculture if the operations are performed ''by a farmer or on a farm as an incident to or in conjunction with such farming operation.'' While ''agriculture'' is sometimes used in a broad sense as including the science and art of cultivating forests, the language quoted in the preceding sentence is a limitation on the forestry and lumbering operations which will be considered agricultural for purposes of section 3(f). It follows that employees of an employer engaged exclusively in forestry or lumbering operations are not considered agricultural employees.

### § 780.201 Meaning of "forestry or lumbering operations."

The term ''forestry or lumbering operations'' refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild or planted Christmas trees are included. (See the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the section 13(a)(13) exemption for forestry or logging operations in which not more than eight employees are employed.) ''Wood working'' as such is not included in ''forestry'' or ''lumbering'' operations. The manufacture of charcoal under modern methods is neither a ''forestry'' nor ''lumbering'' operation and cannot be regarded as ''agriculture.''

[74 FR 26014, May 29, 2009]

### § 780.202 Subordination to farming operations is necessary for exemption.

While section 3(f) speaks of practices performed ''in conjunction with'' as well as ''incident to'' farming operations, it would be an unreasonable construction of the Act to hold that all practices were to be regarded as agricultural if the person performing the practice did any farming, no matter how little, or resorted to tilling a small acreage for the purpose of qualifying for exemption (*Ridgeway* v. *Warren*, 60 F. Supp. 363 (M.D. Tenn.); in re Combs, 5 WH Cases 595, 10 Labor Cases 62,802 (M.D. Ga.)). To illustrate, where an employer owns several thousand acres of timberland on which he carries on lumbering operations and cultivates about 100 acres of farm land which are contiguous to such timberland, he would not be engaged in agriculture so far as his forestry or lumbering operations are

concerned. In such case, the forestry or lumbering operations would clearly not be subordinate to the farming operations but rather the principal or a separate business of the ''farmer.''

### § 780.203 Performance of operations on a farm but not by the farmer.

Logging or sawmill operations on a farm undertaken on behalf of the farmer or on behalf of the buyer of the logs or the resulting lumber by a contract logger or sawmill owner are not within the scope of agriculture unless it can be shown that these logging or sawmill operations are clearly incidental to farming operations on the farm on which the logging or sawmill operations are being conducted. For example, the clearing of additional land for cultivation by the farmer or the preparation of timber for construction of his farm buildings would appear to constitute operations incidental to ''such farming operations.''

### § 780.204 Number of employees engaged in operations not material.

The fact that the employer employs fewer than a certain number of employees in forestry and lumbering operations does not provide a basis for their being considered as agricultural employees. This is to be distinguished from the exemption provided by section 13(a)(13) (discussed in part 788 of this chapter) which is limited to employers employing not more than eight employees in the forestry or logging operations described therein.

NURSERY AND LANDSCAPING OPERATIONS

### § 780.205 Nursery activities generally.

The employees of a nursery who are engaged in the following activities are employed in ''agriculture'':

(a) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees (but not Christmas trees), and shrubs, vines, and flowers;

(b) Handling such plants from propagating frames to the field;

(c) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

[74 FR 26015, May 29, 2009]

### § 780.206 Planting and lawn mowing.

(a) The planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities, or where it constitutes a practice performed by a farmer or on a farm as an incident to or in conjunction with farming operations (as where it is part of the subordinate marketing operations of the grower of such trees or bushes). Thus, employees of the nurseryman who raised such nursery stock are doing agricultural work when they plant the stock on private or public property, trim, spray, brace, and treat the planted stock, or perform other duties incidental to its care and preservation. Similarly, employees who plant fruit trees and berry stock not raised by their employer would be considered as engaged in agriculture if the planting is done on a farm as an incident to or in conjunction with the farming operation on that farm.

(b) On the other hand, the planting of trees and bushes on residential, business, or public property is not agriculture when it is done by employees of an employer who has not grown the trees and bushes, or who, if he has grown them, engages in the planting operations as an incident, not to his farming operations, but to landscaping operations which include principally the laying of sod and the construction of pools, walks, drives, and the like.

(c) The mowing of lawns, except where it can be considered incidental to farming operations, is not agricultural work.

### § 780.207 Operations with respect to wild plants.

Nurseries frequently obtain plants growing wild in the woods or fields which are to be further cultivated by the nursery before they are sold by it. Obtaining such plants is a practice which is incidental to farming operations. The activities are therefore within the scope of agriculture if performed by a farmer or on a farm. Thus, employees of the nursery are engaged in agriculture when performing these activities. On the other hand, employees of an independent contractor performing these activities off the farm

would not be engaged in agriculture. The transplanting of such wild plants in the nursery is performed ''on a farm'' and is an agricultural activity whether performed by employees of an independent contractor or by employees of the nursery.

### § 780.208 Forest and Christmas tree activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. The planting, tending, and cutting of Christmas trees do not constitute farming operations. If such operations on forest products are within section 3(f), they must qualify under the second part of the definition dealing with incidental practices. (See § 780.201.)

[74 FR 26015, May 29, 2009]

### § 780.209 Packing, storage, warehousing, and sale of nursery products.

Employees of a grower of nursery stock who work in packing and storage sheds sorting the stock, grading and trimming it, racking it in bins, and packing it for shipment are employed in ''agriculture'' provided they handle only products grown by their employer and their activities constitute an established part of their employer's agricultural activities and are subordinate to his farming operations. Such employees are not employed in agriculture when they handle the products of other growers (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Jordan* v. *Stark Bros. Nurseries & Orchards Co.*, 45 F. Supp. 769). Agricultural activities would typically include employees engaged in the balling and storing of shrubs and trees grown in the nursery. Where a grower of nursery stock operates, as a separate enterprise, a processing establishment or an establishment for the wholesale of retail distribution of such commodities, the employees in such separate enterprise are not engaged in agriculture (see *Walling* v. *Rocklin*, 132 F. 2d 3; *Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286). Although the handling and the sale of nursery commodities by the grower at or near the place where they were grown may be incidental to his farming operations, the character of these operations changes when they are performed in an establishment set up as a marketing point to aid the distribution of those products.

## HATCHERY OPERATIONS

### § 780.210 The typical hatchery operations constitute "agriculture."

As stated in § 780.127, the typical hatchery is engaged in ''agriculture,'' whether in a rural or city location. Where the hatchery is engaged solely in procuring eggs for hatching, performing the hatching operations, and selling the chicks, all the employees including office and maintenance workers are engaged in agriculture (see *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283).

### § 780.211 Contract production of hatching eggs.

It is common practice for hatcherymen to enter into arrangements with farmer poultry raisers for the production of hatching eggs which the hatchery agrees to buy. Ordinarily, the farmer furnishes the facilities, feed and labor and the hatchery furnishes the basic stock of poultry. The farmer undertakes a specialized program of care and improvement of the flock in cooperation with the hatchery. The hatchery may at times have a surplus of eggs, including those suitable for hatching and culled eggs which it sells. Activities such as grading and packing performed by the hatchery employees in connection with the disposal of these eggs, are an incident to the breeding of poultry by the hatchery and are within the scope of agriculture.

### § 780.212 Hatchery employees working on farms.

The work of hatchery employees in connection with the maintenance of the quality of the poultry flock on farms is also part of the ''raising'' operations. This includes testing for disese, culling, weighing, cooping, loading, and transporting the culled birds. The catching and loading of broilers on farms by hatchery employees for transportation to market are agricultural operations.

### § 780.213 Produce business.

In some instances, hatcheries also engage in the produce business as such and commingle with the culled eggs and chickens other eggs and chickens which they buy for resale. In such a case that work which relates to both the hatchery and produce types of activities would not be within the scope of agriculture.

### § 780.214 Feed sales and other activities.

In some situations, the hatchery also operates a feed store and furnishes feed to the growers. As in the case of the produce business operated by a hatchery, this is not an agricultural activity and employees engaged therein, such as truckdrivers hauling feed to growers, are not agricultural employees. Also office workers and other employees are not employed in agriculture when their duties relate to nonagricultural activities.

### § 780.215 Meaning of forestry or lumbering operations.

The term forestry or lumbering operations refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild Christmas trees is included. (*See* the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the sec. 13(b)(28) exemption for forestry or logging operations in which not more than eight employees are employed.) Wood working as such is not included in forestry or lumbering operations. The manufacture of charcoal under modern methods is neither a forestry nor lumbering operation and cannot be regarded as agriculture.

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### § 780.216 Nursery activities generally and Christmas tree production.

(a) The employees of a nursery who are engaged in the following activities are employed in agriculture:

(1) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees, and shrubs, vines, and flowers;

(2) Handling such plants from propagating frames to the field;

(3) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

(b) Trees produced through the application of extensive agricultural or horticulture techniques to be harvested and sold for seasonal ornamental use as Christmas trees are considered to be agricultural or horticultural commodities. Employees engaged in the application of agricultural and horticultural techniques to produce Christmas trees as ornamental horticultural commodities such as the following are employed in agriculture:

(1) Planting seedlings in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary;

(2) After approximately three years, re-planting in lineout beds;

(3) After two more seasons, lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary;

(4) Pruning or shearing yearly;

(5) Harvesting of the tree for seasonal ornamental use, typically within 7 to 10 years of planting.

(c) Trees to be used as Christmas trees which are gathered in the wild, such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are not agricultural or horticultural commodities for purposes of sec. 3(f).

[73 FR 77239, Dec. 18, 2008. Redesignated at 74 FR 26015, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 26015, May 29, 2009, § 780.205 was redesignated as § 780.216 and newly designated § 780.216 was suspended, effective June 29, 2009.

### § 780.217 Forestry activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. For such operations to fall within sec. 3(f), they must qualify under the second part of the definition dealing with incidental practices. *See* § 780.201.

[73 FR 77239, Dec. 18, 2008. Redesignated at 74 FR 26015, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 26015, May 29, 2009, § 780.208 was redesignated as § 780.217 and newly designated § 780.217 was suspended, effective June 29, 2009.

## Subpart D—Employment in Agriculture That Is Exempted From the Minimum Wage and Overtime Pay Requirements Under Section 13(a)(6)

STATUTORY PROVISIONS

### § 780.300 Statutory exemptions in section 13(a)(6).

Section 13(a)(6) of the Act exempts from the minimum wage requirements of section 6 and from the overtime pay requirements of section 7:

Any employee employed in agriculture: (A) If such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than 13 weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age 16 are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock.

### § 780.301 Other pertinent statutory provisions.

(a) Man-day is defined by section 3(u) of the Act as follows:

''Man-day'' means any day during which an employee performs any agriculture labor for not less than 1 hour.

(b) Under section 3(e) of the Act the term employee does not include certain individuals in determining mandays of labor. Section 3(e) provides that:

''Employee'' includes any individual employed by an employer, except that such term shall not, for the purposes of section 3(u) include:

(1) Any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

(2) Any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, and (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than 13 weeks during the preceding calendar year.

(c) The legislative history of the 1966 amendments to the Fair Labor Standards Act indicates that the Congress in enacting minimum wage protection (section 6(a)(5)) for agriculture workers for the first time sought to provide a minimum wage floor for the farmworkers on large farms or agri-business enterprises. The section 13(a)(6)(A) exemption was intended to exempt those farmworkers on the smaller or familysize farms. In keeping with this intention, a labor requirement of 500 man-days was incorporated into the exemption, and certain workers were specifically excluded from the man-day count, as provided in section 3(e) (1) and (2).

### § 780.302 Basic conditions of section 13 (a)(6)(A).

Section 13(a)(6)(A) applies to an employee provided all the following conditions are met:

(a) He must be ''employed in agriculture''

(b) By an ''employer''

(c) Who did not use more than ''500 man-days'' of agriculture labor

(d) During any ''calendar quarter of the preceding calendar year.''

The following sections discuss the meaning and application of these requirements.

### § 780.303 Exemption applicable on employee basis.

Section 13(a)(6)(A) exempts ''any employee employed in agriculture * * * by an employer * * *.'' It is clear from this language that it is the activities of the employee rather than those of his employer which determine the application of the exemption. In other words, the exemption applies only to employees who are engaged in agricultural activities. Thus some employees of the employer may be exempt while others may not. In any case the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer. For a more detailed discussion of what constitutes employment in agriculture, see subpart B of this part.

### § 780.304 "Employed by an employer."

(a) The employer may be an individual, a partnership, or a corporation. It is not necessary that the employer be a farmer as defined in § 780.131. It is sufficient that he ''uses'' agricultural labor.

(b) In applying this exemption, one of the main criteria is the number of man-days of agricultural labor used by the employer. Section 13(a)(6)(A) provides that the exemption shall not apply to an employee employed in agriculture ''if such employee is employed by an employer who did not * * * use more than 500 man-days of agricultural labor * * *.'' From this language of the statute, the man-days of all agricultural workers, unless specifically excluded, of an employer whether he be the owner of a single farm, the owner of an enterprise consisting of several farms, a tenant farmer, an independent contractor, etc., are to be counted for purposes of section 13(a)(6)(A) whether they are employed at one place or several widely scattered places. For example if an employer owns and operates two farms, it is the total number of man-days used on both farms and not that used on each individual farm that determines whether he meets the 500 man-day test. Likewise independent contractor who harvests crops on different farms during the harvesting season must total all the man-days of agricultural labor used on all such farms except those excludable under section 3(e) in determining whether he meets the 500 man-day test.

### § 780.305 500 man-day provision.

(a) Section 3(u) of the Act defines *man-day* to mean ''any day during which an employee performs agricultural labor for not less than 1 hour.'' 500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. However, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.

(b) All of the employer's employees who are engaged in ''agricultural labor'' except those specifically excluded by section 3(e) (see § 780.301) and those exempt under section 13(a)(14) (see subpart F of this part) must be counted in determining whether the 500 man-day test is met. This is true even though an employee may be exempt from the monetary provisions under another section of the Act. For example, a general manager of a farm may be an exempt executive employee under section 13(a)(1) or a sheepherder may meet the requirements of section 13(a)(6)(E). Regardless of those exemptions, their man-days of employment would be included in the man-day count of the employer.

(c) A farmer whose crops are harvested by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment for the harvest hands. (See § 780.331.) Each employer

must include the contractor's employees in his man-day count in determining whether his own man-day test is met. Each employer will be considered responsible for compliance with the minimum wage and child labor requirements of the Act with respect to the employees who are jointly employed.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27520, Oct. 4, 1973]

### § 780.306 Calendar quarter of the preceding calendar year defined.

In applying section 13(a)(6)(A), it is necessary to consider each of the four calendar quarters (January 1–March 31; April 1–June 30; July 1–September 30; October 1–December 31) in the preceding calendar year (January 1–December 31). If in any calendar quarter of the preceding calendar year the employer used more than 500 man-days of agricultural labor, he must comply with the minimum wage requirements of section 6(a)(5) with respect to any employee not otherwise exempt in the current year. Compliance with the Act is required in the current year regardless of the number of man-days of agricultural labor used in the current year. On the other hand, if in the preceding calendar year the number of man-days used did not exceed 500 in any calendar quarter, there is no requirement to comply with respect to employment of agricultural labor in the current calendar year regardless of how many man-days are used in any calendar quarter of the current calendar year. Such employees are exempt under the basic provisions of section 13(a)(6)(A).

### § 780.307 Exemption for employer's immediate family.

Section 13(a)(6)(B) of the Fair Labor Standards Amendments of 1966 provides a minimum wage and overtime exemption in the case of ''any employee engaged in agriculture * * * if such employee is the parent, spouse, child, or other member of the employer's immediate family.'' The requirements of this exemption, evident from the statutory language, are that the employee be employed in agriculture and that he be a close blood relative, spouse or member of the employer's immediate family. Reference is made to subpart B of this part as to what constitutes employment in agriculture. The section 13(a)(6)(B) exemption applies to such an individual even though he is employed by an employer who otherwise used more than 500 man-days of agricultural labor in a calendar quarter of the preceding calendar year, as discussed in § 780.305.

### § 780.308 Definition of immediate family.

The Act does not define the scope of ''immediate family.'' Whether an individual other than a parent, spouse or child will be considered as a member of the employer's immediate family, for purposes of sections 3(e)(1) and 13(a)(6)(b), does not depend on the fact that he is related by blood or marriage. Other than a parent, spouse or child, only the following persons will be considered to qualify as part of the employer's immediate family: Step-children, foster children, step-parents and foster parents. Other relatives, even when living permanently in the same household as the employer, will not be considered to be part of the ''immediate family.''

[38 FR 17726, July 3, 1973]

### § 780.309 Man-day exclusion.

Section 3(e)(1) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(B). See § 780.301. This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. See § 780.302 *et seq.*

### § 780.310 Exemption for local hand harvest laborers.

Section 13(a)(6)(C) was added to the Act by the Fair Labor Standards Amendments of 1966. The legislative history of the exemption indicates that it was intended to apply to the local worker who goes out on a temporary basis during the harvest season to harvest crops. The exemption was not intended to apply to a full-time farmworker, that is, one who earns a livelihood at farming. For instance, migrant laborers who travel from farm to farm were not intended to be within the scope of this exemption.

### § 780.311 Basic conditions of section 13(a)(6)(C).

(a) Section 13(a)(6)(C) of the Act applies to an employee who:

(1) Is employed in agriculture.

(2) Is employed as a hand harvest laborer.

(3) Is paid on a piece-rate basis.

(4) Is paid piece-rates in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment.

(5) Commutes daily from his permanent residence to the farm on which he is so employed.

(6) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(b) In order for the exemption to apply to an employee, all of the requirements must be met. Since a hand harvest laborer is normally an agricultural worker, while so engaged, such an employee would meet the basic requirements that he be employed in agriculture. Subpart B of this part contains a more detailed discussion of what constitutes employment in agriculture. The meaning and application of the remaining requirements are discussed in the following sections.

### § 780.312 "Hand harvest laborer" defined.

(a) The term hand harvest laborer for purposes of this exemption refers to farm workers engaged in harvesting by hand, or with hand tools, soil grown crops such as cotton, tobacco, grains, fruits, and vegetables. The term would not include harvesting operations performed by an employee with an electrically powered mechanical device, such as a ''blueberry picking tool.'' ''Hand-harvesting'' refers only to soil-grown crops and does not include any operation involving animals, such as shearing or lambing of sheep and catching chickens. Hand-harvesting is defined as manually gathering or severing the crop from the soil, stems, or roots at its growing position in the fields. Included are integral related operations, closely related geographically and in point of time, which are performed before the transportation to concentration points on the farm.

For example:

(1) Employees who take tobacco leaves from the pickers and string them on poles by hand qualify as ''hand harvest laborers'' because the stringing operation is performed in the field almost simultaneously with the picking and before transportation to the concentration point on the farm (drying shed).

(2) The picking up of tomatoes by hand after hand pulling from the vines is ''hand-harvesting,'' as it is performed where the crop is severed and prior to its transportation to the packing shed.

(b) The definition is limited to harvesting, and the performance by the hand harvester of any nonharvesting operation in the same workweek would cause the loss of the section 13(a)(6)(C) exemption.

For example:

(1) Employees who wrap tomatoes in a packing shed would not qualify, as the wrapping is a nonharvesting operation. (*Schultz* v. *Durrence* (S.D. Ga.) 63 CCH. Lab. Cas. 32,387; 19 W.H. Cases 747.)

(2) Employees who hand pick small undesirable fruit prior to harvesting in order to insure a better crop would not qualify for the exemption. This is a preharvest culling operation performed as a part of the cultivation and growing operations not harvesting.

(3) Employees who chop cotton, since this is a nonharvesting operation.

### § 780.313 Piece rate basis.

The exemption provides that the employee must be paid on a piece-rate basis. To be exempt the employee must be compensated solely on piece rates during the workweek. The exemption does not apply in any workweek in which the employee is compensated on any other basis. For example, if an employee is compensated on an hourly rate for part of the week and on a piece rate for part of the week, the exemption would not be available. Also, if any pieceworker who is otherwise subject to the minimum wage provisions of the Act does not meet all the requirements set forth in this section he must be paid at least the minimum wage for each hour worked in a particular workweek, regardless of the fact he is paid on piece rate unless he is exempted by some other provision of the Act.

### § 780.314 Operations customarily * * * paid on a piece rate basis * * *.

A significant test of the exemption is that the hand harvest operation ''has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment.'' The legislative history is silent on who must customarily and generally recognize the hand harvest operation as having been paid on a piece rate basis. However, considering the context in which the term is used, such recognition must be on the part of agricultural employers and employees and other individuals in the region of employment who are familiar with farming operations and practices in the region and the method of compensation utilized in such operations and practices.

### § 780.315 Local hand harvest laborers.

(a) A requirement of the exemption is that an employee must commute each day from his permanent residence to the farm where he is employed. Thus, the exemption does not apply to a migrant worker who travels to different areas of the country during the harvesting seasons. This would be true even though the worker may remain in the area for a considerable period of time. On the other hand, if a migrant worker actually changes his place of residence and thereafter commutes daily from his permanent residence, the exemption applies from the date of the change of residence if the other tests are met.

(b) The fact that a worker may live on the farm where the operations are performed would not be a reason for disqualification. For example, if the other tests for the exemption are met, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption. Such family members would be considered to be commuting daily from their permanent residence despite the fact that their residence may be located on the farm at which they are employed.

### § 780.316 Thirteen week provision.

(a) The exemption provides that an ''employee must have been employed in agriculture less than 13 weeks during the preceding calendar year.'' For purposes of determining whether a worker has been employed in agriculture less than 13 weeks during the preceding calendar year, a week is considered to be a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24-hour periods during which the employee worked at least 1 ''man-day.'' Section 3(u) of the Act defines a man-day as ''any day during which an employee performs any agricultural labor for not less than 1 hour.''

(b) In defining the term ''week'' in this manner for purposes of section 13(a)(6)(C) (as well as section 3(e)(2)) comports with the traditional definition of week used in administering all the other provisions of the law. On this basis, the phrase ''employed in agriculture less than 13 weeks'' means that an employee has spent less than 13 weeks in agricultural work, regardless of the number of hours he worked during each one of the 13 weekly units. This position recognizes and accommodates to situations where an employee works very long as well as very short hours during the week. This would accord with the legislative history of this exemption which clearly indicates that it was meant to apply only to temporary workers whose hours of work would undoubtedly vary in length, and would, thereby effectuate the legislative intent.

(c) In determining the 13-week period, not only that work for the current employer in the preceding calendar year is counted, but also that agricultural work for all employers in the previous year. It is the total of all weeks of agricultural employment by the employee for all employers in the preceding calendar year that determines whether he meets the 13-week test. In this respect a self-employed farmer who works as a hand harvest laborer during part of the year is considered to be ''employed'' in agriculture only during those weeks when he is an employee of other farmers. Thus, such weeks of employment are to be counted but any weeks when he works only for himself are not counted toward the 13 weeks.

(d) The 13-week test applies to each individual worker. It does not apply on a family basis. To carry the example in

the preceding section further, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption even though the driver had been employed in agriculture as much as 13 weeks in the previous calendar year, so long as the family members themselves had not.

(e) If an employer claims this exemption, it is the employer's responsibility to obtain a statement from the employee showing the number of weeks he was employed in agriculture during the preceding calendar year. This requirement is contained in the recordkeeping regulations in § 516.33 (d) of this chapter.

### § 780.317 Man-day exclusion.

Section 3(e)(2) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(C). (See § 780.301.) This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. (See § 780.302 *et seq.*)

### § 780.318 Exemption for nonlocal minors.

(a) Section 13(a)(6)(D) of the 1966 Amendments to the Fair Labor Standards Act exempts from the minimum wage and overtime provisions ''any employee employed in agriculture * * * if such employee (other than an employee described in clause (C) of this subsection): (1) Is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (2) is employed on the same farm as his parent of persons standing in the place of his parent, and (3) is paid at the same piece rate as employees over age 16 are paid on the same farm.''

(b) It is clear from the legislative history of the amendments that the exemption was intended to apply, where the other specific tests are met, only to minors 16 years of age or under who are not ''local'' in the sense that they are away from their permanent home when employed in agriculture. Specifically the exemption was intended to apply in the case of the children of migrants who typically accompany their parents in harvesting and other agricultural work. (S. Rept. No. 1487, 89th Cong., second sess., to accompany H.R. 13712, pp. 9 and 10)

### § 780.319 Basic conditions of exemption.

(a) Section 13(a)(6)(D) applies to an employee engaged in agriculture who meets all of the following tests:

(1) Is not a local hand harvest laborer,

(2) Is 16 years of age or under,

(3) Is employed as a hand harvest laborer,

(4) Is paid on a piece rate basis,

(5) Is employed in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,

(6) Is employed on the same farm as his parent or person standing in the place of his parent, and

(7) Is paid at the same piece rate as employees over age 16 are paid on the same farms.

(b) Some of these requirements which are common to both sections 13(a)(6)(C) and 13(a)(6)(D) have already been discussed in connection with section 13(a)(6)(C) and need not be repeated. They are found in §§ 780.311 (employed in agriculture), 780.312 (hand harvest laborer), 780.313 (piece rate basis), and 780.314 (operations customarily * * * paid on a piece rate basis). The other requirements are discussed in the following sections.

### § 780.320 Nonlocal minors.

The exemption applies only to migrant or other than local hand harvest workers 16 years of age or under who do come within the scope of section 13(a)(6)(C) (application to all local hand harvest laborers who commute daily from their permanent residences). (See § 780.315.) A local youth under the prescribed age who commutes daily from his permanent residence to the farm to perform work is not exempt under section 13(a)(6)(D). The exemption may, however, be available for the specified minors who work for short periods of

several days or weeks without returning daily to their homes on farms beyond commuting distances from their permanent homes.

### § 780.321 Minors 16 years of age or under.

Section 13(a)(6)(D) by its very terms is available only to employees 16 years of age or under. Accordingly, even though all the other tests of the exemption are met, the exemption is inapplicable in the case of an employee over 16 years of age and the employer must pay to such an employee the applicable statutory minimum wage unless his operations come within the reach of some other exemption, such as section 13(a)(6)(A). Furthermore, although section 13(a)(6)(D) provides a minimum wage and overtime exemption for minors 16 years of age or under, the employer must nevertheless comply with the child labor provisions of the Act prohibiting the employment of minors in agriculture except under certain conditions and circumstances. These provisons are discussed in part 1500, subpart G of this title.

### § 780.322 Is employed on the same farm as his parent or persons standing in the place of his parent.

(a) The words ''employed on the same farm'' are accorded their natural meaning with the usual caution, however, that as in the case of all other exemptions, the exemptive language is to be construed narrowly. (See § 780.2.)

(b) Individuals who are considered as ''his parent or persons standing in place of his parent'' include natural parents, or any other person where the relationship between that person and a child is such that the person may be said to stand in place of a parent. For example, one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own, is generally said to stand to the child in place of a parent.

### § 780.323 Exemption for range production of livestock.

Section 13(a)(6)(E) which was added to the Act by the Fair Labor Standards Amendments of 1966 provides an exemption from the minimum wage and overtime requirements of the Act for any employee ''employed in agriculture'' if he is ''principally engaged in the range production of livestock.'' It is apparent from the language of section 13(a)(6)(E) that the application of this exemption depends on the type of work performed by the individual employee for whom exemption is sought and on where the work is done. A determination of whether an employee is exempt therefore requires an examination of that employee's duties and where they are performed. Some employees of the employer may be exempt while others may not.

### § 780.324 Requirements for the exemption to apply.

(a) All the following conditions must be met in order for the exemption to apply to an employee:

(1) He must be ''engaged in agriculture'';

(2) Be ''principally engaged'';

(3) On the ''range'', and

(4) In the ''production of livestock.''

(b) Since the raising of livestock is included in the definition of agriculture under section 3(f) of the Act (see §§ 780.119–780.121 of subpart B of this part), the range production of livestock would normally be deemed agriculture work, and, consequently, an employee, during this time he is engaged in such activities, would meet the basic requirement of the exemption that he be ''employed in agriculture.''

The following sections discuss the meaning and application of the other requirements.

### § 780.325 Principally engaged.

(a) To determine whether an employee is ''principally engaged'' in the range production of livestock, one must consider the nature of his duties and responsibilities. To qualify for this exemption the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose. A determination of whether an employee has range production of livestock as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the range production duties is a useful guide in determining

whether this is the primary duty of the employee. In the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee's time.

(b) Under this principle, an employee who spends more than 50 percent of his time during the year on the range in the duties designated as range production duties would be exempt. This is true even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.

**§ 780.326 On the range.**

(a) For purposes of this exemption, ''range'' is defined generally as land that is not cultivated. It is land that produces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. ''Forage'' as used here means ''browse'' or herbaceous food that is available to livestock or game animals.

(b) The range may be on private or Federal or State land, and need not be open. Typically it is not only noncultivated land, but land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor. Typically, also, many acres of range land are required to graze one animal unit (five sheep or one cow) for 1 month. By its nature, range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres.

**§ 780.327 Production of livestock.**

For an employee to be engaged in the production of livestock, he must be actively taking care of the animals or standing by in readiness for that purpose. Thus, such activities as herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in the raising of livestock and in such immediately incidental duties as inspecting and repairing fences, wells, and windmills would be considered as the production of livestock. On the other hand, such work as terracing, reseeding, haying, and constructing dams, wells, and irrigation ditches would not be considered as the production of livestock within the meaning of the exemption.

**§ 780.328 Meaning of livestock.**

The term ''livestock'' includes cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm. This is further discussed in § 780.120. Turkeys or domesticated fowl are considered poultry and not livestock within the meaning of this exemption.

**§ 780.329 Exempt work.**

(a) The standard that must be used to determine whether the individual employee is exempt is that his primary duty must be the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.

(b) Thus, exempt work must be performed away from the ''headquarters.'' The headquarters is not, however, to be confused with the ''headquarters ranch.'' The term headquarters has reference to the place for the transaction of the business of the ranch (administrative center), as distinguished from buildings or lots used for convenience elsewhere. It is a particular location for the discharge of the management duties. Accordingly, the term ''headquarters'' would not embrace large acreage, but only the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The balance of the ''headquarters ranch'' would be the ''range.''

(c) Furthermore, the legislative history indicates that this exemption was not intended to apply to feed lots or to any area where the stock involved would be near headquarters. Its sponsors stated that the exemption would apply only to those employees principally engaged in activities which require constant attendance on a standby basis, away from headquarters, such as herding, where the computation of

hours worked would be extremely difficult. Such constant surveillance of livestock that graze and reproduce on range lands is necessary to see that the animals receive adequate care, water, salt, minerals, feed supplements, and protection from insects, parasites, disease, predators, adverse weather, etc.

(d) The man-days of labor of employees principally engaged in the range production of livestock, even though the employees are exempt from the wage and hour requirements of the Act, are included in the employer's man-day count for purposes of application of section 13(a)(6)(A). Thus, if a cattle rancher in a particular calendar quarter uses 200 man-days of such range production labor and 400 man-days of agricultural labor performed by individuals not so engaged, he is required to pay the minimum wage to the latter employees in the following year.

### § 780.330 Sharecroppers and tenant farmers.

(a) The test of coverage for sharecroppers and tenant farmers is the same as that applied under the Act to determine whether any other person is an employee or not. Certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent are covered. Those individuals called sharecroppers and tenants whose work is closeIy directed and who have no actual discretion in controlling farm operations are in fact employees by another name. True independent-contractor sharecroppers or tenant farmers who actually control their farm operations are not employees, but if they employ other workers they may be responsible as employers under the Act.

(b) In determining whether such individuals are employees or independent contractors, the criteria laid down by the courts in interpreting the Act's definitions of employment, such as those enunciated by the Supreme Court in *Rutherford Food Corporation* v. *McComb*, are utilized. This case, as well as others, made it clear that the answer to the question of whether an individual is an employee or an independent contractor under the definitions in this Act lies in the relationship in its entirety, and is not determined by common law concepts. It does not depend upon isolated factors but on the ''whole activity.'' An employee is one who as a matter of economic reality follows the usual path of an employee. Each case must be decided on the basis of all facts and circumstances, and as an aid in the assessment, one considers such factors as the following:

(1) The extent to which the services rendered are an integral part of the principal's business;

(2) The permanency of the relationship;

(3) The opportunities for profit or loss;

(4) The initiative, judgment, or foresight exercised by the one who performs the services;

(5) The amount of investment; and

(6) The degree of control which the principal has in the situation.

(c) Where a tenant or sharecropper is found to be an employee, he and any members of his family who work with him on the crop are also to be included in the 500 man-day count of the owner or operator of the farm. Thus, where a sharecropper is an employee and his wife and children help in chopping cotton, all the family members are employees of the farm owner or operator and all their man-days of work are counted.

(d) On the other hand, a sharecropper or tenant who qualifies as a bona fide independent contractor is considered the same as any other employer, and only the man-days of agricultural labor performed by employees of such a sharecropper or tenant are counted toward the man-days used by him. If he does not meet the 500 man-day test, he is not required to pay his employees the minimum wage even though those employees are entitled to the minimum wage when working for a separate employer who met the man-day test.

### § 780.331 Crew leaders and labor contractors.

(a) Whether a crew leader or a labor contractor is the employer of the workers he supplies is a question of fact. The tests here are the same as those used to determine whether a sharecropper or tenant is an independent

contractor. A crew leader who merely assembles a crew and brings them to the farm to be supervised and paid directly by the farmer, and who does the same work and receives the same pay as the crewmembers, is an employee of the farmer, and both he and his crew are counted as such and paid accordingly if the farmer is not exempt under the 500 man-day test. The situation is not significantly different if under the same circumstances, the crew is hired at so much per acre for their work. This is in effect a group piecework arrangement.

(b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output. As the employer, he has the authority to hire and fire the workers and direct them while working in the fields. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representatives, who takes whatever action he deems appropriate. His opportunity for profit or loss comes from his control over the time and manner of performance of work by his crew and his authority to determine the wage rates paid to his workers.

(c) There is also the common and general practice of an individual who performs custom work such as crop dusting or grain harvesting and threshing or sheepshearing. In the typical case this contractor has a substantial investment in equipment and his business decisions and judgments materially affect his opportunity for profit or loss. In the overall picture, the contractor is not following the usual path of an employee, but that of an independent contractor.

For example: A sheepshearing contractor who operates in the following manner is considered an independent contractor and therefore an agricultural employer in his own right—he operates his own equipment including power supply from his own trucks or trailers, boards his shearing crew and has complete responsibility for their work and compensation, has complete charge of the sheep from the time they enter the shearing pen until they are shorn and turned out, and contracts with the rancher for the complete operation at an agreed rate per head.

(d) Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, his employees are considered jointly employed by him and the farmer who is using their labor if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment. (*Hodgson* v. *Okada* (C.A. 10), 20 W.H. Cases 1107; *Hodgson* v. *Griffin & Brand* (C.A. 5) 20 W.H. Cases 1051; *Mitchell* v. *Hertzke,* 234 F. 2d 183, 12 W.H. Cases 877 (C.A. 10).) In a joint employment situation, the man-days of agricultural labor rendered are counted toward the man-days of such labor of each employer. Each employer is considered equally responsible for compliance with the Act. With respect to the recordkeeping regulations in 29 CFR 516.33, the employer who actually pays the employees will be considered primarily responsible for maintaining and preserving the records of hours worked and employees' earnings specified in paragraph (c) of § 516.33 of this chapter.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27521, Oct. 4, 1973]

### § 780.332 Exchange of labor between farmers.

(a) Occasionally a farmer may help his neighbor with the harvest of his crop. For instance, Farmer B helps his neighbor Farmer A harvest his wheat. In return Farmer A helps Farmer B with the harvest at his farm.

(b) In a case where neighboring farmers exchange their own work under an arrangement where the work of one farmer is repaid by the labor of the other farmer and there is no monetary compensation for these services paid or contemplated, the Department of Labor would not assert that either farmer is an employee of the other.

(c) In addition, there may be instances where employees of a farmer also work for neighboring farmers during harvest time. For example, employees of Farmer A may help Farmer B with his harvest, and later, Farmer B's employees may help Farmer A. These employees would be included in the man-day count of the farmer for whom

the work is performed on the day in question. Since the Act defines man-day to mean any day during which an employee performs any agricultural labor for not less than 1 hour, there may be days on which these employees work for both Farmer A and Farmer B for a ''man-day.'' In that event they would be included for that day in the man-day count of both Farmer A and Farmer B.

## Subpart E—Employment in Agriculture or Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

### § 780.400 Statutory provisions.

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.

### § 780.401 General explanatory statement.

(a) Section 13(b)(12) of the Act contains the same wording as did section 13(a)(6) prior to the 1966 amendments. The effect of this is to provide a complete overtime exemption for any employee employed in ''agriculture'' who does not qualify for exemption under section 13(a)(6) (A), (B), (C), (D), and (E) of the 1966 amendments.

(b) In addition to exempting employees employed in agriculture, section 13(b)(12) also exempts from the overtime provisions of the Act employees employed in specified irrigation activities. Prior to the 1966 amendments these employees were exempt from the minimum wage and overtime pay requirements of the Act.

(c) For exempt employment in ''agriculture,'' see subpart B of this part.

### § 780.402 The general guides for applying the exemption.

(a) Like other exemptions provided by the Act, the section 13(b)(12) exemption is narrowly construed (*Phillips, Inc.* v. *Walling*, 334 U.S. 490; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Fleming* v. *Swift & Co.*, 41 F. Supp. 825; *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283; *Walling* v. *Friend*, 156 F. 2d 429; see also § 780.2 of subpart A of this part 780). An employer who claims the exemption has the burden of showing that it applies. (See § 780.2) The section 13(b)(12) exemption for employment in agriculture is intended to cover all agriculture, including ''extraordinary methods'' of agriculture as well as the more conventional ones and large operators as well as small ones. Nevertheless, it was meant to apply only to agriculture. It does not extend to processes that are more akin to manufacturing than to agriculture. Practices performed off the farm by nonfarmers are not within the exemption, except for the irrigation activities specifically described in section 13(b)(12). Practices performed by a farmer do not come within the exemption for agriculture if they are neither a part of farming nor performed by him as an incident to or in conjunction with his own farming operations. These principles have been well established by the courts in such cases as *Mitchell* v. *Budd*, 350 U.S. 473; *Maneja* v. *Waialua*, 349 U.S. 254; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Chapman* v. *Durkin*, 214 F. 2d 363, certiorari denied, 348 U.S. 897; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n.* 80 F. Supp. 953, 181 F. 2d 697.

(b) When the Congress, in the 1961 amendments, provided special exemptions for some activities which had been held not to be included in the exemption for agriculture (see subparts F and J of this part 780), it was made very clear that no implication of disagreement with ''the principles and tests governing the application of the present agriculture exemption as enunciated by the courts'' was intended (Statement of the Managers on the part of the House, Conference Report, H. Rept. No. 327, 87th Cong. first sess., p. 18). Accordingly, an employee is considered an exempt agricultural or irrigation employee if, but only if, his work falls clearly within the specific

language of section 3(f) or section 13(b)(12).

### § 780.403 Employee basis of exemption under section 13(b)(12).

Section 13(b)(12) exempts ''any employee employed in * * *.'' It is clear from this language that it is the activities of the employee rather than those of his employer which ultimately determine the application of the exemption. Thus the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities. But the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer.

### § 780.404 Activities of the employer considered in some situations.

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

## THE IRRIGATION EXEMPTION

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

The exemption provided in section 13(b)(12) for irrigation activities is a direct exemption which depends for its application on its own terms and not on the meaning of ''agriculture'' as defined in section 3(f). This exemption was added by an amendment to section 13(a)(6) in 1949 to alter the effect of the decision of the U.S. Supreme Court in *Farmers Reservoir Company* v. *McComb*, 337 U.S. 755, so as to exclude the type of employees involved in that case from certain requirements of the Act. Congress chose to accomplish this result, not by expanding the definition of agriculture in section 3(f), but by adding a further exemption. In view of this approach, it can well be said that Congress agreed with the Supreme Court's holding that such workers are not employed in agriculture. (*Goldberg* v. *Crowley Ridge Assn.*, 295 F. 2d 7.) Irrigation workers who are employed in any workweek exclusively by a farmer or on a farm in irrigation work which meets the requirement of performance as an incident to or in conjunction with the primary farming operations of such farmer or such farm, as previously explained, are considered as employed in agriculture under section 3(f) and may qualify for the minimum wage and overtime exemption under section 13(a)(6) or for the overtime exemption provided agricultural workers under section 13(b)(12). Where they are not so employed, they are not considered as agricultural workers (*Farmers Reservoir Co.* v. *McComb*, supra), but may qualify for the overtime exemption under section 13(b)(12) relating to irrigation work if their duties and the irrigation system on which they work come within the express language of the statute. Where this is the case, it is not material whether the employees are employed in agriculture.

### § 780.406 Exemption is from overtime only.

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

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

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

employer is paid on a share-crop basis when he receives, as his total compensation, a share of the crop of the farmers serviced.

### § 780.408 Facilities of system must be used exclusively for agricultural purposes.

Section 13(b)(12) requires for exemption of irrigation work that the ditches, canals, reservoirs, or waterways in connection with which the employee's work is done be ''used exclusively for supply and storing of water for agricultural purposes.'' If a water supplier supplies water for other than ''agricultural purposes,'' the exemption would not apply. For example, the exemption would not apply where a portion of its water is delivered by the supplier to a municipality to be used for general, domestic, and commercial purposes. The fact that a small amount of the water furnished for use in his farming operations is in fact used for incidental domestic purposes by the farmer on the farm does not, however, require the conclusion that the water supplied was not exclusively ''for agricultural purposes'' within the meaning of the irrigation exemption in section 13(b)(12). Accordingly, if otherwise applicable, the exemption is not defeated merely because the water stored and supplied through the ditches, canals, reservoirs, or waterways of the irrigation system includes a small amount which is used for domestic purposes on the farms to which it is supplied. On the other hand, if the water supplier should maintain separate facilities for storing and supplying water for domestic use, it is clear that employees employed in connection with the maintenance or operation of such facilities would not be employed in activities to which the exemption applies. Water used for watering livestock raised by a farmer is ''for agricultural purposes.''

### § 780.409 Employment "in connection with the operation or maintenance" is exempt.

The irrigation exemption provided by section 13(b)(12) applies to ''any employee employed * * * in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways'' of an irrigation system which qualifies for the exemption. The employee, to be exempt, must be employed ''in connection with the operation or maintenance'' of the named facilities; other employees of the irrigation system, not employed in connection with the named activities, are not exempt. The exemption may apply to employees engaged in insect, rodent, and weed control along the canals and waterways of the irrigation system.

## Subpart F—Employment or Agricultural Employees in Processing Shade-Grown Tobacco; Exemption From Minimum Wage and Overtime Pay Requirements Under Section 13(a)(14)

INTRODUCTORY

### § 780.500 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart F together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(a)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage and overtime pay provisions of the Act for certain agricultural employees engaged in the processing, prior to stemming, or shade-grown tobacco for use as cigar wrapper tobacco. As appears more fully in subpart A, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The exemptions provided in section 13(a)(6) of the Act for employees employed in agriculture is not discussed in this subpart except in its relation to section 13(a)(14). The meaning and application of the section 13(a)(6) exemption is fully considered in subpart D of this part 780.

### § 780.501 Statutory provision.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage requirements of section 6

of the Act and from the overtime provisions of section 7:

Any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

### § 780.502 Legislative history of exemption.

The exemption for shade-grown tobacco workers was added to the Act by the Fair Labor Standards Amendments of 1961. The intent of the committee which inserted the provision in the amendments which were reported to the House (see H. Rept. No. 75, 87th Cong., first sess., p. 29) was to exclude from the minimum wage and overtime requirements of the Act ''employees engaged prior to the stemming process in processing shade-grown tobacco for use as cigar wrapper tobacco, but only if the employees were employed in the growing and harvesting of such tobacco''. The Report also pointed out that ''such operations were assumed to be exempt prior to the case of *Mitchell* v. *Budd*, 350 U.S. 473 (1956), as a continuation of the agricultural process occurring in the vicinity where the tobacco was grown''. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. In that form, it would have altered the effect of the Supreme Court's decision in the case of *Mitchell* v. *Budd*, cited above, by bringing the described employees under the exemption provided for agriculture in section 13(a)(6) of the Act. (H. Rept. No. 75, p. 26, and H. Rept. No. 327, p. 17, 87th Cong., first sess.) The Conference Committee, in changing the provision to provide a separate exemption, made it clear that it was ''not intended by the committee of conference to change * * * by the exemption for employees engaged in the named operations on shade-grown tobacco the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts.'' (H. Rept. No. 327, supra, p. 18.)

### § 780.503 What determines the application of the exemption.

The application of the section 13(a)(14) exemption depends upon the nature of the work performed by the individual employee for whom exemption is sought and not upon the character of the work of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may therefore be exempt while others may not.

## REQUIREMENTS FOR EXEMPTION

### § 780.504 Basic conditions of exemption.

Under section 13(a)(14) of the Act all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must work on ''shade-grown tobacco.''

(b) He must be an ''agricultural employee'' employed ''in the growing and harvesting'' of shade-grown tobacco.

(c) He must be engaged ''in the processing * * * of such tobacco'' and this processing must be both ''prior to the stemming process'' and to prepare the tobacco ''for use as cigar wrapper tobacco.'' These requirements are discussed in the following sections of this subpart.

## SHADE-GROWN TOBACCO

### § 780.505 Definition of "shade-grown tobacco."

Shade-grown tobacco to which the exemption applies is Connecticut Valley Shade-Grown U.S. Type 61 and Georgia-Florida Shade-Grown U.S. Type 62.

### § 780.506 Dependence of exemption on shade-grown tobacco operations.

The exemption provided by section 13(a)(14) of the Act is limited to the performance of certain operations with respect to the specified commodity, shade-grown tobacco. Work in connection with any other kind of tobacco, or any other commodity, including any other farm product, is not exempt

under this section. An employee must be an agricultural employee variously employed in the growing and harvesting of ''shade-grown tobacco'' and in the described processing of ''such tobacco'' in order that the section 13(a)(14) exemption may apply.

### § 780.507 "Such tobacco."

To be within the exemption, the processing activities with respect to shade-grown tobacco must be performed by an employee who has been employed in growing and harvesting ''such tobacco.'' The term ''such tobacco'' clearly is limited to the specified type of tobacco named in the section, that is, shade-grown tobacco. While a literal interpretation of the term ''such tobacco'' might lead to a conclusion that the exemption extends only to the processing of the tobacco which the employee grew or harvested, it appears from the legislative history that the intent was to extend the exemption to the processing of such tobacco which may be viewed ''as a continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.'' (H. Rept. 75, 87th Cong., first sess., p. 26.) Thus, it appears that the term ''such tobacco'' has reference to the local crop of shade-grown tobacco, raised by other local growers as well as by the processor, and which is being processed as a continuation of the growing and harvesting of such crop in the vicinity.

### § 780.508 Application of the exemption.

(a) As indicated in § 780.504, an employee qualifies for exemption under section 13(a)(14) only if he is an agricultural employee employed in the growing and harvesting of shade-grown tobacco and is engaged in the processing of such tobacco. However, both operations do not have to be performed during the same workweek. Section 13(a)(14) of the Act is intended to exempt any agricultural employee from the minimum wage and overtime provisions of the Act in any workweek when he is employed in the growing and harvesting of shade-grown tobacco, irrespective of the provisions of section 13(a)(6) and whether or not in such workweek he is also engaged in the processing of the tobacco as described in section 13(a)(14). The exemption would also apply in any workweek in which the employee, who grew and harvested shade-grown tobacco, is exclusively engaged in such processing.

(b) An employee so employed in any workweek is considered to be excluded from the ''employee employed in agriculture'' whose exemption from the pay provisions of the Act is governed by section 13(a)(6). Therefore, his man-days of exempt labor under section 13(a)(14) in any such workweek are not to be counted as man-days of agricultural labor within the meaning of section 3(u) of the Act and to which section 13(a)(6) refers.

(c) However, since section 3(u) defines man-day to mean ''any day during which an employee performs any agricultural labor for not less than 1 hour'' in the case of an employee who qualifies for the exemption in some workweeks but not in others under section 13(a)(14), all such man-days of his agricultural labor in the workweeks when he is not exempt under section 13(a)(14) will be counted. In this connection, the performance of some agricultural work which does not relate to shade-grown tobacco by an agricultural employee of a grower of such tobacco will not be considered as the performance of nonexempt work outside the section 13(a)(14) exemption in any workweek in which such an employee is employed by such an employer in the growing and harvesting of such tobacco or in its processing prior to stemming, or both, and engages in other agricultural work only incidentally or to an insubstantial extent.

### § 780.509 Agriculture.

The definition of ''agriculture,'' as contained in section 3(f) of the Act, is discussed in subpart B of this part 780. The principles there discussed should be referred to as guides to the meaning of the terms ''agricultural employee'' and ''growing and harvesting'' as used in section 13(a)(14).

### § 780.510 "Any agricultural employee."

The section 13(a)(14) exemption applies to ''any agricultural employee'' who is employed in the specified activities. The term ''any agricultural employee'' includes not only agricultural

employees of the tobacco grower but also such employees of other farmers or independent contractors. ''Any agricultural employee'' employed in the growing and harvesting of shade-grown tobacco will qualify for exemption if he engages in the specified processing operations. The use of the word ''agricultural'' before ''employee'' makes it apparent that separate consideration must be given to whether an employee is an ''agricultural employee'' and to whether he is employed in the specified ''growing and harvesting'' within the meaning of the Act.

### § 780.511 Meaning of "agricultural employee."

An ''agricultural employee,'' for purposes of section 13(a)(14), may be defined as an employee employed in activities which are included in the definition of ''agriculture'' in section 3(f) of the Act (see § 780.103), and who is employed in these activities with sufficient regularity or continuity to characterize him as a person who engages in them as an occupation. Isolated or sporadic instances of engagement by an employee in activities defined as ''agriculture'' would not ordinarily establish that he is an ''agricultural employee.'' His engagement in agriculture should be sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.

### § 780.512 "Employed in the growing and harvesting."

Section 13(a)(14) exempts processing operations on shade-grown tobacco only when performed by agricultural employees ''employed in the growing and harvesting'' of such tobacco. The use of the term ''and'' in the phrase ''growing and harvesting'' may be in recognition of the fact that in the raising of shade-grown tobacco the two operations are typically intermingled; however, it is not considered that the word ''and'' would preclude a determination on the particular facts that an employee is qualified for the exemption if he is employed only in ''growing'' or only in ''harvesting.'' Employment in work other than growing and harvesting of shade-grown tobacco will not satisfy the requirement that the employee be employed in growing and harvesting, even if such work is on shade-grown tobacco and constitutes ''agriculture'' as defined in section 3(f) of the Act. For example, delivery of the tobacco by an employee of the farmer to the receiving platform of the bulking plant would be a ''delivery to market'' included in ''agriculture'' when performed by the farmer as an incident to or in conjunction with his farming operations (*Mitchell* v. *Budd*, 350 U.S. 473), but it would not be part of ''growing and harvesting.''

### § 780.513 What employment in growing and harvesting is sufficient.

To qualify for exemption the employee must be one of those who ''were employed in the growing and harvesting of such tobacco'' (H. Rept. No. 75, 87th Cong., First Sess., p. 29) and one whose processing work could be viewed as a ''continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.'' (Ibid. p. 26.) This appears to require that such employment be in connection with the crop of shade-grown tobacco which is being processed; it appears to preclude an employee who has had no such employment in the current crop season from qualifying for this exemption even if in some past season he was employed in growing and harvesting such tobacco. Bona fide employment in growing and harvesting shade-grown tobacco would also appear to be necessary. An attempt to qualify an employee for the processing exemption by sending him to the fields for growing or harvesting work for a few hours or days would not establish the bona fide employment in growing and harvesting contemplated by the Act. It would not seem sufficient that an employee has been engaged in growing or harvesting operations only occasionally or casually or incidentally for a small fraction of his work time. (See *Walling* v. *Haden*, 153 F. 2d 196.) Employment for a significant period in the current crop season or on some regular recurring basis during this season would appear to be necessary before an agricultural

employee could reasonably be described as one ''employed in the growing and harvesting of shade-grown tobacco.'' The determination in a doubtful case will, therefore, require a careful examination and consideration of the particular facts.

### § 780.514 "Growing" and "harvesting."

The general meaning of ''growing'' and ''harvesting'' of agricultural commodities is explained in §§ 780.117 and 780.118 of subpart B of this part 780, where the meaning of these terms as used in the Act's definition of agriculture is fully discussed. As there indicated, these terms include the actual raising of the crop and the operations customarily performed in connection with the removal of the crops by the farmer from their growing position, but do not extend to operations subsequent to and unconnected with the actual process whereby the agricultural commodities are severed from their attachment to the soil. Thus, while transportation to a concentration point on the farm may be included, ''harvesting'' never extends to transportation or other operations off the farm. The ''growing'' of shade-grown tobacco is considered to include such work as preparing the soil, planting, irrigating, fertilizing, and other activities. This type of tobacco requires special cultivation and is grown in fields that are completely enclosed and covered with cheesecloth shade. The leaves of the plant are picked in stages, as they mature. The leaves are taken immediateIy to a tobacco barn, located on the farm, where they are strung on sticks and dried by heat. Before the drying process is completed, the leaves are allowed to absorb moisture. Then they are dried again. It is not until the end of this drying operation that the leaves are packed in boxes and taken from the farm to a building plant for further processing (see *Mitchell* v. *Budd*, 350 U.S. 473). Under the general principles stated above, ''harvesting'' of shade-grown tobacco is considered to include the removal of the tobacco leaves from the plant and moving the tobacco from the field to the drying barn on the farm, together with the performance of other work as a necessary part of such operations. Subsequent operations such as the drying of the tobacco in the barn on the farm and packing of the tobacco for transportation to the bulking plant are not included in ''harvesting.''

EXEMPT PROCESSING

### § 780.515 Processing requirements of section 13(a)(14).

When it has been determined that an employee is an ''agricultural employee employed in the growing and harvesting of shade-grown tobacco,'' to whom section 13(a)(14) of the Act may apply, it then becomes necessary to ascertain whether he is ''engaged in the processing * * * of such tobacco, prior to the stemming process, for use as Cigar-wrapper tobacco.''

### § 780.516 "Prior to the stemming process."

The exemption provided by section 13(a)(14) applies only to employees whose processing operations on shade-grown tobacco are performed ''prior to the stemming process.'' (See H. Rept. No. 75, 87th Cong., first sess., p. 26). This means that an employee engaged in stemming, the removal of the midrib from the tobacco leaf (*McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n.*, 80 F. Supp. 953, affirmed 181 F. 2d 697), or in any operations on the tobacco which are performed after stemming has begun will not come within the exemption. Stemming and all subsequent operations are nonexempt work.

### § 780.517 "For use as Cigar-wrapper tobacco."

The phrase ''for use as Cigar-wrapper tobacco'' limits the type of end product which may be produced by the exempt operations. As its name indicates, cigar-wrapper tobacco is used as a cigar wrapper and is distinguished from other types of tobacco which serve other purposes such as filler, pipe, chewing, and other kinds of tobacco. Normally, shade-grown tobacco is used only for cigar wrappers. However, if the tobacco is not being processed by the employer for such specific and limited use, the employee is not engaged in exempt processing operations.

**§ 780.518 Exempt processing operations.**

The processing operations under section 13(a)(14) include, but are not limited to, ''drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling'' of the shade-grown tobacco. As previously noted, these operations are exempt only if performed on shade-grown tobacco prior to the stemming process to prepare the tobacco for use as cigar wrapper tobacco.

**§ 780.519 General scope of exempt operations.**

All operations normally performed in the processing of shade-grown tobacco for use as cigar wrapper tobacco, if performed prior to the stemming process and for such use, are included in the exemption. As a whole, this processing substantially changes the physical properties and chemical content of the tobacco, improves its color, increases its combustibility, and eliminates the rawness and harshness of the freshly cured leaf. In the process the leaves are piled in ''bulks'' of about 4,000 pounds each to undergo a ''sweating'' or ''fermentation'' process in which temperature and humidity are carefully controlled. Proper heat control includes, among other things, breaking up the bulk, redistributing the tobacco, and adding water. Proper fermentation or aging requires the bulk to be reconstructed several times. This bulking process may last from 4 to 8 months. When the tobacco is properly dried, cured, fermented, and aged, it is moved to long tables where the leaves are individually graded and sorted, after which they are tied in bundles called ''hands'' of about 30 to 35 leaves each, which are then baled for shipment. Equipment required for the work may include a steam-heated plant, platforms, thermometers, bulk covers, baling boxes and presses, baling mats and packing, sorting, and grading tables. (See *Mitchell* v. *Budd*, 350 U.S. 473, 475.) Employees performing any part of this processing prior to the stemming process, including the operations named in section 13(a)(14), may come within the exemption if they are otherwise qualified and if the tobacco on which they work is being processed for use as cigar wrapper tobacco.

**§ 780.520 Particular operations which may be exempt.**

(a) *General*. Section 13(a)(14) lists a number of operations as being included in the processing of shade-grown tobacco. Some of these are, and others are not, themselves ''processing'' in the sense that performance of the operations changes the natural form of the commodity on which it is performed. All of the operations named and described in paragraph (b) of this section, however, are a necessary and integral part of the overall process of preparing shade-grown tobacco for use as cigar wrapper tobacco and, when performed as part of that process and prior to stemming of the tobacco, by an employee qualified under the terms of the section, will provide the basis for his exemption from the minimum wage and overtime provisions of the Act.

(b) *Particular operations*—(1) *Drying*. Drying includes the removal or lowering of the moisture content of the tobacco, whether by natural means or by exposure to heat from ovens, furnaces, etc.

(2) *Curing*. Curing includes removing the tobacco to the curing shed or barn and stringing the tobacco over slats.

(3) *Fermenting*. Fermenting includes the operations controlling the chemical changes which take place in the tobacco as the result of bulking and rebulking.

(4) *Bulking*. Bulking includes piling the tobacco in piles or bulks of about 4,000 pounds each for the purpose of fermenting the tobacco.

(5) *Rebulking*. Rebulking includes the breaking down of the tobacco bulks or piles and rearranging them so that the tobacco on the inside will be placed on the outside of the bulk and tobacco on the outside will be placed inside.

(6) *Sorting*. Sorting includes segregation of the tobacco leaves in connection with the grading and classifying of the cured tobacco.

(7) *Grading*. Grading includes sorting or classifying as to size and quality.

(8) *Aging*. Aging includes the curing process brought about by bulking.

(9) *Baling*. Baling includes the tying of the tobacco into ''hands'' and placing them in bales for shipment.

### § 780.521 Other processing operations.

The language of the section, namely, ''including, but not limited to,'' extends the exemption for processing to include other operations in the processing of shade-grown tobacco besides those specifically enumerated. These additional operations include only those which are a necessary and integral part of preparing the shade-grown tobacco for use as cigar wrapper tobacco. These additional operations, like those enumerated in section 13(a)(14), must be performed before the tobacco has been stemmed. Stemming work and further work on the tobacco after stemming has been performed are nonexempt.

### § 780.522 Nonprocessing employees.

Only those employees who actually engaged in the growing and harvesting of shade-grown tobacco and the specified exempt processing activities are exempt. Clerical, maintenance and custodial workers are not included.

## Subpart G—Employment in Agriculture and Livestock Auction Operations Under the Section 13(b)(13) Exemption

INTRODUCTORY

### § 780.600 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart G together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(13) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for certain employees who, in the same workweek, are employed by a farmer in agriculture and also in the farmer's livestock auction operations. As appears more fully in subpart A of this part, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The general exemptions provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture are not discussed in this subpart except in its relation to section 13(b)(13). The meaning and application of these exemptions are fully considered in subparts D and E of this part 780.

### § 780.601 Statutory provision.

Section 13(b)(13) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1).

### § 780.602 General explanatory statement.

Ordinarily, as discussed in subparts D and E of this part 780, an employee who in the same workweek engages in work which is exempt as agriculture under section 13(a)(6) or 13(b)(12) of the Act and also performs nonexempt work to which the Act applies is not exempt in that week (§ 780.11). Employees of a farmer are not employed in work exempt as ''agriculture'' while engaged in livestock auction operations in which the livestock offered at auction includes livestock raised by other farmers (*Mitchell* v. *Hunt*, 263 F. 2d 913) (C.A. 5); *Hearnsberger* v. *Gillespie*, 435 F. 2d 926 (C.A. 8). However, under section 13(b)(13) an employee who is employed by a farmer in agriculture as well as in livestock auction operations in the same workweek will not lose the overtime exemption for that workweek, if certain conditions are met. These conditions and their meaning and application are discussed in this subpart.

REQUIREMENTS FOR EXEMPTION

### § 780.603 What determines application of exemption.

The application of the section 13(b)(13) exemption depends largely

upon the nature of the work performed by the individual employee for whom exemption is sought. The character of the employer's business also determine the application of the exemption. Whether an employee is exempt therefore depends upon his duties as well as the nature of the employer's activities. Some employees of the employer may be exempt in some weeks and others may not.

### § 780.604 General requirements.

The general requirements for exemption under section 13(b)(13) are as follows:

(a) Employment of the employee ''primarily'' in agriculture in the particular workweek.

(b) This primary employment by a farmer.

(c) Engagement by the farmer in raising livestock.

(d) Engagement by the farmer in livestock auction operations ''as an adjunct to'' the raising of livestock.

(e) Payment of the minimum wage required by section 6(a)(1) of the Act for all hours spent in livestock auction work by the employee.

These requirements will be separately discussed in the following sections of this subpart.

### § 780.605 Employment in agriculture.

One requirement for exemption is that the employee be employed in ''agriculture.'' ''Agriculture,'' as used in the Act, is defined in section 3(f) as follows:

> (f) ''Agriculture'' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

An employee meets the tests of being employed in agriculture when he either engages in any one or more of the branches of farming listed in the first part of the above definition or performs, as an employee of a farmer or on a farm, practices incident to such farming operations as mentioned in the second part of the definition (*Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755). The exemption applies to ''any employee'' of a farmer whose employment meets the tests for exemption. Accordingly, any employee of the farmer who is employed in ''agriculture,'' including laborers, clerical, maintenance, and custodial employees, harvesters, dairy workers, and others may qualify for the exemption under section 13(b)(13) if the other conditions of the exemption are met.

### § 780.606 Interpretation of term "agriculture."

Section 3(f) of the Act, which defines ''agriculture,'' has been extensively interpreted by the Department of Labor and the courts. Subpart B of this part 780 contains those interpretations which have full application in construing the term ''agriculture'' as used in the 13(b)(13) exemption.

### § 780.607 "Primarily employed" in agriculture.

Not only must the employee be employed in agriculture, but he must be ''primarily'' so employed during the particular workweek or weeks in which the 13(b)(13) exemption is to be applied. The word ''primarily'' may be considered to mean chiefly or principally (*Agnew* v. *Board of Governors*, 153 F. 2d 785). This interpretation is consistent with the view, expressed by the sponsor of the exemption at the time of its adoption on the floor of the Senate (107 Cong. Rec. (daily ed., April 19, 1961), p. 5879), that the word means ''most of his time.'' The Department of Labor will consider that an employee who spends more than one-half of his hours worked in the particular workweek in agriculture, as defined in the Act, is ''primarily'' employed in agriculture during that week.

### § 780.608 "During his workweek."

Section 13(b)(13) specifically requires that the unit of time to be used in determining whether an employee is primarily employed in agriculture is ''during his workweek.'' The employee's own workweek, and not that of any other person, is to be used in applying the exemption. The employee's employment must meet the ''primarily'' test in each workweek in which the exemption is applied to him.

### § 780.609 Workweek unit in applying the exemption.

The unit of time to be used in determining the application of the exemption to an employee is the workweek. (See *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572.) A workweek is a fixed and regularly recurring interval of 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 of the workweek for the purpose of escaping the requirements of the Act is not permitted.

### § 780.610 Workweek exclusively in exempt work.

An employee who engages exclusively in a workweek in duties which come within the exemption under section 13(b)(13) and is paid in accordance with the requirements of that exemption, is exempt in that workweek from the overtime requirements of the Act.

### § 780.611 Workweek exclusively in agriculture.

In any workweek in which the employee works exclusively in agriculture, performing no duty in respect to livestock auction operations, his exemption for that week is determined by application of sections 13(a)(6) and 13(b)(12) to his activities. (See subparts D and E of this part.)

### § 780.612 Employment by a "farmer."

A further requirement for exemption is the expressed statutory one that the employee must be employed in agriculture by a ''farmer.'' Employment by a nonfarmer will not qualify an employee for the exemption.

### § 780.613 "By such farmer."

The employee's primary employment in agriculture during the exempt week is also required to be by ''such farmer.'' The phrase ''such farmer'' refers to the particular farmer by whom the employee is employed in agriculture and who engages in the livestock auction operations as an adjunct to his raising of livestock. Even if an employee may spend more than half of his work time in a workweek in agriculture, he would not be exempt if such employment in agriculture were engaged in for various persons so that less than the primary portion of his workweek was performed in his employment in agriculture by such farmer. For example, an employee may work a 60-hour week and be employed in agriculture for 50 of those hours, of which 20 hours are worked in his employment by the farmer who is engaged in the livestock auction operations, the other 30 being performed for a neighboring farmer. Although this employee was primarily employed in agriculture during the workweek he is not exempt. His primary employment in agriculture was not by the farmer described in section 13(b)(13) as required.

### § 780.614 Definition of a farmer.

The Act does not define the term ''farmer.'' Whether an employer is a ''farmer'' within the meaning of section 13(b)(13) must be determined by consideration of the particular facts, keeping in mind the purpose of the exemption. A full discussion of the meaning of the term ''farmer'' as used in the Act's definition of agriculture is contained in §§ 780.130 through 780.133. Generally, as indicated in that discussion, a farmer under the Act is one who engages, as an occupation, in farming operations as a distinct activity for the purpose of producing a farm crop. A corporation or a farmers' cooperative may be a ''farmer'' if engaged in actual farming of the nature and extent there indicated.

### § 780.615 Raising of livestock.

Livestock auction operations are within the 13(b)(13) exemption only

when they are conducted as an adjunct to the raising of livestock by the farmer. The farmer is required to engage in the raising of livestock as a prerequisite for the exemption of an employee employed in the operations described in section 13(b) (13). Engagement by the farmer in one or more of the other branches of farming will not meet this requirement.

### § 780.616 Operations included in raising livestock.

Raising livestock includes such operations as the breeding, fattening, feeding, and care of domestic animals ordinarily raised or used on farms. A fuller discussion of the meaning of raising livestock is contained in §§ 780.119 through 780.122.

### § 780.617 Adjunct livestock auction operations.

The livestock auction operations referred to in section 13(b)(13) are those engaged in by the farmer ''as an adjunct'' to the raising of livestock. This phrase limits the relative extent to which the farmer may conduct livestock auctions and claim exemption under section 13(b)(13). To qualify under the exemption provision, the auction operations should be an established part of the farmer's raising of the livestock and subordinate to it. (*Hearnsberger* v. *Gillespie*, 435 F. 2d 926 (C.A. 8).) The auction operations should not be conducted on so large a scale as to predominate over the raising of livestock. The livestock auction should be adjunct to the farmer's raising of livestock not only when he engages in it on his own account, but also when he joins with other farmers to hold an auction.

### § 780.618 "His own account"—"in conjunction with other farmers."

Under the terms of section 13(b)(13), the farmer may operate a livestock auction solely for his own benefit or he may join with ''other farmers'' to auction livestock for their mutual benefit. (See § 780.614 with regard to the definition of ''farmer.'') Unless the auction is conducted by the farmer alone or with others who are ''farmers'' the exemption does not apply.

### § 780.619 Work "in connection with" livestock auction operations.

An employee whose agricultural employment meets the tests for exemption may engage in ''other'' employment ''in connection with'' his employer's livestock auction operations under the conditions stated in section 13(b)(13). The work which an employee may engage in under the phrase ''in connection with'' includes only those activities which are a necessary incident to conducting a livestock auction of the limited type permitted under the exemption. Such work as transporting the livestock and caring for it, custodial, maintenance, and clerical duties are included. Work which cannot be considered necessarily incident to the livestock auction is not exempt.

### § 780.620 Minimum wage for livestock auction work.

The application of the exemption is further determined by whether another condition has been met. That condition is that the employee, in the workweek in which he engages in livestock auction activities, must be paid at a wage rate not less than the minimum rate required by section 6(a)(1) of the Act for the time spent in livestock auction work. The exemption does not apply unless there is payment for all hours spent in livestock auction work at not less than the applicable minimum rate prescribed in the Act.

## EFFECT OF EXEMPTION

### § 780.621 No overtime wages in exempt week.

In a workweek in which all the requirements of the section 13(b)(13) exemption are met, the employee is exempt from the overtime requirements of section 7 for that entire workweek.

## Subpart H—Employment by Small Country Elevators Within Area of Production; Exemption From Overtime Pay Requirements Under Section 13(b)(14)

INTRODUCTORY

### § 780.700 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for employees employed by certain country elevators ''within the area of production,'' as defined by the Secretary of Labor in part 536 of this chapter.

### § 780.701 Statutory provision.

Section 13(b)(14) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm: *Provided,* That no more than five employees are employed in the establishment in such operations * * *.

### § 780.702 What determines application of the exemption.

The application of the section 13(b)(14) exemption depends on te employment of the employee by an establishment of the kind described in the section, and on such employment ''within the area of production'' as defined by regulation. In any workweek when an employee is employed in country elevator activities by such an establishment within the area of production, the overtime pay requirements of the Act will not apply to him.

### § 780.703 Basic requirements for exemption.

The basic requirements for exemption of country elevator employees under section 13(b)(14) of the Act are as follows:

(a) The employing establishment must:

(1) Be an establishment ''commonly recognized as a country elevator,'' and

(2) Have not more than five employees employed in its operations as such; and

(b) The employee must:

(1) Be ''employed by'' such establishment, and

(2) Be employed ''within the area of production,'' as defined by the Secretary of Labor.

All the requirements must be met in order for the exemption to apply to an employee in any workweek. The requirements in section 13(b)(14) are ''explicit prerequisites to exemption'' and the burden of showing that they are satisfied rests upon the employer who asserts that the exemption applies (*Arnold* v. *Kanowsky*, 361 U.S. 388). In accordance with the general rules stated in § 780.2 of subpart A of this part, this exemption is to be narrowly construed and applied only to those establishments plainly and unmistakably within its terms and spirit. The requirements for its application will be separately discussed below.

ESTABLISHMENT COMMONLY RECOGNIZED AS A COUNTRY ELEVATOR

### § 780.704 Dependence of exemption on nature of employing establishment.

If an employee is to be exempt under section 13(b)(14), he must be employed by an ''establishment'' which is ''commonly recognized as a country elevator.'' If he is employed by such an establishment, the fact that it may be part of a larger enterprise which also engages in activities that are not recognized as those of country elevators (see *Tobin* v. *Flour Mills*, 185 F. 2d 596) would not make the exemption inapplicable.

### § 780.705 Meaning of "establishment."

The word ''establishment'' has long been interpreted by the Department of Labor and the courts to mean a distinct physical place of business and not to include all the places of business which may be operated by an organization (*Phillips* v. *Walling*, 334 U.S. 490;

*Mitchell* v. *Bekins Van and Storage Co.*, 352 U.S. 1027). Thus, in the case of a business organization which operates a number of country elevators (see *Tobin* v. *Flour Mills*, 185 F. 2d 596), each individual elevator or other place of business would constitute an establishment, within the meaning of the Act. Country elevators are usually one-unit places of business with, in some cases, an adjoining flat warehouse. No problem exists of determining what is the establishment in such cases. However, where separate facilities are used by a country elevator, a determination must be made, based on their proximity to the elevator and their relationship to its operations, on whether the facilities and the elevator are one or more than one establishment. If there are more than one, it must be determined by which establishment the employee is employed and whether that establishment meets the requirements of section 13(b)(14) before the application of the exemption to the employee can be ascertained (compare *Mitchell* v. *Cammill*, 245 F. 2d 207; *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262).

### § 780.706 Recognition of character of establishment.

A further requirement for exemption is that the establishment must be ''commonly recognized'' as a country elevator. The word ''commonly'' means ordinarily or generally and the term ''recognized'' means known. An elevator should be generally known by the public as a country elevator. This requirement imposes, on the establishment for whose employees exemption is sought, the obligation to demonstrate that it engages in the type of work and has the attributes which will cause the general public to know it as a country elevator. The recognition which the statute requires must be shown to exist if the employer seeks to take the benefit of the exemption (see *Arnold* v. *Kanowsky*, 361 U.S. 388, 395).

### § 780.707 Establishments "commonly recognized" as country elevators.

In determining whether a particular establishment is one that is ''commonly recognized'' as a country elevator—and this must be true of the particular establishment if the exemption is to apply—it should be kept in mind that the intent of section 13(b)(14) is to ''exempt country elevators that market farm products, mostly grain, for farmers'' (107 Cong. Rec. (daily ed.) p. 5883). It is also appropriate to consider the characteristics and functions which the courts and government agencies have recognized as those of ''country elevators'' and the distinctions which have been recognized between country elevators and other types of establishments. For example, in proceedings to determine industries of a seasonal nature under part 526 of the regulations in this chapter, ''country'' grain elevators, public terminal and subterminal grain elevators, wheat flour mill elevators, non-elevator-type bulk grain storing establishments, and ''flat warehouses'' in which grain is stored in sacks, have been recognized as distinct types of establishments engaged in grain storage. (See 24 FR 2584; 3581.) As the legislative history of the exemption cited above makes clear, country elevators handle ''mostly grain.'' The courts have recognized that the terms ''country elevator'' and ''country grain elevator'' are interchangeable (the term ''country house'' has also been recognized as synonymous), and that there are significant differences between country elevators and other types of establishments engaged in grain storage (see *Tobin* v. *Flour Mils*, 185 F. 2d 596; *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269).

### § 780.708 A country elevator is located near and serves farmers.

Country elevators, as commonly recognized, are typically located along railroads in small towns or rural areas near grain farmers, and have facilities especially designed for receiving bulk grain by wagon or truck from farms, elevating it to storage bins, and direct loading of the grain in its natural state into railroad boxcars. The principal function of such elevators is to provide a point of initial concentration for grain grown in their local area and to handle, store for limited periods, and load out such grain for movement in carload lots by rail from the producing area to its ultimate destination. They

also perform a transport function in facilitating the even and orderly movement of grain over the interstate network of railroads from the producing areas to terminal elevators, markets, mills, processors, consumers, and to seaboard ports for export. The country elevator is typically the farmer's market for his grain or the point at which his grain is delivered to carriers for transportation to market. The elevator may purchase the grain from the farmer or store and handle it for him, and it may also store and handle substantial quantities of grain owned by or pledged to the Government under a price-support program. Country elevators customarily receive, weigh, test, grade, clean, mix, dry, fumigate, store, and load out grain in its natural state, and provide certain incidental services and supplies to farmers in the locality. The foregoing attributes of country elevators have been recognized by the courts. See, for example, *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269; *Tobin* v. *Flour Mills,* 185 F. 2d 596; *Holt* v. *Barnesville Elevator Co.,* 145 F. 2d 250; *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262.

**§ 780.709 Size and equipment of a country elevator.**

Typically, the establishments commonly recognized as country elevators are small. Most of the establishments intended to come within the exemption have only one or two employees (107 Cong. Rec. (daily ed.) p. 5883), although some country elevators have a larger number. (See *Holt* v. *Barnesville Elevator Co.,* 145 F. 2d 250.) Establishments with more than five employees are not within the exemption. (See § 780.712.) The storage capacity of a country elevator may be as small as 6,000 bushels (see *Tobin* v. *Flour Mills,* 185 F. 2d 596) and will generally range from 15,000 to 50,000 bushels. As indicated in § 780.708, country elevators are equipped to receive grain in wagons or trucks from farmers and to load it in railroad boxcars. The facilities typically include scales for weighing the farm vehicles loaded with grain, grain bins, cleaning and mixing machinery, driers for prestorage drying of grain and endless conveyor belts or chain scoops to carry grain from the ground to the top of the elevator. The facilities for receiving grain in truckloads or wagonloads from farmers and the limited storage capacity, together with location of the elevator in or near the grain-producing area, serve to distinguish country elevators from terminal or subterminal elevators, to which the exemption is not applicable. The latter are located at terminal or interior market points, receive grain in carload lots, and receive the bulk of their grain from country elevators. Although some may receive grain from farms in the immediate areas, they are not typically equipped to receive grain except by rail. (See *Tobin* v. *Flour Mills,* supra; *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269.) It is the facilities of a country elevator for the elevation of bulk grain and the discharge of such grain into rail cars that make it an ''elevator'' and distinguish it from warehouses that perform similar functions in the flat warehousing, storage, and marketing for farmers of grain in sacks. Such warehouses are not ''elevators'' and therefore do not come within the section 13(b)(14) exemption.

**§ 780.710 A country elevator may sell products and services to farmers.**

Section 13(b)(14) expressly provides that an establishment commonly recognized as a country elevator, within the meaning of the exemption, includes ''such an establishment which sells products and services used in the operation of a farm.'' This language makes it plain that if the establishment is ''such an establishment,'' that is, if its functions and attributes are such that it is ''commonly recognized as a country elevator'' but not otherwise, exemption of its employees under this section will not be lost solely by reason of the fact that it sells products and services used in the operation of a farm. Establishments commonly recognized as country elevators, especially the smaller ones, not only engage in the storing of grain but also conduct various merchandising or ''sideline'' operations as well. They may distribute feed grains to feeders and other farmers, sell fuels for farm use, sell and

treat seeds, and sell other farm supplies such as fertilizers, farm chemicals, mixed concentrates, twine, lumber, and farm hardware supplies and machinery. (See *Tobin* v. *Flour Mills,* 185 F. 2d 596; *Holt* v. *Barnesville Elevator Co.,* 145 F. 2d 250). Services performed for farmers by country elevators may include grinding of feeds, cleaning and fumigating seeds, supplying bottled gas, and gasoline station services. As conducted by establishments commonly recognized as country elevators, the selling of goods and services used in the operation of a farm is a minor and incidental secondary activity and not a main business of the elevator (see *Tobin* v. *Flour Mills,* supra; *Holt* v. *Barnesville Elevator Co.,* supra).

**§ 780.711 Exemption of mixed business applies only to country elevators.**

The language of section 13(b)(14) permitting application of the exemption to country elevators selling products and services used in the operation of a farm does not extend the exemption to an establishment selling products and services to farmers merely because of the fact that it is also equipped to provide elevator services to its customers. The exemption will not apply if the extent of its business of making sales to farmers is such that the establishment is not commonly known as a ''country elevator'' or is commonly recognized as an establishment of a different kind. As the legislative history of the exemption indicates, its purpose is limited to exempting country elevators that market farm products, mostly grain, for farmers who are working long workweeks and need to have the elevator facilities open and available for disposal of their crops during the same hours that are worked by the farmers. (See 107 Cong. Rec. (daily ed.) p.5883.) The reason for the exemption does not justify its application to employees selling products and services to farmers otherwise than as an incidental and subordinate part of the business of a country elevator as commonly recognized. An establishment making such sales must be ''such an establishment'' to come within this exemption. An employer may, however, be engaged in the business of making sales of goods and services to farmers in an establishment separate from the one in which he provides the recognized country elevator services. In such event, the exemption of employees who work in both establishments may depend on whether the work in the sales establishment comes within another exemption provided by the Act. (See *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262, and infra, § 780.724.)

EMPLOYMENT OF ''NO MORE THAN FIVE EMPLOYEES''

**§ 780.712 Limitation of exemption to establishments with five or fewer employees.**

If the operations of an establishment are such that it is commonly recognized as a country elevator, its employees may come within the section 13(b)(14) exemption provided that ''no more than five employees are employed in the establishment in such operations''. The exemption is intended, as explained by its sponsor, to ''affect only institutions that have five employees or less'' (107 Cong. Rec. (daily ed.) p. 5883). Since the Act is applied on a workweek basis, a country elevator is not an exempt place of work in any workweek in which more than five employees are employed in its operations.

**§ 780.713 Determining the number of employees generally.**

The number of employees referred to in section 13(b)(14) is the number ''employed in the establishment in such operations''. The determination of the number of employees so employed involves a consideration of the meaning of employment ''in the establishment'' and ''in such operations'' in relation to each other. If, in any workweek, an employee is ''employed in the establishment in such operations'' for more than a negligible period of time, he should be counted in determining whether, in that workweek, more than five employees were so employed. An employee so employed must be counted for this purpose regardless of whether he would, apart from this exemption, be within the coverage of the Act. Also, as noted in the following discussion, the employees to be counted are not necessarily limited to employees directly employed by the country elevator but may include employees directly

employed by others who are engaged in performing operations of the elevator establishment.

### § 780.714 Employees employed "in such operations" to be counted.

(a) The five-employee limitation on the exemption for country elevators relates to the number of employees employed in the establishment ''in such operations.'' This means that the employees to be counted include those employed in, and do not include any who are not employed in, the operations of the establishment commonly recognized as a country elevator, including the operations of such an establishment in selling products and services used in the operation of a farm, as previously explained.

(b) In some circumstances, an employee employed in an establishment commonly recognized as a country elevator may, during his workweek, be employed in work which is not part of the operations of the elevator establishment. This would be true, for example, in the case of an employee who spends his entire workweek in the construction of an overflow warehouse for the elevator. Such an employee would not be counted in that workweek because constructing a warehouse is not part of the operations of the country elevator but is an entirely distinct activity.

(c) Employees employed by the same employer in a separate establishment in which he is engaged in a different business, and not employed in the operations of the elevator establishment, would not be counted.

(d) Employees not employed by the elevator establishment who come there sporadically, occasionally, or casually in the course of their duties for other employers are not employed in the operations of the establishment commonly recognized as a country elevator and would not be counted in determining whether the five-employee limitation is exceeded in any workweek. Examples of such employees are employees of a restaurant who bring food and beverages to the elevator employees, and employees of other employers who make deliveries to the establishment.

### § 780.715 Counting employees "employed in the establishment."

(a) Employees employed ''in the establishment,'' if employed ''in such operations'' as previously explained, are to be counted in determining whether the five-employee limitation on the exemption is exceeded.

(b) Employees employed ''in'' the establishment clearly include all employees engaged, other than casually or sporadically, in performing any duties of their employment there, regardless of whether they are direct employees of the country elevator establishment or are employees of a farmer, independent contractor, or other person who are suffered or permitted to work (see Act, section 3(g)) in the establishment. However, tradesmen, such as dealers and their salesmen, for example, are not employed in the elevator simply because they visit the establishment to do business there. Neither are workers who deliver, on behalf of their employers, goods used in the sideline business of the establishment to be considered employed in the elevator.

(c) The use of the language ''employed in'' rather than ''engaged in'' makes it plain also that the employees to be counted include all those employed by the establishment in its operations without regard to whether they are engaged in the establishment or away from it in performing their duties. This has been the consistent interpretation of similar language in other sections of the Act.

## EMPLOYEES ''EMPLOYED * * * BY'' THE COUNTRY ELEVATOR ESTABLISHMENT

### § 780.716 Exemption of employees "employed * * * by" the establishment.

If the establishment is a country elevator establishment qualified for exemption as previously explained, and if the ''area of production'' requirement is met (see § 780.720), any employee ''employed * * * by'' such establishment will come within the section 13(b)(14) exemption. This will bring within the exemption employees who are engaged in duties performed away from the establishment as well as those

whose duties are performed in the establishment itself, so long as such employees are ''employed * * * by'' the country elevator establishment within the meaning of the Act. The employees employed ''by'' the establishment, who may come within the exemption if the other requirements are met, are not necessarily identical with the employees employed ''in the establishment in such operations'' who must be counted for purposes of the five-employee limitation since some of the latter employees may be employed by another employer. (See §§ 780.712 through 780.715.)

### § 780.717 Determining whether there is employment "by" the establishment.

(a) No single test will determine whether a worker is in fact employed ''by'' a country elevator establishment. This question must be decided on the basis of the total situation (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *U.S.* v. *Silk*, 331 U.S. 704). Clearly, an employee is so employed where he is hired by the elevator, engages in its work, is paid by the elevator and is under its supervision and control.

(b) ''Employed by'' requires that there be an employer-employee relationship between the worker and the employer engaged in operating the elevator. The fact, however, that the employer carries an employee on the payroll of the country elevator establishment which qualifies for exemption does not automatically extend the exemption to that employee. In order to be exempt an employee must actually be ''employed by'' the exempt establishment. This means that whether the employee is performing his duties inside or outside the establishment, he must be employed in the work of the exempt establishment itself in activities within the scope of its exempt business in order to meet the requirement of actual employment ''by'' the establishment (see *Walling* v. *Connecticut Co.*, 154 F. 2d 552).

(c) In the case of employers who operate multiunit enterprises and conduct business operations in more than one establishment (see *Tobin* v. *Flour Mills*, 185 F. 2d 596; *Remington* v. *Shaw* (W.D. Mich.) 2 WH Cases 262), there will be employees of the employer who perform central office or central warehousing activities for the enterprise or for more than one establishment, and there may be other employees who spend time in the various establishments of the enterprise performing duties for the enterprise rather than for the particular establishment in which they are working at the time. Such employees are employed by the enterprise and not by any particular establishment of the employer (*Mitchell* v. *Miller Drugs*, 255 F. 2d 574; *Mitchell* v. *Kroger Co.*, 248 F. 2d 935). Accordingly, so long as they perform such functions for the enterprise they would not be exempt as employees employed by a country elevator establishment operated as part of such an enterprise, even while stationed in it or placed on its payroll.

### § 780.718 Employees who may be exempt.

Employees employed ''by'' a country elevator establishment which qualifies for exemption will be exempt, if the ''area of production'' requirement is met, while they are engaged in any of the customary operations of the establishment which is commonly recognized as a country elevator. Included among such employees are those who are engaged in selling the elevator's goods or services, keeping its books, receiving, handling, and loading out grain, grinding and mixing feed or treating seed for farmers, performing ordinary maintenance and repair of the premises and equipment or engaging in any other work of the establishment which is commonly recognized as part of its operations as a country elevator. An employee employed by such an elevator is not restricted to performing his work inside the establishment. He may also engage in his exempt duties away from the elevator. For example, a salesman who visits farmers on their farms to discuss the storage of their grain in the elevator is performing exempt work while on such visits. It is sufficient that an employee employed by an elevator is, while working away from the establishment, doing the exempt work of the elevator. If the establishment is engaged only in activities commonly recognized as those of a

country elevator and none of its employees engaged in any other activities, all the employees employed by the country elevator will come within the exemption if no more than five employees are employed in the establishment in such operations and if the ''area of production'' requirement is met.

### § 780.719 Employees not employed "by" the elevator establishment.

Since the exemption depends on employment ''by'' an establishment qualified for exemption rather than simply the work of the employee, employees who are not employed by the country elevator are not exempt. This is so even though they work in the establishment and engage in duties which are part of the services which are commonly recognized as those of a country elevator. Since they are not employed by the elevator, employees of independent contractors, farmers and others who work in or for the elevator are not exempt under section 13(b)(14) simply because they work in or for the elevator (see *Walling* v. *Friend*, 156 F. 2d 429; *Mitchell* v. *Kroger*, 248 F. 2d 935; *Durkin* v. *Joyce Agency*, 110 F. Supp. 918, affirmed sub. nom. *Mitchell* v. *Joyce Agency*, 348 U.S. 945). Thus an employee of an independent contractor who works inside the elevator in drying grain for the elevator is not exempt under this section.

## EMPLOYMENT ''WITHIN THE AREA OF PRODUCTION''

### § 780.720 "Area of production" requirement of exemption.

(a) In addition to the requirements for exemption previously discussed, section 13(b)(14) requires that the employee employed by an establishment commonly recognized as a country elevator be ''employed within the area of production (as defined by the Secretary).'' Regulations defining employment within the ''area of production'' for purposes of section 13(b)(14) are contained in part 536 of this chapter. All the requirements of the applicable regulations must be met in order for the exemption to apply.

(b) Under the regulations, an employee is considered to be employed within ''the area of production'' within the meaning of section 13(b)(14) if the country elevator establishment by which he is employed is located in the ''open country or a rural community,'' as defined in the regulations, and receives 95 percent or more of the agricultural commodities handled through its elevator services from normal rural sources of supply within specified distances from the country elevator. A definition of ''area of production'' in terms of such criteria has been upheld by the U.S. Supreme Court in *Mitchell* v. *Budd*, 350 U.S. 473. Reference should be made to part 536 of this chapter for the precise requirements of the definition.

(c) However, it is appropriate to point out here that nothing in the definition places limits on the distance from which commodities come to the elevator for purposes other than the storage of marketing of farm products. The commodities, 95 percent of which are required by definition to come from specified distances, are those agriculural commodities received by the elevator with respect to which it performs the primary concentration, storage, and marketing functions of a country elevator as previously explained (see § 780.708). This is consistent with the emphasis given, in the legislative history, to the country elevator's function of marketing farm products, mostly grain, for farmers (see 107 Cong. Rec. (daily ed.) p. 5883). Commodities brought or shipped to a country elevator establishment not for storage or for market but in connection with its secondary, incidental, or side-line functions of selling products and services used in the operation of a farm (see § 780.610) are not required to be counted in determining whether 95 percent of the agricultural commodities handled come from rural sources of supply within the specified distances.

## WORKWEEK APPLICATION OF EXEMPTION

### § 780.721 Employment in the particular workweek as test of exemption.

The period for determining whether the ''area of production'' requirement of section 13(b)(14) is met is prescribed in the regulations in part 536 of this chapter. Whether or not an establishment is one commonly recognized as a

country elevator must be tested by general functions and attributes over a representative period of time, as previously explained, and requires reexamination for exemption purposes only if these change. But insofar as the exemption depends for its application on the employment of employees, it applies on a workweek basis. An employee employed by the establishment is not exempt in any workweek when more than five employees ''are employed in the establishment in such operations,'' as previously explained (see §§ 780.712 through 780.715). Nor is any employee within the exemption in a workweek when he is not employed ''by'' the establishment within the meaning of section 13(b)(14) (see §§ 780.716 through 780.719). This is in accordance with the general rule that the unit of time to be used in determining the application of the Act and its exemptions to an employee is the workweek. (See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. *Mitchell* v. *Hunt*, 263 F. 2d 913; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n*, 80 F. Supp. 953, affirmed 181 F. 2d 697.) A workweek is a fixed and regularly recurring interval of 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.

### § 780.722 Exempt workweeks.

An employee performing work for an establishment commonly recognized as a country elevator is exempt under section 13(b)(14) in any workweek when he is, for the entire workweek, employed ''by'' such establishment, if no more than five employees are ''employed in the establishment in such operations'', and if the ''area of production'' requirement is met.

### § 780.723 Exempt and nonexempt employment.

Under section 13(b)(14), where an employee, for part of his workweek, is employed ''by'' an ''exempt'' establishment (one commonly recognized as a country elevator which has five employees or less employed in the establishment in such operations in that workweek) and the employee is, in his employment by the establishment, employed ''within the area of production'' as defined by the regulations, but in the remainder of the workweek is employed by his employer in an establishment or in activities not within this or another exemption provided by the Act, in the course of which he performs any work to which the Act applies, the employee is, not exempt for any part of that workweek (see *Mitchell* v. *Hunt*, 263 F. 2d 913; *Waialua* v. *Maneja*, 77 F. Supp. 480; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n*, 181 F. 2d 697).

### § 780.724 Work exempt under another section of the Act.

Where an employee's employment during part of his workweek would qualify for exemption under section 13(b)(14) if it continued throughout the workweek, and the remainder of his workweek is spent in employment which, if it continued throughout the workweek, would qualify for exemption under another section or sections of the Act, the exemptions may be combined (see *Remington* v. *Shaw* (W.D. Mich.) 2 WH Cases 262). The employee, however, qualifies for exemption only to the extent of the exemption which is more limited in scope (see *Mitchell* v. *Hunt*, 263 F. 2d 913). For example, if part of the 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 provisions under another section, the employee is exempt that week from the overtime provisions, but not from the minimum wage requirements. In this connection, attention is directed to another exemption in the Act which relates to work in grain elevators, which may apply in appropriate circumstances, either in combination with section 13(b)(14) or to employees for whom the requirements of section 13(b)(14) cannot be met. This other exemption is that provided by section 7(c). Section 7(c), which is discussed in part 526 of this chapter, provides a limited overtime exemption for employees

employed in the seasonal industry of storing grain in country grain elevators, public terminal and sub-terminal elevators, wheat flour mills, nonelevator bulk storing establishments and flat warehouses, § 526.10(b)(14) of this chapter.

## Subpart I—Employment in Ginning of Cotton and Processing of Sugar Beets, Sugar-Beet Molasses, Sugarcane, or Maple Sap into Sugar or Syrup; Exemption From Overtime Pay Requirements Under Section 13(b)(15)

INTRODUCTORY

### § 780.800 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart I constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(15) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for two industries (a) for employees engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and (b) for employees engaged in the processing of sugar beets, sugar-beet molasses, sugarcane or maple sap, into sugar (other than refined sugar) or syrup. The limited overtime exemptions provided for cotton ginning and for sugar processing under sections 7(c) and 7(d) (see part 526 of this chapter) are not discussed in this subpart.

### § 780.801 Statutory provisions.

Section 13(b)(15) of the Fair Labor Standards Act exempts from the overtime requirements of section 7:

> Any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (other than refined sugar) or syrup.

Section 13(b)(15) supplants two exemptions that were contained in the Act prior to the Fair Labor Standards Amendments of 1966. The first is former section 13(a)(18), having identical language, which provided a complete exemption for those employed in the ginning of cotton. The second is the former section 7(c) which provided an overtime exemption for the employees of an employer engaged in sugar processing operations resulting in unrefined sugar or syrup.

### § 780.802 What determines application of the exemption.

It is apparent from the language of section 13(b)(15) that the application of this exemption depends upon the nature and purpose of the work performed by the individual employee for whom exemption is sought, and in the case of ginning of cotton on the location of the place of employment where the work is done and other factors as well. It does not depend upon the character of the business of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may be exempt while others may not.

### § 780.803 Basic conditions of exemption; first part, ginning of cotton.

Under the first part of section 13(b)(15) of the Act, the ginning of cotton, all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be ''engaged in ginning.''

(b) The commodity ginned must be cotton.

(c) The ginning of the cotton must be ''for market.''

(d) The place of employment in which this work is done must be ''located in a county where cotton is grown in commercial quantities.'' The following sections discuss the meaning and application of these requirements.

GINNING OF COTTON FOR MARKET

### § 780.804 "Ginning" of cotton.

The term ''ginning'' refers to operations performed on ''seed cotton'' to separate the seeds from the spinnable fibers. (*Moore* v. *Farmer's Manufacturing and Ginning Co.*, 51 Ariz., 378, 77 F. 2d 209; *Frazier* v. *Stone*, 171 Miss. 56, 156 So.

596). ''Seed cotton'' is cotton in its natural state (*Burchfield* v. *Tanner*, 142 Tex. 404, 178 S.W. 2d 681, 683) and the ginning to which section 13(b)(15) refers is the ''first processing'' of this agricultural commodity (107 Cong. Rec. (daily ed.) p. 5887), which converts it into the marketable product commonly known as ''lint cotton'' (*Wirtz* v. *Southern Pickery Inc.* (W.D. Tenn.) 278 F. Supp. 729; *Mangan* v. *State*, 76 Ala. 60, 66) by removing the seed from the lint and then pressing and wrapping the lint into bales.

### § 780.805 Ginning of "cotton."

Only the ginning of ''cotton'' is within the first part of the exemption. An employee engaged in ginning of moss, for example, would not be exempt. The reconditioning of cotton waste resulting from spinning or oil mill operations is not included, since such waste is not the agricultural commodity in its natural state for whose first processing the exemption was provided. (See 107 Cong. Rec. (daily ed.) p. 5887.) The ''cotton,'' ''seed cotton,'' and ''lint cotton'' ginned by ordinary gins do not include ''linter'' or ''Grabbot'' cotton, obtained by reginning cotton seed and hard locks of cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning (*Mississippi Levee Com'rs* v. *Refuge Cotton Oil Co.*, 91 Miss. 480, 44 So. 828, 829). Mote ginning, the process whereby raw motes (leaves, trash, sticks, dirt, and immature cotton with some cottonseed) are run through a ginning process to extract the short-fiber cotton, is not included in the ginning of cotton unless it is done as a part of the whole ginning process in one gin establishment as a continuous and uninterrupted series of operations resulting in useful cotton products including the regular ''gin'' bales, the ''mote'' bales (short-fiber cotton), and the cottonseed.

### § 780.806 Exempt ginning limited to first processing.

As indicated in § 780.804, the ginning for which the exemption is intended is the first processing of the agricultural commodity, cotton, in its natural form, into lint cotton for market. It does not include further operations which may be performed on the cottonseed or the cotton lint, even though such operations are performed in the same establishment where the ginning is done. Delinting, which is the removal of short fibers and fuzz from cottonseed, is not exempt under section 13(b)(15). It is not first processing of the seed cotton; rather, it is performed on cottonseed, usually in cottonseed processing establishments, and even if regarded as ginning (*Mitchell* v. *Burgess*, 239 F. 2d 484) it is not the ginning of cotton for market contemplated by section 13(b)(15). It may come within the overtime exemption provided in section 7(d) of the Act for certain seasonal industries. (See § 526.11(b)(1) of part 526 of this chapter.) Compressing of cotton, which is the pressing of bales into higher density bales than those which come from the gin, is a further processing of the cotton entirely removed from ginning (*Peacock* v. *Lubbock Compress Co.*, 252 F. 2d 892). Employees engaged in compressing may, however, be subject to exemption from overtime pay under section 7(c). (See § 526.10(b)(8) of this chapter.)

### § 780.807 Cotton must be ginned "for market."

As noted in § 780.804, it is ginning of seed cotton which converts the cotton to marketable form. Section 13(b)(15), however, provides an exemption only where the cotton is actually ginned ''for market.'' (*Wirtz* v. *Southern Pickery, Inc.* (W.D. Tenn.) 278 F. Supp. 729.) The ginning of cotton for some other purpose is not exempt work. Cotton is not ginned ''for market'' if it is not to be marketed in the form in which the ginning operation leaves it. Cotton is not ginned ''for market'' if it is being ginned preliminary to further processing operations to be performed on the cotton by the same employer before marketing the commodity in an altered form. (Compare *Mitchell* v. *Park* (D. Minn.), 14 WH Cases 43, 36 Labor Cases 65, 191; *Bush* v. *Wilson & Co.*, 157 Kans. 82, 138 P. 2d 457; *Gaskin* v. *Clell Coleman & Sons*, 2 WH Cases 977.)

EMPLOYEES ''ENGAGED IN'' GINNING

**§ 780.808 Who may qualify for the exemption generally.**

The exemption applies to ''any employee engaged in'' ginning of cotton. This means that the exemption may apply to an employee so engaged, no matter by whom he is employed. Employees of the gin operator, of an independent contractor, or of a farmer may come within the exemption in any workweek when all other conditions of the exemption are met. To come within the exemption, however, an employee's work must be an integral part of ginning of cotton, as previously described. The courts have uniformly held that exemptions in the Act must be construed strictly to carry out the purpose of the Act. (See § 780.2, in subpart A of this part.) No operation in which an employee engages in a place of employment where cotton is ginned is exempt unless it comes within the meaning of the term ''ginning.''

**§ 780.809 Employees engaged in exempt operations.**

Employees engaged in actual ginning operations, as described in § 780.804 will come within the exemption if all other conditions of section 13(b)(15) are met. The following activities are among those within the meaning of the term ''engaged in ginning of cotton'':

(a) ''Spotting'' vehicles in the gin yard or in nearby areas before or after being weighed.

(b) Moving vehicles in the gin yard or from nearby areas to the ''Suction'' and reparking them subsequently.

(c) Weighing the seed cotton prior to ginning, weighing lint cotton and seed subsequent to ginning (including preparation of weight records and tickets in connection with weighing operations).

(d) Placing seed cotton in temporary storage at the gin and removing the cotton from such storage to be ginned.

(e) Operating the suction feed.

(f) Operating the gin stands and power equipment.

(g) Making gin repairs during the ginning season.

(h) Operating the press, including the handling of bagging and ties in connection with the ginning operations of that gin.

(i) Removing bales from the press to holding areas on or near the gin premises.

(j) Others whose work is so directly and physically connected with the ginning process itself that it constitutes an integral part of its actual performance.

**§ 780.810 Employees not "engaged in" ginning.**

Since an employee must actually be ''engaged in'' ginning of cotton to come within the exemption, an employee engaged in other tasks, not an integral part of ''ginning'' operations, will not be exempt. (See, for rule that only the employees performing the work described in the exemption are exempt, *Wirtz* v. *Burton Mercantile and Gin Co., Inc.*, 234 F. Supp. 825, aff'd per curiam 338 F. 2d 414, cert. denied 380 U.S. 965; *Wirtz* v. *Kelso Gin Co., Inc.* (E.D. Ark.) 50 Labor Cases 31, 631, 16 WH Cases 663; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Phillips* v. *Meeker Cooperative Light and Power Ass'n* 63 F. Supp. 743, affirmed 158 F. 2d 698; *Jenkins* v. *Durkin*, 208 F. 2d 941; *Heaburg* v. *Independent Oil Mill, Inc.*, 46 F. Supp. 751; *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F. Supp. 969.) The following activities are among those not within the meaning of the term ''engaged in ginning of cotton'':

(a) Transporting seed cotton from farms or other points to the gin.

(b) General maintenance work (as opposed to operating repairs).

(c) General office and custodial duties.

(d) ''Watching'' duties.

(e) Working in the seed house.

(f) Transporting seed, hulls, and ginned bales away from the gin.

(g) Any activity performed during the ''off-season.''

COUNTY WHERE COTTON IS GROWN IN COMMERCIAL QUANTITIES

**§ 780.811 Exemption dependent upon place of employment generally.**

Under the first part of section 13(b)(15), if the employee's work meets the requirements for exemption, the location of the place of employment where he performs it will determine whether the exemption is applicable. This location is required to be in a

county where cotton is grown in commercial quantities. The exemption will apply, however, to an employee who performs such work in ''any'' place of employment in such a county. The place of employment in which he engages in ginning need not be an establishment exclusively or even principally devoted to such operations; nor is it important whether the place of employment is on a farm or in a town or city in such a county, or whether or to what extent the cotton ginned there comes from the county in which the ginning is done or from nearby or distant sources. It is enough if the place of employment where the employee is engaged in ginning cotton for market is ''located'' in such a county.

### § 780.812 "County."

As used in the section 13(b)(15) exemption, the term ''county'' refers to the political subdivision of a State commonly known as such, whether or not such a unit bears that name in a particular State. It would, for example, refer to the political subdivision known as a ''parish'' in the State of Louisiana. A place of employment would not be located in a county, within the meaning of the exemption, if it were located in a city which, in the particular State, was not a part of any county.

### § 780.813 "County where cotton is grown."

For the exemption to apply, the employee must be ginning cotton in a place of employment in a county where cotton ''is grown'' in the described quantities. It is the cotton grown, not the cotton ginned in the place of employment, to which the quantity test is applicable. The quantities of cotton ginned in the county do not matter, so long as the requisite quantities are grown there.

### § 780.814 "Grown in commercial quantities."

Cotton must be ''grown in commercial quantities'' in the county where the place of employment is located if an employee ginning cotton in such place is to be exempt under section 13(b)(15). The term ''commercial quantities'' is not defined in the statute, but in the cotton-growing areas of the country there should be little question in most instances as to whether commercial quantities of cotton are grown in the county where the ginning is done. If it should become necessary to determine whether commercial quantities are grown in a particular county, it would appear appropriate in view of crop-year variations to consider average quantities produced over a representative period such as 5 years. On the question of whether the quantities grown are ''commercial'' quantities, the trade understanding of what are ''commercial'' quantities of cotton would be important. It would appear appropriate also to measure ''commercial'' quantities in terms of marketable lint cotton in bales rather than by acreage or amounts of seed cotton grown, since seed cotton is not a commercially marketable product (*Mangan* v. *State*, 76 Ala. 60). Also, production of a commodity in ''commercial'' quantities generally involves quantities sufficient for sale with a reasonable expectation of some return to the producers in excess of costs (*Bianco* v. *Hess* (Ariz.), 339 P. 2d 1038; *Nystel* v. *Thomas* (Tex. Civ. App.) 42 S.W. 2d 168).

### § 780.815 Basic conditions of exemption; second part, processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

Under the second part of section 13(b)(15) of the Act, the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be engaged in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

(b) The product of the processing must be sugar (other than refined sugar) or syrup.

### § 780.816 Processing of specific commodities.

Only the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap is within the exemption. Operations performed on commodities other than those named are not exempt under this section even though they result in the production of unrefined sugar or syrup. For example, sorghum cane or refinery syrup (which is a byproduct of refined syrup) are not

named commodities and employees engaged in processing these products are not exempt under this section even though the resultant product is raw sugar. The loss of exemption would obtain for the same reason for employees engaged in processing sugar, glucose, or ribbon cane syrup into syrup.

### § 780.817 Employees engaged in processing.

Only those employees who are engaged in the processing will come within the exemption. The processing of sugarcane to which the exemption applies and in which the employee must be engaged in order to come within it is considered to begin when the processor receives the cane for processing and to end when the cane is processed ''into sugar (other than refined sugar) or syrup.'' Employees engaged in the following activities of a sugarcane processing mill are considered to be engaged in ''the processing of'' the sugarcane into the named products, within the meaning of the exemption:

(a) Loading of the sugarcane in the field or at a concentration point and hauling the cane to the mill ''if performed by employees of the mill.'' (Such activities performed by employees of some other employer, such as an independent contractor, are not considered to be within the exemption.)

(b) Weighing, unloading, and stacking the cane at the mill yard.

(c) Performing sampling tests (such as a trash test or sucrose content test) on the incoming cane.

(d) Washing the cane, feeding it into the mill crushers and crushing.

(e) Operations on the extracted cane juice in the making of raw sugar and molasses: Juice weighing and measurement, heating, clarification, filtration, evaporating, crystallization, centrifuging, and handling and storing the raw sugar or molasses at the plant during the grinding season.

(f) Laboratory analytical and testing operations at any point in the processing or at the end of the process.

(g) Loading out raw sugar or molasses during the grinding season.

(h) Handling, baling, or storing bagasse during the grinding season.

(i) Firing boilers and other activities connected with the overall operation of the plant machinery during grinding operations, including cleanup and maintenance work and day-to-day repairs. (This includes shop employees, mechanics, electricians, and employees maintaining stocks of various items used in repairs.)

### § 780.818 Employees not engaged in processing.

Employees engaged in operations which are not an integral part of processing of the named commodities will not come within the exemption. The following activities are not considered exempt under section 13(b)(15):

(a) Office and general clerical work.

(b) Feeding and housing millhands and visitors (typically this is called the ''boarding house'').

(c) Hauling raw sugar or molasses away from the mill.

(d) Any work outside the grinding season.

### § 780.819 Production must be of unrefined sugar or syrup.

The second part of the section 13(b)(15) exemption is specifically limited to the production ''of sugar (other than refined sugar) or syrup.'' The production of ''refined sugar'' a term which is commonly understood to refer to the refinement of ''raw sugar'' is expressly excluded. Thus, the exemption does not apply to the manufacture of sugar that is produced by melting sugar, purifying the melted sugar solution through a carbon medium process and the recrystallization of the sugar from this solution. Nor does the exemption apply to the processing of cane syrup into refined sugar or to the further processing of sugar, as for example, beet sugar into powdered or liquid sugar.

## Subpart J—Employment in Fruit and Vegetable Harvest Transportation; Exemption From Overtime Pay Requirements Under Section 13(b)(16)

INTRODUCTORY

### § 780.900 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart J together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(16) of the Fair Labor Standards Act of 1938, as amended. This section provides exemption from the overtime pay provisions of the Act for employees engaging in specified transportation activities when fruits and vegetables are harvested. As appears more fully in subpart A of this part, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The general exemption provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture, are not discussed in this subpart except in their relation to section 13(b)(16). The meaning and application of these exemptions are fully considered in subparts D and E, respectively, of this part 780.

### § 780.901 Statutory provisions.

Section 13(b)(16) of the Act exempts from the overtime provisions of section 7:

> Any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.

### § 780.902 Legislative history of exemption.

Since the language of section 13(b)(16) and its predecessor, section 13(a)(22) is identical, the legislative history of former section 13(a)(22) still retains its pertinency and vitality. The former section 13(a)(22) was added to the Act by the Fair Labor Standards Amendments of 1961. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. It would have altered the effect of holdings of the courts that operations such as those described in the amendment are not within the agriculture exemption provided by section 13(a)(6) when performed by employees of persons other than the farmer. (*Chapman* v. *Durkin*, 214 F. 2d 360, certiorari denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, certiorari denied, 348 U.S. 897.) The amendment was offered to exempt operations which, in the sponsor's view, were meant to be exempt under the original Act. (See 107 Cong. Rec. (daily ed.) p. 4523.) The Conference Committee, in changing the provision to make it a separate exemption made it clear that is was "not intended by the committee of conference to change by this exemption (for the described transportation employees) * * * the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts." (H. Rept. No. 327, 87th Cong., first session, p. 18.)

### § 780.903 General scope of exemption.

The exemption provided by section 13(b)(16) is in two parts, subsection (A), which exempts employees engaged in the described transportation and preparation for transportation of fruits or vegetables, and subsection (B) which exempts employees engaged in the specified transportation of employees who harvest fruits or vegetables. The transportation and preparation for transportation of fruits and vegetables must be from the farm to a place of first processing or first marketing located in the same State where the farm is located; the transportation of harvesters must be between the farm and a place located in the same State as the farm.

### § 780.904 What determines the exemption.

The application of the exemption provided by section 13(b)(16) depends on the nature of the employee's work and not on the character of the employer's business. An employee is not exempt in any workweek unless his employment in that workweek meets all the requirements for exemption. To determine whether an employee is exempt an examination should be made of the duties which that employee performs. Some employees of the employer may be exempt and others may not.

### § 780.905 Employers who may claim exemption.

A nonfarmer, as well as a farmer, who has an employee engaged in the operations specified in section 13(b)(16) may take advantage of the exemption. Employees of contractual haulers, packers, processors, wholesalers, ''bird-dog'' operators, and others may qualify for exemption. If an employee is engaged in the specified operations, the exemption will apply ''whether or not'' these operations are ''performed by the farmer'' who has grown the harvested fruits and vegetables. Where such operations are performed by the farmer, the engagement by his employee in them will provide a basis for exemption under section 13(b)(16) without regard to whether the farmer is performing the operations as an incident to or in conjunction with his farming operations.

## EXEMPT OPERATIONS ON FRUITS OR VEGETABLES

### § 780.906 Requisites for exemption generally.

Section 13(b)(16), in clause (A), provides an exemption from the overtime pay provision of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged ''in the transportation and preparation for transportation of fruits and vegetables''; and

(b) Such transportation must be transportation ''from the farm''; and

(c) The destination to which the fruits or vegetables are transported must be ''a place of first processing or first marketing''; and

(d) The transportation must be from the farm to such destination ''within the same State''.

### § 780.907 "Fruits or vegetables."

The exempt operations of preparing for transportation and transporting must be performed with respect to ''fruits or vegetables.'' The intent of section 13(b)(16) is to exempt such operations on fruits or vegetables which are ''just-harvested'' and still in their raw and natural state. As explained at the time of adoption of the amendment on the floor of the House, the exemption was intended to eliminate the difference in treatment of farmers and nonfarmers with respect to exemption of such ''handling or hauling of fruit or vegetables in their raw or natural state.'' (See 107 Cong. Rec. (daily ed.) p. 4523.) Transporting and preparing for transportation other farm products which are not fruits or vegetables are not exempt under section 13(b)(16). For example, operations on livestock, eggs, tobacco, or poultry are nonexempt. Sugarcane is not a fruit or vegetable for purposes of this exemption (*Wirtz* v. *Osceola Farms Co.*, 372 F. 2d 584).

### § 780.908 Relation of employee's work to specified transportation.

In order for the exemption to apply to an employee, he must be engaged ''in the transportation and preparation for transportation'' of the just-harvested fruits or vegetables from the farm to the specified places within the same State. Engagement in other activities is not exempt work. The employee must be actually engaged in the described operations. The exemption is not available for other employees of the employer, such as office, clerical, and maintenance workers.

### § 780.909 "Transportation."

''Transportation,'' as used in section 13(b)(16), refers to the movement by any means of conveyance of fruits or vegetables from the farm to a place of first processing or first marketing in the same State. It includes only those activities which are immediately necessary to move the fruits or vegetables to the specified points and the return

trips. Drivers, drivers' helpers, loaders, and checkers perform work which is exempt. Transportation ends with delivery at the receiving platform of the place to which the fruits or vegetables are transported. (*Mitchell* v. *Budd*, 350 U.S. 473.) Thus, unloading at the delivery point by employees who did not transport the commodities would not be a part of the transportation activities under section 13(b)(16).

**§ 780.910 Engagement in transportation and preparation.**

Since transportation and preparation for transportation are both exempt activities, an employee who engages in both is performing exempt work. In referring to ''the transportation and preparation for transportation'' of the fruits or vegetables, the statute recognizes the two activities as interrelated parts of the single task of moving the commodities from the farm to the designated points. Accordingly, the word ''and'' between the words ''transportation'' and ''preparation'' is not considered to require that any employee be employed in both parts of the task in order to be exempt. The exemption may apply to an employee engaged either in transporting or preparing the commodities for transportation if he otherwise qualifies under section 13(b)(16).

**§ 780.911 Preparation for transportation.**

The ''preparation for transportation'' of fruits or vegetables includes only those activities which are necessary to prepare the fruits or vegetables for transportation from the farm to the places described in section 13(b)(16). These preliminary activities on the farm will vary with the commodity involved, with the means of the transportation to be used, and with the nature of operations to be performed on the commodity after delivery.

**§ 780.912 Exempt preparation.**

The following operations, if required in order to move the commodities from the farm and to deliver them to a place of first marketing or first processing, are considered preparation for transportation: Assembling, weighing, placing the fruits or vegetables in containers such as lugs, crates, boxes or bags, icing, marking, labeling or fastening containers, and moving the commodities from storage or concentration areas on the farm to loading sites.

**§ 780.913 Nonexempt preparation.**

(a) *Retail packing*. Since the exemption, as expressly stated in section 13(b)(16), includes the transportation of the fruits or vegetables only to places of first marketing or first processing, packing or preparing for retail or further distribution beyond the place of first processing or first marketing is not exempt as ''preparation for transportation.'' (*Schultz* v. *Durrence* (D. Ga.), 19 WH Cases 747, 63 CCH Lab. Cas. secs. 32, 387.)

(b) *Preparation for market*. No exemption is provided under section 13(b)(16) for operations performed on the farm in preparation for market (such as ripening, cleaning, grading, or sorting) rather than in preparation for the transportation described in the section. Exemption, if any, for these activities should be considered under sections 13(a)(6) and 13(b)(12). (See subparts D and E of this part 780.)

(c) *Processing or canning*. Processing is not exempt preparation for transportation. Thus, the canning of fruits or vegetables is not under section 13(b)(16).

**§ 780.914 "From the farm."**

The exemption applies only to employees whose work relates to transportation of fruits or vegetables ''from the farm.'' The phrase ''from the farm'' makes it clear that the preparation of the fruits or vegetables should be performed on the farm and that the first movement of the commodities should commence at the farm. A ''farm'' has been interpreted under the Act to mean a tract of land devoted to one or more of the primary branches of farming outlined in the definition of ''agriculture'' in section 3(f) of the Act. These expressly include the cultivation and tillage of the soil and the growing and harvesting of any agricultural or horticultural commodities.

### § 780.915 "Place of first processing."

Under section 13(b)(16) the fruits or vegetables may be transported to only two types of places. One is a ''place of first processing'', which includes any place where canning, freezing, drying, preserving, or other operations which first change the form of the fresh fruits or vegetables from their raw and natural state are performed. (For overtime exemption applicable to ''first processing,'' see part 526 of this chapter.) A plant which grades and packs only is not a place of first processing (*Walling* v. *DeSoto Creamery and Produce Co.*, 51 F. Supp. 938). However, a packer's plant may qualify as a place of first marketing. (See § 780.916.)

### § 780.916 "Place of * * * first marketing."

A ''place of * * * first marketing'' is the second of the two types of places to which the freshly harvested fruits or vegetables may be transported from the farm under the exemption provided by section 13(b)(16). Typically, a place of first marketing is a farmer's market of the kind to which ''delivery to market'' is made within the meaning of section 3(f) of the Act when a farmer delivers such commodities there as an incident to or in conjunction with his own farming operations. Under section 13(b)(16), of course, there is no requirement that the transportation be performed by or for a farmer or as an incident to or in conjunction with any farming operations. A place of first marketing may be described in general terms as a place at which the freshly harvested fruits or vegetables brought from the farm are first delivered for marketing, such as a packing plant or an establishment of a wholesaler or other distributor, cooperative marketing agency, or processor to which the fruits or vegetables are first brought from the farm and delivered for sale. A place of first marketing may also be a place of first processing (see *Mitchell* v. *Budd*, 350 U.S. 473) but it need not be. The ''first place of packing'' to which the just-harvested fruits or vegetables are transported from the farm is intended to be included. (See 107 Cong. Rec. (daily ed.) p. 4523.) Transportation to places which are not first processing or first marketing places is not exempt.

### § 780.917 "Within the same State."

To qualify for exemption under section 13(b)(16), the transportation of the fruits or vegetables must be made to the specified places ''within the same State'' in which the farm is located. Transportation is made to a place ''within the same State'' when the commodities are taken from the farm, hauled and delivered within the same State to first markets or first processors for sale or processing at the place of delivery. The exemption is not provided for transportation to any place of first marketing or first processing across State lines and does not apply to any part of the transportation within the State of fruits or vegetables destined for a place in another State at which they are to be first marketed or first processed. Transportation from the farm to an intermediate point in such a journey located within the same State would not qualify for exemption; it would make no difference that the intermediate point is a place of first marketing or first processing for other fruits or vegetables if it is not actually such for the fruits or vegetables being transported. On the other hand, where the place to which fruits or vegetables are transported from the farm within the same State is actually the place of first marketing or first processing of those very commodities, transportation of the goods across State lines by the first-market operator or first processor, after such delivery to him within the State, does not affect the nature of the delivery to him as one made within the State.

## EXEMPT TRANSPORTATION OF FRUIT OR VEGETABLE HARVEST EMPLOYEES

### § 780.918 Requisites for exemption generally.

Section 13(b)(16), in clause (B), provides an exemption from the minimum wage and overtime pay provisions of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged ''in transportation'' of harvest workers; and

(b) The harvest workers transported must be ''persons employed or to be employed in the harvesting of fruits or vegetables''; and

(c) The employee's transportation of such harvest workers must be ''between the farm and any point within the same State.''

**§ 780.919 Engagement "in transportation" of harvest workers.**

In order for the exemption to apply, the employees must be engaged ''in transportation'' of the specified harvest workers between the points stated in the statute. Actual engagement ''in transportation'' of such workers is required. Engagement in other activities is not exempt work. Drivers, driver's helpers, and others who are engaged in the actual movement of the persons transported may qualify for the exemption. Office employees, garage mechanics, and other employees of the employer who may perform supporting activities but do not engage in the actual transportation work do not come within the exemption. There is no restriction in the statute as to the means of conveyance used; the exempt transportation may be by land, air, or water in any vehicle or conveyance appropriate for the purpose. Employees of any employer who are engaged in the specified transportation activities may qualify for exemption; it is not necessary that the transportation be performed by the farmer. (See § 780.905.)

**§ 780.920 Workers transported must be fruit or vegetable harvest workers.**

Clause (B) of section 13(b)(16) exempts only those transportation employees who are engaged in transportation ''of persons employed or to be employed in the harvesting of fruits or vegetables.'' Transportation of harvest workers is not exempt unless the workers are fruit and vegetable harvest workers; transportation of workers employed or to be employed in harvesting or other commodities is not exempt work under section 13(b)(16). *Wirtz* v. *Osceola Farms Co.*, 372 F. (2d) 584 (C.A. 5). Nor does the exemption apply to the transportation of persons for the purpose of planting or cultivating any crop, whether or not it is a fruit or a vegetable crop.

**§ 780.921 Persons "employed or to be employed" in fruit or vegetable harvesting.**

The exemption applies to the transportation of persons ''employed or to be employed'' in the harvesting of fruits or vegetables. Included in this phrase are persons who at the time of transportation are currently employed in harvesting fruits or vegetables and others who, regardless of their occupation at such time, are being transported to be employed in such harvesting. The conveying of persons to a farm from a factory, packinghouse or processing plant would be exempt where their transportation is for the purpose of their employment in harvesting the named commodities. On the other hand, the transportation of harvest workers, who have been employed in the fruit or vegetable harvest, to such a plant for the purpose of their employment in the plant would not be exempt. The transportation must come within the intended scope of section 13(b)(16) which is to provide exemption for ''transportation of the harvest crew to and from the farm'' (see 107 Cong. Rec. daily ed. p. 4523).

**§ 780.922 "Harvesting" of fruits or vegetables.**

Only transportation of employees employed or to be employed in the ''harvesting'' of fruits or vegetables is exempt under clause (B) of section 13(b)(16). As indicated in § 780.920, such harvest workers do not include employees employed or to be employed in planting or cultivating the crop. Nor do they include employees employed or to be employed in operations subsequent to harvesting, even where such operations constitute ''agriculture'' within the definition in section 3(f) of the Act. ''Harvesting'' refers to the removal of fruits or vegetables from their growing position in the fields, and as explained in § 780.118 of this part, includes the operations customarily performed in connection with this severance of the crops from the soil (see *Vives* v. *Serralles*, 145 F. 2d 552), but does not extend to operations subsequent to and unconnected with the actual severance process or to operations performed off the farm. It may include

moving the fruits or vegetables to concentration points on the farm, but would not include packingshed or other operations performed in preparation for market rather than as part of harvesting, such as ripening, cleaning, grading, sorting, drying, and storing. If the workers are employed or to be employed in ''harvesting'', it does not matter for purposes of the exemption whether a farmer or someone else employs them or does the harvesting. It is the character of their employment as ''harvesting'' and not the identity of their employer or the owner of the crop which determines whether their transportation to and from the farm will provide a basis for exemption of the transportation of employees.

### § 780.923 "Between the farm and any point within the same State."

The transportation of fruit or vegetable harvest workers is permitted ''between the farm and any point within the same State''. The exempt transportation of such harvest workers therefore includes their movement to and from the farm (see 107 Cong. Rec. (daily ed.) p. 4523). Such transportation must, however, be from or to points ''within the same State'' in which the farm is located. Crossing of State lines is not contemplated. Thus, the exemption would not apply to day-haul transportation of fruit or vegetable harvest workers between a town in one State and farms located in another State. Also, the intent to exempt ''transportation of the harvest crew to and from the farm'' (see 107 Cong. Rec. (daily ed.) p. 4523) within a single State would not justify exemption of the transportation of workers from one State to another to engage in harvest work in the latter State. The exemption does not apply to transportation of persons on any trip, or any portion of a trip, in which the point of origin or point of destination is in another State. Subject to these limitations, however, where employees are being transported for employment in harvesting they may be picked up in any place within the State, including other farms, packing or processing establishments, factories, transportation terminals, and other places. The broad term ''any point'' must be interpreted in the light of the purpose of the exemption to facilitate the harvesting of fruits or vegetables. Transportation from a farm to ''any point'' within the same State (such as a factory or processing plant) where some other purpose than harvesting is served is not exempt.

## Subpart K—Employment of Homeworkers in Making Wreaths; Exemption From Minimum Wage, Overtime Compensation, and Child Labor Provisions Under Section 13(d)

INTRODUCTORY

### § 780.1000 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart K together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(d) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage, overtime pay, and child labor provisions of the Act for certain homeworkers employed in making wreaths from evergreens and in harvesting evergreens and other forest products for use in making wreaths. Attention is directed to the fact that a limited overtime exemption for employees employed in the decoration greens industry is provided under section 7(c) of the Act (see part 526 of this chapter). The section 7(c) exemption is not limited to homeworkers.

### § 780.1001 General explanatory statement.

Workers in rural areas sometimes engage, as a family unit, around the Christmas holidays, in gathering evergreens and making them into wreaths in their homes. Such workers, under well-settled interpretations by the Department of Labor and the courts, have been held to be employees of the firm which purchases the wreaths and furnishes the workers with wire used in making such wreaths.

REQUIREMENTS FOR EXEMPTION

**§ 780.1002 Statutory requirements.**

Section 13(d) of the Fair Labor Standards Act exempts from the minimum wage provisions of section 6, the overtime requirements of section 7 and the child labor restrictions of section 12:

Any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

**§ 780.1003 What determines the application of the exemption.**

The application of this exemption depends on the nature of the employee's work and not on the character of the employer's business. To determine whether an employee is exempt an examination should be made of the activities which that employee performs and the conditions under which he performs them. Some employees of the employer may be exempt and others may not.

**§ 780.1004 General requirements.**

The general requirements of the exemption are that:

(a) The employee must be a homeworker;

(b) The employee must be engaged in making wreaths as a homeworker;

(c) The wreaths must be made principally of evergreens;

(d) Any harvesting of the evergreens and other forest products by the homeworkers must be for use in making the wreaths by homeworkers.

**§ 780.1005 Homeworkers.**

The exemption applies to ''any homeworker.'' A homeworker within the meaning of the Act is a person who works for an employer in or about a home, apartment, tenement, or room in a residential establishment.

**§ 780.1006 In or about a home.**

Whether the work of an employee is being performed ''in or about a home,'' so that he may be considered a homeworker, must be determined on the facts in the particular case. In general, however the phrase ''in or about a home'' includes any home, apartment, or other dwelling place and surrounding premises, such yards, garages, sheds or basements. A convent, orphanage or similar institution is considered a home.

**§ 780.1007 Exemption is inapplicable if wreath-making is not in or about a home.**

The section 13(d) exemption does not apply when the wreaths are made in or about a place which is not considered a ''home''. Careful consideration is required in many cases to determine whether work is being performed in or about a home. Thus, the circumstances under which an employee may engage in work in what ostensibly is a ''home'' may require the conclusion, on an examination of all the facts, that the work is not being performed in or about a home within the intent of the term and for purposes of section 13(d) of the Act.

**§ 780.1008 Examples of places not considered homes.**

The following are examples of workplaces which, on examination, have been considered not to be a ''home'':

(a) Living quarters allocated to and regularly used solely for production purposes, where workers work regular schedules and are under constant supervision by the employer, are not considered to be a home.

(b) While a convent, orphanage or similar institution is considered a home, an area in such place which is set aside for and used for sewing or other productive work under supervision is not a home.

(c) Where an employee performs work on wreaths in a home and also engages in work on the wreaths for the employer during that workweek in a factory, he is not exempt in that week, since some of his work is not performed in a home.

**§ 780.1009 Wreaths.**

The only product which may be produced under the section 13(d) exemption by a homeworker is a wreath having no less than the specified evergreen content. The making of a product other than a wreath is nonexempt even

though it is made principally of evergreens.

**§ 780.1010 Principally.**

The exemption is intended to apply to the making of an evergreen wreath. Such a wreath is one made ''principally'' of evergreens. *Principally* means chiefly, in the main or mainly (*Hartford Accident and Indemnity Co.* v. *Casualty Underwriters Insurance Co.*, 130 F. Supp. 56). A wreath is made ''principally'' of evergreens when it is comprised mostly of evergreens. For example, where a wreath is composed of evergreens and other kinds of material, the evergreens should comprise a greater part of the wreath than all the other materials together, including materials such as frames, stands, and wires. The principal portion of a wreath may consist of any one or any combination of the evergreens listed in section 13(d), including ''other evergreens.'' The making of wreaths in which natural evergreens are a secondary component is not exempt.

**§ 780.1011 Evergreens.**

The material which must principally be used in making the wreaths is listed as ''natural holly, pine, cedar, or other evergreens.'' Other plants or materials cannot be used to satisfy this requirement.

**§ 780.1012 Other evergreens.**

The ''other evergreens'' of which the wreath may be principally made include any plant which retains its greenness through all the seasons of the year, such as laurel, ivy, yew, fir, and others. While plants other than evergreens may be used in making the wreaths, such plants, whether they are forest products cultivated plants, cannot be considered as part of the required principal evergreen component of the wreath.

**§ 780.1013 Natural evergreens.**

Only ''natural'' evergreens may comprise the principal part of the wreath. The word ''natural'' qualifies all of the evergreens listed in the section, including ''other evergreens.'' The term *natural* means that the evergreens at the time they are being used in making a wreath must be in the raw and natural state in which they have been harvested. Artificial evergreens (*Herring Magic* v. *U.S.*, 258 F. 2d 197; *Cal. Casualty Indemnity Exchange* v. *Industrial Accident Commission of Cal.* 90 P. 2d 289) or evergreens which have been processed as by drying and spraying with tinsel or by other means are not included. It is immaterial whether the natural evergreen used in making a wreath has been cultivated or is a product of the woods or forest.

**§ 780.1014 Harvesting.**

The homeworker is permitted to harvest evergreens and other forest products to be used in making the wreath. The word *harvesting* means the removal of evergreens and other forest products from their growing positions in the woods or forest, including transportation of the harvested products to the home of the homeworker and the performance of other duties necessary for such harvesting.

**§ 780.1015 Other forest products.**

The homeworker may also harvest ''other forest products'' for use in making wreaths. The term *other forest products* means any plant of the forest and includes, of course, deciduous plants as well.

**§ 780.1016 Use of evergreens and forest products.**

Harvesting of evergreens and other forest products is exempt only when these products will be ''used in making such wreaths.'' The phrase ''used in making such wreaths'' places a definite limitation on the purpose for which evergreens may be harvested under section 13(d). Harvesting of these materials for a use other than making wreaths is nonexempt. Also, such harvesting is nonexempt when the evergreens are used for wreathmaking by persons other than the homeworkers (see *Mitchell* v. *Hunt*, 263 F. 2d 913). For example, harvesting of evergreens for sale or distribution to an employer who uses them in his factory to make wreaths is not exempt.

# PART 782—EXEMPTION FROM MAXIMUM HOURS PROVISIONS FOR CERTAIN EMPLOYEES OF MOTOR CARRIERS

Sec.
782.0 Introductory statement.
782.1 Statutory provisions considered.
782.2 Requirements for exemption in general.
782.3 Drivers.
782.4 Drivers' helpers.
782.5 Loaders.
782.6 Mechanics.
782.7 Interstate commerce requirements of exemption.
782.8 Special classes of carriers.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq*.

SOURCE: 36 FR 21778, Nov. 13, 1971, unless otherwise noted.

## § 782.0 Introductory statement.

(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator of the Wage and Hour Division as to the scope and applicability of the exemption provided by section 13(b)(1) of the act have been expressed in interpretations issued from time to time in various forms. This part, as of the date of its publication in the FEDERAL REGISTER, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretations of the Administrator which will provide ''a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.'' (*Skidmore* v. *Swift & Co.*, 323 U.S. 134)

(b) The interpretations contained in this part indicate, with respect to the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct in the light of the decisions of the courts, the Interstate Commerce Commission, and since October 15, 1966, its successor, the Secretary of Transportation, and which will guide them in the performance of their administrative duties under the act unless and until they are otherwise directed by authoritative decisions of the courts or conclude upon reexamination of an interpretation that it is incorrect.

(c) Public Law 89–670 (80 Stat. 931) transferred to and vested in the Secretary of Transportation all functions, powers, and duties of the Interstate Commerce Commission: (1) Under section 204 (a)(1) and (a)(2) to the extent they relate to qualifications and maximum hours of service of employees and safety of operations and equipment, and (2) under section 204(a)(5) of the Motor Carrier Act. The interpretations contained in this part are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act (Pub. L. 49, 80th Cong., first sess. (61 Stat. 84), discussed in part 790, statement on effect of Portal-to-Portal Act of 1947), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

## § 782.1 Statutory provisions considered.

(a) Section 13(b)(1) of the Fair Labor Standards Act provides an exemption from the maximum hours and overtime requirements of section 7 of the act, but not from the minimum wage requirements of section 6. The exemption is applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935, (part II of the Interstate Commerce Act, 49 Stat. 546, as amended; 49 U.S.C. 304, as amended by Pub. L. 89–670, section 8e which substituted ''Secretary of Transportation'' for ''Interstate Commerce Commission''—Oct. 15, 1966) except that the exemption is not applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service solely by virtue of section 204(a)(3a) of part II of the Interstate Commerce Act. (Pub. L. 939, 84th Cong., second sess., Aug. 3, 1956, secs. 2 and 3) The Fair Labor Standards Act confers no authority on the Secretary of Labor or the Administrator to extend or restrict

the scope of this exemption. It is settled by decisions of the U.S. Supreme Court that the applicability of the exemption to an employee otherwise entitled to the benefits of the Fair Labor Standards Act is determined exclusively by the existence of the power conferred under section 204 of the Motor Carrier Act to establish qualifications and maximum hours of service with respect to him. It is not material whether such qualifications and maximum hours of service have actually been established by the Secretary of Transportation; the controlling consideration is whether the employee comes within his power to do so. The exemption is not operative in the absence of such power, but an employee with respect to whom the Secretary of Transportation has such power is excluded, automatically, from the benefits of section 7 of the Fair Labor Standards Act. (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44; *Boutell* v. *Walling*, 327 U.S. 463; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Morris* v. *McComb*, 332 U.S. 422)

(b) Section 204 of the Motor Carrier Act, 1935, provides that it shall be the duty of the Interstate Commerce Commission (now that of the Secretary of Transportation (see § 782.0(c))) to regulate common and contract carriers by motor vehicle as provided in that act, and that ''to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment.'' (Motor Carrier Act, sec. 204(a)(1)(2), 49 U.S.C. 304(a)(1)(2)) Section 204 further provides for the establishing of similar regulations with respect to private carriers of property by motor vehicle, if need therefor is found. (Motor Carrier Act, sec. 204(a)(3), 49 U.S.C. 304(a)(3))

(c) Other provisions of the Motor Carrier Act which have a bearing on the scope of section 204 include those which define common and contract carriers by motor vehicle, motor carriers, private carriers of property by motor vehicle (Motor Carrier Act, sec. 203(a)(14), (15), (16), (17), 49 U.S.C. sec. 303(a)(14), (15), (16), (17)) and motor vehicle (Motor Carrier Act, sec. 203(a)(13)); those which confer regulatory powers with respect to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce (Motor Carrier Act, sec. 202(a)), as defined in the Motor Carrier Act, sec. 203(a) (10), (11), and reserve to each State the exclusive exercise of the power of regulation of intrastate commerce by motor carriers on its highways (Motor Carrier Act, sec. 202(b)); and those which expressly make section 204 applicable to certain transportation in interstate or foreign commerce which is in other respects excluded from regulation under the act. (Motor Carrier Act, sec. 202(c))

### § 782.2 Requirements for exemption in general.

(a) The exemption of an employee from the hours provisions of the Fair Labor Standards Act under section 13(b)(1) depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act (*Boutell* v. *Walling*, 327 U.S. 463; *Walling* v. *Casale*, 51 F. Supp. 520; and see Ex parte Nos. MC–2 and MC–3, in the Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M.C.C. 125, 132), and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act. *United States* v. *American Trucking Assns.*, 310 U.S. 534; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; Ex parte No. MC–28, 13 M.C.C. 481; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; *Walling* v. *Comet Carriers*, 151 F. (2d) 107 (C.A. 2).

(b)(1) The carriers whose transportation activities are subject to the Secretary of Transportation jurisdiction are specified in the Motor Carrier Act

itself (see § 782.1). His jurisdiction over private carriers is limited by the statute to private carriers of property by motor vehicle, as defined therein, while his jurisdiction extends to common and contract carriers of both passengers and property. See also the discussion of special classes of carriers in § 782.8. And see paragraph (d) of this section. The U.S. Supreme Court has accepted the Agency determination, that activities of this character are included in the kinds of work which has been defined as the work of drivers, driver's helpers, loaders, and mechanics (see §§ 782.3 to 782.6) employed by such carriers, and that no other classes of employees employed by such carriers perform duties directly affecting such ''safety of operation.'' Ex parte No. MC–2, 11 M.C.C. 203; Ex parte No. MC–28, 13 M.C.C. 481; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44. See also paragraph (d) of this section and §§ 782.3 through 782.8.

(2) The exemption is applicable, under decisions of the U.S. Supreme Court, to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) As that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Morris* v. *McComb*, 332 U.S. 442. Although the Supreme Court recognized that the special knowledge and experience required to determine what classifications of work affects safety of operation of interstate motor carriers was applied by the Commission, it has made it clear that the determination whether or not an individual employee is within any such classification is to be determined by judicial process. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; Cf. *Missel* v. *Overnight Motor Transp.*, 40 F. Supp. 174 (D. Md.), reversed on other grounds 126 F. (2d) 98 (C.A. 4), affirmed 316 U.S. 572; *West* v. *Smoky Mountains Stages*, 40 F. Supp. 296 (N.D. Ga.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W.D. Va.); *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 5 W.H. Cases 172, 9 Labor Cases par. 62,576; *Hager* v. *Brinks, Inc.*, 6 W.H. Cases 262 (N.D. Ill.)) In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Porter* v. *Poindexter*, 158 F.—(2d) 759 (C.A. 10); *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W.D. Ky.); *Crean* v. *Moran Transp. Lines* (W.D. N.Y.) 9 Labor Cases, par. 62,416 (see also earlier opinion in 54 F. Supp. 765)); what is controlling is the character of the activities involved in the performance of his job.

(3) As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is (or, in the case of a member of a group of drivers, driver's helpers, loaders, or mechanics employed by a common carrier and engaged in safety-affecting occupations, that he is likely to be) called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b)(2) of this section, he comes within the exemption in all workweeks when he is employed at such job. This general rule assumes that the activities involved in the continuing duties of the job in all such workweeks will include activities which have been determined to affect directly the safety of operation of motor vehicles on the public highways in transportation in interstate commerce. Where this is the case, the rule applies regardless of the proportion of the employee's time or of his activities which is actually devoted to such safety-affecting work in the particular workweek, and the exemption will be applicable even in a workweek when the employee happens to perform no work directly affecting ''safety of operation.'' On the other hand, where the continuing duties of the employee's job have no substantial

direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply to him in any workweek so long as there is no change in his duties. (*Pyramid Motor Freight Corp.* v. *Ispass,* 330 U.S. 695; *Morris* v. *McComb,* 332 U.S. 422; *Levinson* v. *Spector Motor Service,* 330 U.S. 649; *Rogers Cartage Co.* v. *Reynolds,* 166 F. (2d) 317 (C.A. 6); *Opelika Bottling Co.* v. *Goldberg,* 299 F. (2d) 37 (C.A. 5); *Tobin* v. *Mason & Dixon Lines, Inc.,* 102 F. Supp. 466 (E.D. Tenn.)) If in particular workweeks other duties are assigned to him which result, in those workweeks, in his performance of activities directly affecting the safety of operation of motor vehicles in interstate commerce on the public highways, the exemption will be applicable to him those workweeks, but not in the workweeks when he continues to perform the duties of the non-safety-affecting job.

(4) Where the same employee of a carrier is shifted from one job to another periodically or on occasion, the application of the exemption to him in a particular workweek is tested by application of the above principles to the job or jobs in which he is employed in that workweek. Similarly, in the case of an employee of a private carrier whose job does not require him to engage regularly in exempt safety-affecting activities described in paragraph (b)(1) of this section and whose engagement in such activities occurs sporadically or occasionally as the result of his work assignments at a particular time, the exemption will apply to him only in those workweeks when he engages in such activities. Also, because the jurisdiction of the Secretary of Transportation over private carriers is limited to carriers of property (see paragraph (b)(1) of this section) a driver, driver's helper, loader, or mechanic employed by a private carrier is not within the exemption in any workweek when his safety-affecting activities relate only to the transporation of passengers and not to the transportation of property.

(c) The application of these principles may be illustrated as follows:

(1) In a situation considered by the U.S. Supreme Court, approximately 4 percent of the total trips made by drivers employed by a common carrier by motor vehicle involved in the hauling of interstate freight. Since it appeared that employer, as a common carrier, was obligated to take such business, and that any driver might be called upon at any time to perform such work, which was indiscriminately distributed among the drivers, the Court considered that such trips were a natural, integral, and apparently inseparable part of the common carrier service performed by the employer and driver employees. Under these circumstances, the Court concluded that such work, which directly affected the safety of operation of the vehicles in interstate commerce, brought the entire classification of drivers employed by the carrier under the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, so that all were exempt even though the interstate driving on particular employees was sporadic and occasional, and in practice some drivers would not be called upon for long periods to perform any such work. (*Morris* v. *McComb,* 332 U.S. 422)

(2) In another situation, the U.S. Court of Appeals (Seventh Circuit) held that the exemption would not apply to truckdrivers employed by a private carrier on interstate routes who engaged in no safety-affecting activities of the character described above even though other drivers of the carrier on interstate routes were subject to the jurisdiction of the Motor Carrier Act. The court reaffirmed the principle that the exemption depends not only upon the class to which the employer belongs but also the activities of the individual employee. (*Goldberg* v. *Faber Industries,* 291 F. (2d) 232)

(d) The limitations, mentioned in paragraph (a) of this section, on the regulatory power of the Secretary of Transportation (as successor to the Interstate Commerce Commission) under section 204 of the Motor Carrier Act are also limitations on the scope of the exemption. Thus, the exemption does not apply to employees of carriers who are not carriers subject to his jurisdiction, or to employees of noncarriers such as commercial garages,

firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, firms engaged in the leasing and renting of motor vehicles to carriers and in keeping such vehicles in condition for service pursuant to the lease or rental agreements. (*Boutell* v. *Walling*, 327 U.S. 463; *Walling* v. *Casale*, 51 F. Supp. 520). Similarly, the exemption does not apply to an employee whose job does not involve engagement in any activities which have been defined as those of drivers, drivers' helpers, loaders, or mechanics, and as directly affecting the ''safety of operation'' of motor vehicles. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *United States* v. *American Trucking Assn.*, 310 U.S. 534; *Gordon's Transports* v. *Walling*, 162 F. (2d) 203 (C.A. 6); *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10)) Except insofar as the Commission has found that the activities of drivers, drivers' helpers, loaders, and mechanics, as defined by it, directly affect such ''safety of operation,'' it has disclaimed its power to establish qualifications of maximum hours of service under section 204 of the Motor Carrier Act. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695) *Safety of operation* as used in section 204 of the Motor Carrier Act means ''the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone.'' (Ex parte Nos. MC–2 and MC–3 (Conclusions of Law No. 1), 28 M.C.C. 125, 139) Thus the activities of drivers, drivers' helpers, loaders, or mechanics in connection with transportation which is not in interstate of foreign commerce within the meaning of the Motor Carrier Act provide no basis for exemption under section 13(b)(1) of the Fair Labor Standards Act. (*Walling*, v. *Comet Carriers*, 151 F. (2d) 107 (C.C.A. 2); *Hansen* v. *Salinas Valley Ice Co.* (Cal. App.) 144 P. (2d) 896; *Reynolds* v. *Rogers Cartage Co.*, 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds, 166 F. (d) 317 (C.A. 6); *Earle* v. *Brinks, Inc.*, 54 F. Supp. 676 (S.D. N.Y.); *Walling* v. *Villaume Box & Lumber Co.*, 58 F. Supp. 150 (D. Minn.); *Hager* v. *Brinks, Inc.*, 11 Labor Cases, par. 63,296 (N.D. Ill.), 6 W.H. Cases 262; *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Dallum* v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785 (D. Minn.); *McLendon* v. *Bewely Mills* (N.D. Tex.); 3 Labor Cases, par. 60,247, 1 W.H. Cases 934; *Gibson* v. *Glasgow* (Tenn. Sup. Ct.), 157 S.W. (2d) 814; cf. *Morris* v. *McComb*, 332 U.S. 422. See also § 782.1 and §§ 782.7 through 782.8.)

(e) The jurisdiction of the Secretary of Transportation under section 204 of the Motor Carrier Act relates to safety of operation of motor vehicles only, and ''to the safety of operation of such vehicles on the highways of the country, and that alone.'' (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 192. See also *United States* v. *American Trucking Assns.*, 319 U.S. 534, 548.) Accordingly, the exemption does not extend to employees merely because they engage in activities affecting the safety of operation of motor vehicles operated on private premises. Nor does it extend to employees engaged solely in such activities as operating freight and passenger elevators in the carrier's terminals of moving freight or baggage therein or the docks or streets by hand trucks, which activities have no connection with the actual operation of motor vehicles. (*Gordon's Transport* v. *Walling*, 162 F. (2d) 203 (C.A. 6), certorari denied 322 U.S. 774; *Walling* v. *Comet Carriers*, 57 F. Supp. 1018, affirmed, 151 F. (2d) 107 (C.A. 2), certiorari dismissed, 382 U.S. 819; *Gibson* v. *Glasgow* (Tenn. Sup. Ct.), 157 S.W. (2d) 814; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 128. See also Pyramid Motor Freight *Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Serv.*, 330 U.S. 949.)

(f) Certain classes of employees who are not within the definitions of drivers, driver's helpers, loaders, and mechanics are mentioned in §§ 782.3–782.6, inclusive. Others who do not come within these definitions include the following, whose duties are considered to affect safety of operation, if at all, only indirectly; stenographers (including those who write letters relating to safety or prepare accident reports); clerks of all classes (including rate clerks, billing clerks, clerks engaged in preparing schedules, and filing clerks in charge of filing accident reports,

hours-of-service records, inspection reports, and similar documents); foremen, warehousemen, superintendents, salesmen, and employees acting in an executive capacity. (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; Ex parte No. MC–28, 13 M.C.C. 481. But see §§ 782.5(b) and 782.6(b) as to certain foremen and superintendents.) Such employees are not within the section 13(b)(1) exemption. (*Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572 (rate clerk who performed incidental duties as cashier and dispatcher); *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10) (checker of freight and bill collector); *Potashnik, Local Truck System* v. *Archer* (Ark. Sup. Ct.), 179 S.W. (2d) 696 (night manager who did clerical work on waybills, filed day's accumulation of bills and records, billed out local accumulation of shipments, checked mileage on trucks and made written reports, acted as night dispatcher, answered telephone calls, etc.).)

**§ 782.3 Drivers.**

(a) A ''driver,'' as defined for Motor Carrier Act jurisdiction (49 CFR parts 390–395; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C.1; Ex parte No. MC–4, 1 M.C.C. 1), is an individual who drives a motor vehicle in transporation which is, within the meaning of the Motor Carrier Act, in interstate or foreign commerce. (As to what is considered transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act, see § 782.7). This definition does not require that the individual be engaged in such work at all times; it is recognized that even full-duty drivers devote some of their working time to activities other than such driving. ''Drivers,'' as thus officially defined, include, for example, such partial-duty drivers as the following, who drive in interstate or foreign commerce as part of a job in which they are required also to engage in other types of driving or nondriving work: Individuals whose driving duties are concerned with transportation some of which is in intrastate commerce and some of which is in interstate or foreign commerce within the meaning of the Motor Carrier Act; individuals who ride on motor vehicles engaged in transportation in interstate or foreign commerce and act as assistant or relief drivers of the vehicles in addition to helping with loading, unloading, and similar work; drivers of chartered buses or of farm trucks who have many duties unrelated to driving or safety of operation of their vehicles in interstate transportation on the highways; and so-called ''driver-salesmen'' who devote much of their time to selling goods rather than to activities affecting such safety of operation. (*Levinson* v. *Spector Motor Service*, 300 U.S. 649; *Morris* v. *McComb*, 332 U.S. 422; *Richardson* v. *James Gibbons Co.*, 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N.D. Ill.); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.); *Vannoy* v. *Swift & Co.* (Mo. S. Ct.), 201 S.W. (2d) 350; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; Ex parte No. MC–4, 1 M.C.C. 1. Cf. *Colbeck* v. *Dairyland Creamery Co.* (S.D. Supp. Ct.), 17 N.W. (2d) 262, in which the court held that the exemption did not apply to a refrigeration mechanic by reason solely of the fact that he crossed State lines in a truck in which he transported himself to and from the various places at which he serviced equipment belonging to his employer.)

(b) The work of an employee who is a full-duty or partial-duty ''driver,'' as the term ''driver'' is above defined, directly affects ''safety of operation'' within the meaning of section 204 of the Motor Carrier Act whenever he drives a motor vehicle in interstate or foreign commerce within the meaning of that act. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649, citing *Richardson* v. *James Gibbons Co.*, 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; *Morris* v. *McComb*, 332 U.S. 422; Ex parte No. MC–28, 13 M.C.C. 481, 482, 488; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 139 (Conclusion of Law No. 2). See also Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte No. MC–4, 1 M.C.C. 1.) The Secretary has power to establish, and has established, qualifications and maximum hours of service for such drivers employed by common and contract carriers or passengers or property and by private carriers of property pursuant to section

204, of the Motor Carrier Act. (See Ex parte No. MC–4, 1 M.C.C. 1; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte No. MC–28, 13 M.C.C. 481; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Southland Gasoline Co*. v. *Bayley*, 319 U.S. 44; *Morris* v. *McComb*, 332 U.S. 422; Safety Regulations (Carriers by Motor Vehicle), 49 CFR parts 390, 391, 395) In accordance with principles previously stated (see § 782.2), such drivers to whom this regulatory power extends are, accordingly, employees exempted from the overtime requirements of the Fair Labor Standards Act by section 13(b)(1). (*Southland Gasoline Co*. v. *Bayley*, 319 U.S. 44; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Morris* v. *McComb*, 332 U.S. 422; *Rogers Cartage Co*. v. *Reynolds*, 166 F. (2d) 317 (C.A. 6). This does not mean that an employee of a carrier who drives a motor vehicle is exempted as a ''driver'' by virtue of that fact alone. He is not exempt if his job never involves transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act (see §§ 782.2 (d) and (e), 782.7, and 782.8, or if he is employed by a private carrier and the only such transportation called for by his job is not transportation of property. (See § 782.2. See also Ex parte No. MC–28, 13 M.C.C. 481, Cf. *Colbeck* v. *Dairyland Creamery Co*. (S. Ct. S.D.), 17 N.W. (2d) 262 (driver of truck used only to transport himself to jobsites, as an incident of his work in servicing his employer's refrigeration equipment, held non exempt).) It has been held that so-called ''hostlers'' who ''spot'' trucks and trailers at a terminal dock for loading and unloading are not exempt as drivers merely because as an incident of such duties they drive the trucks and tractors in and about the premises of the trucking terminal. (*Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726 6 Wage Hour Rept. 676, cf. *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846)

### § 782.4 Drivers' helpers.

(a) A Driver's ''helper,'' as defined for Motor Carrier Act jurisdiction (Ex Parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135, 136, 138, 139), is an employee other than a driver, who is required to ride on a motor vehicle when it is being operated in interstate or foreign commerce within the meaning of the Motor Carrier Act. (The term does not include employees who ride on the vehicle and act as assistants or relief drivers. Ex parte Nos. MC–2 and MC–3, supra. See § 782.3.) This definition has classified all such employees, including armed guards on armored trucks and conductorettes on buses, as ''helpers'' with respect to whom he has power to establish qualifications and maximum hours of service because of their engagement in some or all of the following activities which, in his opinion, directly affect the safety of operation of such motor vehicles in interstate or foreign commerce (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135–136): Assist in loading the vehicles (they may also assist in unloading (Ex parte Nos. MC–2 and MC–3, supra), an activity which has been held not to affect ''safety of operation,'' see § 782.5(c); as to what it meant by ''loading'' which directly affects ''safety of operation,'' see § 782.5(a)); dismount when the vehicle approaches a railroad crossing and flag the driver across the tracks, and perform a similar duty when the vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway; in case of a breakdown: (1) Place the flags, flares, and fuses as required by the safety regulations. (2) go for assistance while the driver protects the vehicle on the highway, or vice versa, or (3) assist the driver in changing tires or making minor repairs; and assist in putting on or removing chains.

(b) An employee may be a ''helper'' under the official definition even though such safety-affecting activities constitute but a minor part of his job. Thus, although the primary duty of armed guards on armored trucks is to protect the valuables in the case of attempted robberies, they are classified as ''helpers'' where they ride on such trucks being operated in interstate or foreign commerce, because, in the case of an accident or other emergency and in other respects, they act in a capacity somewhat similar to that of the helpers described in the text. Similarly, conductorettes on buses whose primary duties are to see to the comfort of the passengers are classified as

''helpers'' whose such buses are being operated in interstate or foreign commerce, because in instances when accidents occur, they help the driver in obtaining aid and protect the vehicle from oncoming traffic.

(c) In accordance with principles previously stated (see § 782.2), the section 13(b)(1) exemption applies to employees who are, under the Secretary of Transporation's definitions, engaged in such activities as full- or partial-duty ''helpers'' on motor vehicles being operated in transporation in interstate or foreign commerce within the meaning of the Motor Carrier Act. (*Ispass* v. *Pyramid Motor Freight Corp.*, 152 F. (2d) 619 (C.A. 2); *Walling* v. *McGinley Co.* (E.D. Tenn.), 12 Labor Cases, par. 63,731, 6 W.H. Cases 916. See also *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Dallum* v. *Farmers, Coop Trucking Assn.* 46 F. Supp. 785 (D. Minn.).) The exemption has been held inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of ''helpers'' which have been found to affect directly the safety of operation of such vehicles in interstate or foreign commerce. (*Walling* v. *Gordon's Transports* (W.D. Tenn.) 10 Labor Cases par. 62,934, 6 W.H. Cases 831, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied, 332 U.S. 774 (helpers on city ''pickup and delivery trucks'' where it was not shown that the loading in any manner affected safety of operation and the helper's activities were ''in no manner similar'' to those of a driver's helper in over-the-road operation).) It should be noted also that an employee, to be exempted as a driver's ''helper'' under the Secretary's definitions, must be ''required'' as part of his job to ride on a motor vehicle when it is being operated in interstate or foreign commerce; an employee of a motor carrier is not exempted as a ''helper'' when he rides on such a vehicle, not as a matter of fixed duty, but merely as a convenient means of getting himself to, from, or between places where he performs his assigned work. (See *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, modifying, on other grounds, 152 F. (2d) 619 (C.A. 2).)

**§ 782.5 Loaders.**

(a) A ''loader,'' as defined for Motor Carrier Act jurisdiction (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134, 139), is an employee of a carrier subject to section 204 of the Motor Carrier Act (other than a driver or driver's helper as defined in §§ 782.3 and 782.4) whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. A ''loader'' may be called by another name, such as ''dockman,'' ''stacker,'' or ''helper,'' and his duties will usually also include unloading and the transfer of freight between the vehicles and the warehouse, but he engages, as a ''loader,'' in work directly affecting ''safety of operation'' so long as he has responsibility when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized. (*Levinson* v. *Spector Motor Service*, 300 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Gordon's Transport* (W.D. Tenn.), 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see § 782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work defined: (1) As that of a loader, and (2) as directly affecting the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, since such an employee is an employee with respect to whom the Secretary of Transporation has power to establish qualifications and maximum hours of service. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp.

846; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Gordon's Transports* (W.D. Tenn.); 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6) certiorari denied 332 U.S. 774; *Tinerella* v. *Des Moines Transp. Co.*, 41 F. Supp. 798.) Where a checker, foreman, or other supervisor plans and immediately directs the proper loading of a motor vehicle as described above, he may come within the exemption as a partial-duty loader. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Walling* v. *Gordon's Transports* (W.D. Tenn.), 10 Labor Cases, par. 62,934; affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 885; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Crean* v. *Moran Transporation Lines*, 57 F. Supp. 212 (W.D. N.Y.). See also 9 Labor Cases, par. 62,416; *Walling* v. *Commercial Motor Freight* (S.D. Ind.), 11 Labor Cases, par. 63,451; *Hogla* v. *Porter* (E.D. Okla.), 11 Labor Cases, par. 63,389 6 W. H. Cases 608.)

(c) An employee is not exempt as a loader where his activities in connection with the loading of motor vehicles are confined to classes of work other than the kind of loading described above, which directly affects ''safety of operation.'' (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649) The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of ''loading'' which directly affects ''safety of operation.'' Thus the following activities have been held to provide no basis for exemption: Unloading; placing freight in convenient places in the terminal, checking bills of lading; wheeling or calling freight being loaded or unloaded; loading vehicles for trips which will not involve transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act; and activities relating to the preservation of the freight as distinguished from the safety of operation of the motor vehicles carrying such freight on the highways. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543; *Walling* v. *Gordon's Transports* (W.D. Tenn.), 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Crean* v. *Moran Transp. Lines*, 50 F. Supp. 107, 54 F. Supp. 765 (cf. 57 F. Supp. 212); *Gibson* v. *Glasgow* (Tenn. Sup. Ct.) 157 S.W. (2d) 814. See also *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617.) As is apparent from opinion in Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, red caps of bus companies engaged in loading baggage on buses are not loaders engaged in work directly affecting safety of operation of the vehicles. In the same opinion, it is expressly recognized that there is a class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect ''safety of operations.'' Support for this conclusion is found in *Wirtz* v. *C&P Shoe Corp.* 335 F. (2d) 21 (C.A. 5), wherein the court held the loading of boxes of shoes, patterned on the last in, first out principle clearly was not of a safety affecting character ''in view of the light weight of the cargo involved.'' In the case of coal trucks which are loaded from stockpiles by the use of an electric bridge crane and a mechanical conveyor, it has been held that employees operating such a crane or conveyor in the loading process are not exempt as ''loaders'' under section 13(b)(1). (*Barrick* v. *South Chicago Coal & Dock Co.* (N.D. Ill.), 8 Labor Cases, par. 62,242, affirmed 149 F. (2d) 960 (C.A. 7).) It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a ''loader'' merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure inplace, or even because he does the physical work of arranging pieces of freight in the vehicle where another

employee tells him exactly what to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done. (See *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Yellow Transit Freight Lines Inc.* v. *Balven*, 320 F. (2d) 495 (C.A. 8); *Foremost Dairies* v. *Ivey*, 204 F. (2d) 186 (C.A. 5); *Ispass* v. *Pyramid Motor Freight Corp.*, 78 F. Supp. 475 (S.D. N.Y.); *Mitchell* v. *Meco Steel Supply Co.*, 183 F. Supp. 779 (S.D. Tex.); *Garton* v. *Sanders Transfer & Storage Co.*, 124 F. Supp. 84 (M.D. Tenn.); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543; *Walling* v. *Gordon's Transports* (W.D. Tenn.) 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Crean* v. *Moran Transporation Lines*, 50 F. Supp. 107 (see also further opinion in 54 F. Supp. 765, and cf. the court's holding in 57 F. Supp. 212 with *Walling* v. *Gordon's Transports*, cited above). See also *Levinson* v. *Spector Motor Service*, 330 U.S. 649.) Such activities would not seem to constitute the kind of ''loading'' which directly affects the safety of operation of the loaded vehicle on the public highways, under the official definitions. (See Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134).

**§ 782.6 Mechanics.**

(a) A ''mechanic,'' for purposes of safety regulations under the Motor Carrier Act is an employee who is employed by a carrier subject to the Secretary's jurisdiction under section 204 of the Motor Carrier Act and whose duty it is to keep motor vehicles operated in interstate or foreign commerce by his employer in a good and safe working condition. (Ex parte, Nos. MC–2 and MC–3, 28 M.C.C. 125, 132, 133. Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710 (repair of refrigeration equipment). See also *Morris* v. *McComb*, 332 U.S. 422.) It has been determined that the safety of operation of such motor vehicles on the highways is directly affected by those activities of mechanics, such as keeping the lights and brakes in a good and safe working condition, which prevent the vehicles from becoming potential hazards to highway safety and thus aid in the prevention of accidents. The courts have held that mechanics perform work of this character where they actually do inspection, adjustment, repair or maintenance work on the motor vehicles themselves (including trucks, tractors and trailers, and buses) and are, when so engaged, directly responsible for creating or maintaining physical conditions essential to the safety of the vehicles on the highways through the correction or prevention of defects which have a direct causal connection with the safe operation of the unit as a whole. (*Walling* v. *Silver Bros.*, 136 F. (2d) 168 (C.A. 1); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Tinerella* v. *Des Moines Transp. Co.*, 41 F. Supp. 798; *Robbins* v. *Zabarsky*, 44 F. Supp. 867; *West* V. *Smoky Mt. Stages*, 40 F. Supp. 296; *Walling* v. *Cumberland & Liberty Mills Co.* (S.D. Fla.), 6 Labor Cases, par. 61,184; *Esibill* v. *Marshall* (D. N.J.), 6 Labor Cases, par. 61,256; *Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726; *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956; *Kentucky Transport Co.* v. *Drake* (Ky. Ct. App.). 182 SW (2d) 960.) The following activities performed by mechanics on motor vehicles operated in interstate or foreign commerce are illustrative of the specific kinds of activities which the courts, in applying the foregoing principles, have regarded as directly affecting ''safety of operation'': The inspection, repair, adjustment, and maintenance for safe operation of steering apparatus, lights, brakes, horns, windshield wipers, wheels and axles, bushings, transmissions, differentials, motors, starters and ignition, carburetors, fifth wheels, springs and spring hangers, frames, and gasoline tanks (*McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Wolfe* v. *Union Transfer & Storage Co.*, 48 F. Supp. 855; *Mason & Dixon Lines* v. *Ligon* (Tenn. Ct. App.) 7 Labor Cases, par. 61,962; *Walling* v. Palmer, 67 F. Supp. 12; *Kentucky Transport Co.* v. *Drake* (Ky. Ct. App.), 182 SW (2d) 960.) Inspecting and checking air pressure in tires, changing tires, and repairing and rebuilding tires for immediate replacement on the vehicle from which they were removed

have also been held to affect safety of operation directly. (*Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Walling* v. *Palmer*, 67 F. Supp. 12. See also *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755.) The same is true of hooking up tractors and trailers, including light and brake connections, and the inspection of such hookups. (*Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Walling* v. *Palmer*, 67 F. Supp. 12. See also *Walling* v. *Gordon's Transports* (W.D. Tenn.). 10 Labor cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 744.)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see § 782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work which, under the definitions referred to above, is that of a ''mechanic'' and directly affects the safety of operation of motor vehicles on the public highways in interstate or foreign commerce, within the meaning of the Motor Carrier Act. The power under the Motor Carrier Act to establish qualifications and maximum hours of service for such an employee has been sustained by the courts. (*Morris* v. *McComb*, 332 U.S. 422. See also *Pyramid Motor Freight Corp.* v. *Ispass*. 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Walling* v. *Silver Bros.*, 136 F. (2d) 168 (C.C.A. 1)). A supervisory employee who plans and immediately directs and checks the proper performance of this class of work may come within the exemption as a partial-duty mechanic. (*Robbins* v. *Zabarsky*, 44 F. Supp. 867; *Mason & Dixon Lines* v. *Ligon* (Tenn. Ct. App.), 7 Labor Cases par. 61,962; cf. *Morris* v. *McComb*, 332 U.S. 422 and *Levinson* v. *Spector Motor Service*, 330 U.S. 649)

(c)(1) An employee of a carrier by motor vehicle is not exempted as a ''mechanic'' from the overtime provisions of the Fair Labor Standards Act under section 13(b)(1) merely because he works in the carrier's gargage, or because he is called a ''mechanic,'' or because he is a mechanic by trade and does mechanical work. (*Wirtz* v. *Tyler Pipe & Foundry Co.*, 369 F. 2d 927 (C.A. 5).) The exemption applies only if he is doing a class of work defined as that of a ''mechanic'', including activities which directly affect the safety of operation of motor vehicles in transporation on the public highways in interstate or foreign commerce. (*Morris* v. *McComb*, 332 U.S. 422; *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861; *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576. Compare Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710 with *Colbeck* v. *Dairyland Creamery Co.* (S.D. Sup. Ct.), 17 N.W. (2d) 262. See also *Pyramid Motor Freight Corp.* v. *Ispass* 330 U.S. 695.) Activities which do not directly affect such safety of operation include those performed by employees whose jobs are confined to such work as that of dispatchers, carpenters, tarpaulin tailors vehicle painters, or servicemen who do nothing but oil, gas, grease, or wash the motor vehicles. (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 132, 133, 135) To these may be added activities such as filling radiators, checking batteries, and the usual work of such employees as stockroom personnel, watchmen, porters, and garage employees performing menial nondiscretionary tasks or disassembling work. Employees whose work is confined to such ''nonsafety'' activities are not within the exemption, even though the proper performance of their work may have an indirect effect on the safety of operation of the motor vehicles on the highways. (*Morris* v. *McComb*, 332 U.S. 422; *Campbell* v. *Riss & Co.* (W.D. Mo.), 5 Labor Cases, par. 61,092 (dispatcher); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755 (work of janitor and caretaker, carpentry work, body building, removing paint, preparing for repainting, and painting); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (body building, construction work, painting and lettering); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (washing vehicles); *Walling* v. *Palmer*, 67 F. Supp. 12 (putting water in radiators and batteries, oil and gas in vehicles, and washing vehicles); *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861 (body builders, tarpaulin worker,

stockroom boy, night watchman, porter); *Bumpus* v. *Continental Baking Co.* (W.D. Tenn.), 1 Wage Hour Cases 920 (painter), reversed on other grounds 124 F. (2d) 549; *Green* v. *Riss & Co.*, 45 F. Supp. 648 (night watchman and gas pump attendant); *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576 (body builders); *Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726 (greasing and washing); *Walling* v. *East Texas Freight Lines* (N.D. Tex.), 8 Labor Cases, par. 62,083 (Menial tasks); *Collier* v. *Acme Freight Lines,* unreported (S.D. Fla., Oct. 1943) (same); *Potashnik Local Truck System* v. *Archer* (Ark. Sup. Ct.). 179 S.W. (2d) 696 (checking trucks in and out and acting as night dispatcher, among other duties); *Overnight Motor Corp.* v. *Missel,* 316 U.S. 572 (rate clerk with part-time duties as dispatcher).) The same has been held true of employees whose activities are confined to construction work, manufacture or rebuilding of truck, bus, or trailer bodies, and other duties which are concerned with the safe carriage of the contents of the vehicle rather than directly with the safety of operation on the public highways of the motor vehicle itself (*Anuchick* v. *Transamerican Freight Lines,* 46 F. Supp. 816; *Walling* v. *Silver Fleet Motor Express,* 67 F. Supp. 846; *McDuffie* v. *Hayes Freight Lines* 71 F. Supp. 755; *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576. Compare *Colbeck* v. *Dairyland Creamery Co.* (S.D. Sup. Ct.) 17 N.W. (2d) 262 with Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710.)

(2) The distinction between direct and indirect effects on safety of operation is exemplified by the comments in rejecting the contention in Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135, that the activities of dispatchers directly affect safety of operation. It was stated: ''It is contended that if a dispatcher by an error in judgment assigns a vehicle of insufficient size and weight-carrying capacity to transport the load, or calls a driver to duty who is sick, fatigued, or otherwise not in condition to operate the vehicle, or requires or permits the vehicle to depart when the roads are icy and the country to be traversed is hilly, an accident may result. While this may be true, it is clear that such errors in judgment are not the proximate causes of such accidents, and the dispatchers engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.''

(3) Similarly, the exemption has been held inapplicable to mechanics repairing and rebuilding parts, batteries, and tires removed from vehicles where a direct causal connection between their work and the safe operation of motor vehicles on the highways is lacking because they do no actual work on the vehicles themselves and entirely different employees have the exclusive responsibility for determining whether the products of their work are suitable for use, and for the correct installation of such parts, on the vehicles. (*Keeling* v. *Huber & Huber Motor Express,* 57 F. Supp. 617; *Walling* v. *Huber & Huber Motor Express,* 67 F. Supp. 855) Mechanical work on motor vehicles of a carrier which is performed in order to make the vehicles conform to technical legal requirements rather than to prevent accidents on the highways has not been regarded by the courts as work directly affecting ''safety of operation.'' (*Kentucky Transport Co.* v. *Drake* (Ky. Ct. App.), 182 S.W. (2d) 960; *Anuchick* v. *Transamerican Freight Lines,* 46 F. Supp. 861; *Yellow Transit Freight Lines Inc.* v. *Balsen* 320 F. (2d) 495 (C.A. 8)) And it is clear that no mechanical work on motor vehicles can be considered to affect safety of operation of such vehicles in interstate or foreign commerce if the vehicles are never in fact used in transportation in such commerce on the public highways. (*Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956)

### § 782.7 Interstate commerce requirements of exemption.

(a) As explained in preceding sections of this part, section 13(b)(1) of the Fair Labor Standards Act does not exempt an employee of a carrier from the act's overtime provisions unless it appears, among other things, that his activities as a driver, driver's helper, loader, or mechanic directly affect the safety of operation of motor vehicles in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. What constitutes such

transportation in interstate or foreign commerce, sufficient to bring such an employee within the regulatory power of the Secretary of Transportation under section 204 of that act, is determined by definitions contained in the Motor Carrier Act itself. These definitions are, however, not identical with the definitions in the Fair Labor Standards Act which determine whether an employee is within the general coverage of the wage and hours provisions as an employee ''engaged in (interstate or foreign) commerce.'' For this reason, the interstate commerce requirements of the section 13(b)(1) exemption are not necessarily met by establishing that an employee is ''engaged in commerce'' within the meaning of the Fair Labor Standards Act when performing activities as a driver, driver's helper, loader, or mechanic, where these activities are sufficient in other respects to bring him within the exemption. (*Hager* v. *Brinks, Inc.* (N.D. Ill.), 11 Labor Cases, par. 63,296, 6 W.H. Cases 262; *Earle* v. *Brinks, Inc.*, 54 F. Supp. 676 (S.D. N.Y.); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.). See also, *Walling* v. *Villaume Box & Lbr. Co.*, 58 F. Supp. 150 (D. Minn.). And see in this connection paragraph (b) of this section and § 782.8.) To illustrate, employees of construction contractors are, within the meaning of the Fair Labor Standards Act, engaged in commerce where they operate or repair motor vehicles used in the maintenance, repair, or reconstruction of instrumentalities of interstate commerce (for example, highways over which goods and persons regularly move in interstate commerce). (*Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn). See also *Engbretson* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C.A. 7); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *Pedersen* v. *J. F. Fitzgerald Constr. Co.*, 318 U.S. 740, 742.) Employees so engaged are not, however, brought within the exemption merely by reason of that fact. In order for the exemption to apply, their activities, so far as interstate commerce is concerned, must relate directly to the transportation of materials moving in interstate or foreign commerce within the meaning of the Motor Carrier Act. Asphalt distributor-operators, although not exempt by reason of their work in applying the asphalt to the highways, are within the exemption where they transport to the road site asphalt moving in interstate commerce. See *Richardson* v. *James Gibbons Co.*, 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44 (and see reference to this case in footnote 18 of *Levinson* v. *Spector Motor Service*, 330 U.S. 649); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.).

(b)(1) Highway transportation by motor vehicle from one State to another, in the course of which the vehicles cross the State line, clearly constitutes interstate commerce under both acts. Employees of a carrier so engaged, whose duties directly affect the safety of operation of such vehicles, are within the exemption in accordance with principles previously stated. (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44; *Plunkett* v. *Abraham Bros.*, 129 F. (2d) 419 (C.A. 6); *Vannoy* v. *Swift & Co.* (Mo. Sup. Ct.), 201 S.W. (2d) 350; *Nelson* v. *Allison & Co.* (E.D. Tenn.), 13 Labor Cases, par. 64,021; *Reynolds* v. *Rogers Cartage Co.* (W.D. Ky.), 13 Labor Cases, par. 63,978, reversed on other grounds 166 F. (2d) 317 (C.A. 6); *Walling* v. *McGinley Co.* (E.D. Tenn.), 12 Labor Cases, par. 63,731; *Walling* v. *A. H. Phillips, Inc.*, 50 F. Supp. 749, affirmed (C.A. 1) 144 F. (2d) 102,324 U.S. 490. See §§ 782.2 through 782.8.) The result is no different where the vehicles do not actually cross State lines but operate solely within a single State, if what is being transported is actually moving in interstate commerce within the meaning of both acts; the fact that other carriers transport it out of or into the State is not material. (*Morris* v. *McComb*, 68 S. Ct. 131; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Silver Bros. Co.* 136 F. (2d) 168 (C.A. 1); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C.A. 8); *Dallum* v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785 (D. Minn.); *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N.D. Ill.); *Keegan* v. *Rupport* (S.D. N.Y.), 7 Labor Cases, par. 61,726, 3 W.H. Cases 412; *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956, 5 W.H. Cases 926). Transportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a ''practical continuity

of movement'' across State lines from the point of origin to the point of destination. (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C.A. 8); *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C.A. 3); *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956 5 W.H. Cases 926) Since the interstate commerce regulated under the two acts is not identical (see paragraph (a) of this section), such transportation may or may not be considered also a movement in interstate commerce within the meaning of the Motor Carrier Act. Decisions of the Interstate Commerce Commission prior to 1966 seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act. (see § 782.8.) It is deemed necessary, however, as an enforcement policy only and without prejudice to any rights of employees under section 16 (b) of the Act, to assume that such a movement in interstate commerce under the Fair Labor Standards Act is also a movement in interstate commerce under the Motor Carrier Act, except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise. (See § 782.8(a); and compare *Beggs* v. *Kroger Co.*, 167 F. (2d) 700, with the Interstate Commerce Commission's holding in Ex parte No. MC–48, 71 M.C.C. 17, discussed in paragraph (b)(2) of this section.) Under this enforcement policy it will ordinarily be assumed by the Administrator that the interstate commerce requirements of the section 13(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver, driver's helper, loader, or mechanic in transportation by motor vehicle which, although confined to a single State, is a part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act. This policy does not extend to drivers, driver's helpers, loaders, or mechanics whose transportation activities are ''in commerce'' or ''in the production of goods for commerce'' within the meaning of the act but are not a part of an interstate movement of the goods or persons carried (see, e.g., *Wirtz* v. *Crystal Lake Crushed Stone Co.*, 327 F. 2d 455 (C.A. 7)). Where, however, it has been authoritatively held that transportation of a particular character within a single State is not in interstate commerce as defined in the Motor Carrier Act (as has been done with respect to certain transportation of petroleum products from a terminal within a State to other points within the same State—see paragraph (b)(2) of this section), there is no basis for an exemption under section 13(b)(1), even though the facts may establish a ''practical continuity of movement'' from out-of-State sources through such in-State trip so as to make the trip one in interstate commerce under the Fair Labor Standards Act. Of course, engagement in local transportation which is entirely in intrastate commerce provides no basis for exempting a motor carrier employee. (*Kline* v. *Wirtz*, 373 F. 2d 281 (C.A. 5). See also paragraph (b) of this section.)

(2) The Interstate Commerce Commission held that transportation confined to points in a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different State is not in interstate or foreign commerce within the meaning of part II of the Interstate Commerce Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex parte No. MC–48 (71 M.C.C. 17, 29). The Commission specifically ruled that there is not fixed and persisting intent where: (i) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage. In *Baird* v. *Wagoner Transportation Co.*, 425 F. (2d) 407 (C.A. 6), the court found each of these factors to be present and held

the intrastate transportation activities were not ''in interstate commerce'' within the meaning of the Motor Carrier Act and denied the section 13(b)(1) exemption. While ex parte No. MC–48 deals with petroleum and petroleum products, the decision indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act. (See in this connection, *Mid-Continent Petroleum Corp.* v. *Keen,* 157 F. 2d 310 (C.A. 8); *DeLoach* v. *Crowley's Inc.*, 128 F. 2d 378 (C.A. 5); *Walling* v. *Jacksonville Paper Co.*, 69 F. Supp. 599, affirmed 167 F. 2d 448, reversed on another point in 336 U.S. 187; and *Standard Oil Co.* v. *Trade Commission,* 340 U.S. 231, 238).

(c) The wage and hours provisions of the Fair Labor Standards Act are applicable not only to employees engaged in commerce, as defined in the act, but also to employees engaged in the production of goods for commerce. Employees engaged in the ''production'' of goods are defined by the act as including those engaged in ''handling, transporting, or in any other manner working on such goods, or in closely related process or occupation directly essential to the production thereof, in any State.'' (Fair Labor Standards Act, sec. 3(j), 29 U.S.C., sec. 203(j), as amended by the Fair Labor Standards Amendments of 1949, 63 Stat. 910. See also the Division's Interpretative Bulletin, part 776 of this chapter on general coverage of the wage and hours provisions of the act.) Where transportation of persons or property by motor vehicle between places within a State falls within this definition, and is not transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act because movement from points out of the State has ended or because movement to points out of the State has not yet begun, the employees engaged in connection with such transportation (this applies to employees of common, contract, and private carriers) are covered by the wage and hours provisions of the Fair Labor Standards Act and are not subject to the jurisdiction of the Secretary of Transportation. Examples are: (1) Drivers transporting goods in and about a plant producing goods for commerce; (2) chauffeurs or drivers of company cars or buses transporting officers or employees from place to place in the course of their employment in an establishment which produces goods for commerces; (3) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods; (4) drivers transporting goods between a factory and the plant of an independent contractor who performs operations on the goods, after which they are returned to the factory which further processes the goods for commerce; and (5) drivers transporting goods such as machinery or tools and dies, for example, to be used or consumed in the production of other goods for commerce. These and other employees engaged in connection with the transportation within a State of persons or property by motor vehicle who are subject to the Fair Labor Standards Act because engaged in the production of goods for commerce and who are not subject to the Motor Carrier Act because not engaged in interstate or foreign commerce within the meaning of that act, are not within the exemption provided by section 13(b)(1). (*Walling* v. *Comet Carriers*, 151 F. (2d) 107 (C.A. 2); *Griffin Cartage Co.* v. *Walling,* 153 F. (2d) 587 (C.A. 6); *Walling* v. *Morris,* 155 F. (2d) 832 (C.A. 6), reversed on other grounds in *Morris* v. *McComb,* 332 U.S. 422; *West Kentucky Coal Co.* v. *Walling,* 153 F. (2d) 582 (C.A. 6); *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C.A. 4); *Atlantic Co.* v. *Walling,* 131 F. (2d) 518 (C.A. 5); *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C.A. 6); *Walling* v. *Griffin Cartage Co.,* 62 F. Supp. 396 (E.D. Mich.), affirmed 153 F. (2d) 587 (C.A. 6); *Dallum* v. *Farmers Coop. Trucking Assn.*, 46 F. Supp. 785 (D. Minn.); *Walling* v. *Villaume Box & Lbr. Co.*, 58 F. Supp. 150 (D. Minn); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Reynolds* v. *Rogers Cargate Co.*, 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds 166 F. (2d) 317 (C.A. 6), *Hansen*

v. *Salinas Valley Ice Co.* (Cal. App.), 144 P. (2d) 896).

**§ 782.8 Special classes of carriers.**

(a) The Interstate Commerce Commission consistently maintained that transportation with a State of consumable goods (such as food, coal, and ice) to railroad, docks, etc., for use of trains and steamships is not such transportation as is subject to its jurisdiction. (*New Pittsburgh Coal Co.* v. *Hocking Valley Ry. Co.*, 24 I.C.C. 244; *Corona Coal Co.* v. *Secretary of War*, 69 I.C.C. 389; Bunker Coal from Alabama to Gulf Ports, 227 I.C.C. 485.) The intrastate delivery of chandleries, including cordage, canvas, repair parts, wire rope, etc., to ocean-going vessels for use and consumption aboard such vessels which move in interstate or foreign commerce falls within this category. Employees of carriers so engaged are considered to be engaged in commerce, as that term is used in the Fair Labor Standards Act. These employees may also be engaged in the ''production of goods for commerce'' within the meaning of section 3(j) of the Fair Labor Standards Act. See cases cited in § 782.7(c), and see *Mitchell* v. *Independent Ice Co.*, 294 F. 2d 186 (C.A. 5), certiorari denied 368 U.S. 952, and part 776 of this chapter. Since the Commission has disclaimed jurisdiction over this type of operation (see, in this connection § 782.7(b)), it is the Division's opinion that drivers, driver's helpers, loaders, and mechanics employed by companies engaged in such activities are covered by the wage and hours provisions of the Fair Labor Standards Act, and are not within the exemption contained in section 13(b)(1). (See *Hansen* v. *Salinas Valley Ice Co.* (Cal. App.), 144 P. (2d) 896.)

(b) Prior to June 14, 1972, when the Department of Transportation published a notice in the FEDERAL REGISTER (37 FR 11781) asserting its power to establish qualifications and maximum hours of service of employees of contract mail haulers, thereby reversing the long-standing position of the Interstate Commerce Commission, the Administrator of the Wage and Hour Division had taken the position that employees engaged in the transportation of mail under contract with the Postal Service were not within the exemption provided by section 13(b)(1) of the Fair Labor Standards Act. As the result of the notice of June 14, 1972, the Administrator will no longer assert that employees of contract mail carriers are not within the 13(b)(1) exemption for overtime work performed after June 14, 1972, pending authoritative court decisions to the contrary. This position is adopted without prejudice to the rights of individual employees under section 16(b) of the Fair Labor Standards Act.

(c) Section 202(c)(2) of the Motor Carrier Act, as amended on May 16, 1942, makes section 204 of that act ''relative to qualifications and maximum hours of service of employees and safety of operations and equipment,'' applicable ''to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a * * * railroad * * * express company * * * motor carrier * * * water carrier * * * or a freight forwarder * * * in the performance within terminal areas of transfer, collection, or delivery service.'' Thus, drivers, drivers' helpers, loaders, and mechanics of a motor carrier performing pickup and delivery service for a railroad, express company, or water carrier are to be regarded as within the 13(b)(1) exemption. (See *Levinson* v. *Spector Motor Service*, 330 U.S. 649 (footnote 10); cf. *Cedarblade* v. *Parmelee Transp. Co.* (C.A. 7), 166 F. (2d) 554, 14 Labor Cases, par. 64,340.) The same is true of drivers, drivers' helpers, loaders, and mechanics employed directly by a railroad, a water carrier or a freight forwarder in pickup and delivery service. Section 202(c)(1) of the Motor Carrier Act, as amended on May 16, 1942, includes employees employed by railroads, water carriers, and freight forwarders, in transfer, collection, and delivery service in terminal areas by motor vehicles within the Interstate Commerce Commission's regulatory power under section 204 of the same act. See *Morris* v. *McComb*, 332 U.S. 422 and § 782.2(a). (Such employees of a carrier subject to part I of the Interstate Commerce Act may come within the exemption from the overtime requirements provided by section 13(b)(2). Cf. *Cedarblade* v. *Parmelee Transp. Co.* (C.A. 7), 166 F. (2d) 554, 14

Labor Cases, par. 64,340. Thus, only employees of a railroad, water carrier, or freight forwarder outside of the scope of part I of the Interstate Commerce Act and of the 13(b)(2) exemption are affected by the above on and after the date of the amendment.) Both before and after the amendments referred to, it has been the Division's position that the 13(b)(1) exemption is applicable to drivers, drivers' helpers, loaders, and mechanics employed in pickup and delivery service to line-haul motor carrier depots or under contract with forwarding companies, since the Interstate Commerce Commission had determined that its regulatory power under section 204 of the Motor Carrier Act extended to such employees.

(d) The determinations of the Interstate Commerce Commission discussed in paragraphs (a), (b), and (c) of this section have not been amended or revoked by the Secretary of Transportation. These determinations will continue to guide the Administrator of the Wage and Hour Division in his enforcement of section 13(b)(1) of the Fair Labor Standards Act.

[36 FR 21778, Nov. 13, 1971, as amended at 37 FR 23638, Nov. 7, 1972]

# PART 783—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES EMPLOYED AS SEAMEN


INTRODUCTORY

Sec.
783.0 Purpose of this part.
783.1 General scope of the Act.
783.2 Matters discussed in this part.
783.3 Significance of official interpretations.
783.4 Basic support for interpretations.
783.5 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

783.6 Definitions of terms used in the Act.
783.7 ''Employer'', ''employee'', and ''employ''.
783.8 ''Person''.
783.9 ''Enterprise''.
783.10 ''Establishment''.
783.11 ''Enterprise engaged in commerce or in the production of goods for commerce''.
783.12 ''Commerce''.
783.13 ''Production''.
783.14 ''Goods''.
783.15 ''State''.
783.16 ''Wage''.
783.17 ''American vessel''.

APPLICATION IN GENERAL OF THE ACT'S PROVISIONS

783.18 Commerce activities of employees.
783.19 Commerce activities of enterprises in which employee is employed.
783.20 Exemptions from the Act's provisions.
783.21 Guiding principles for applying coverage and exemption provisions.
783.22 Pay standards for employees subject to ''old'' coverage of the Act.
783.23 Pay standards for ''newly covered'' employees.

THE STATUTORY PROVISIONS REGARDING SEAMEN

783.24 The section 13(a)(14) exemption.
783.25 The section 13(b)(6) exemption.
783.26 The section 6(b)(2) minimum wage requirement.
783.27 Scope of the provisions regarding ''seamen''.

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF THE EXEMPTIONS

783.28 General legislative history.
783.29 Adoption of the exemption in the original 1938 Act.
783.30 The 1961 Amendments.

WHO IS ''EMPLOYED AS A SEAMAN''

783.31 Criteria for employment ''as a seaman''.
783.32 ''Seaman'' includes crew members.
783.33 Employment ''as a seaman'' depends on the work actually performed.
783.34 Employees aboard vessels who are not ''seamen''.
783.35 Employees serving as ''watchmen'' aboard vessels in port.
783.36 Barge tenders.
783.37 Enforcement policy for nonseaman's work.

WHAT IS AN ''AMERICAN VESSEL''

783.38 Statutory definition of ''American vessel''.
783.39 ''Vessel'' includes all means of water transportation.
783.40 ''Documented'' vessel.
783.41 ''Numbered'' vessel.
783.42 Vessels neither ''documented'' nor ''numbered''.

COMPUTATION OF WAGES AND HOURS

783.43 Computation of seaman's minimum wage.
783.44 Board and lodging as wages.
783.45 Deductions from wages.
783.46 Hours worked.

783.47 Off-duty periods.

APPLICATION OF THE EXEMPTIONS

783.48 Factors determining application of exemptions.
783.49 Workweek unit in applying the exemptions.
783.50 Work exempt under another section of the Act.
783.51 Seamen on a fishing vessel.

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

SOURCE: 27 FR 8309, Aug. 21, 1962, unless otherwise noted.

INTRODUCTORY

### § 783.0 Purpose of this part.

This part 783 is the official interpretation of the Department of Labor with respect to the meaning and application of sections 6(b)(2), 13(a)(14), and 13(b)(6) of the Fair Labor Standards Act, as amended, which govern the application of the minimum wage and overtime pay requirements of the Act to employees employed as seamen. Prior to the Fair Labor Standards Amendments of 1961, which became effective on September 3, 1961, all employees employed as seamen were exempt from both the minimum wage and overtime pay provisions of the Act. The 1961 amendments have narrowed this exemption so as to extend the minimum wage provisions of the Act to employees employed as seamen on American vessels. Employees employed as seamen on vessels other than American vessels continue to be exempt from both the minimum wage and the overtime pay requirements of the Act. It is the purpose of this part to make available in one place the interpretations of the law relating to employees employed as seamen which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

### § 783.1 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, 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 exempt 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.

### § 783.2 Matters discussed in this part.

This part 783 discusses the meaning and application of the exemptions provided in sections 13(a)(14) and 13(b)(6) of the Act. The provisions of section 6(b)(2) of the Act, which relate to the calculation of minimum wages and the hours worked by seamen on American vessels, are also discussed in this part. Other provisions of the Act are discussed only to make clear their relevance to these provisions and are not considered in detail in this part. Interpretations and regulations also published elsewhere in this title deal in some detail with such subjects as the general coverage of the Act (part 776 of this chapter), methods of payment of wages (part 531 of this chapter), hours worked (part 785 of this chapter), recordkeeping requirements (part 516 of this chapter), and qualifications for exempt executive, administrative, and professional employees (part 541 of this chapter). 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. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

### § 783.3 Significance of official interpretations.

This part contains the official interpretations of the Department of Labor pertaining to the provisions of section 6(b)(2) and the exemptions provided in sections 13(a)(14) and 13(b)(6) of the Act. It is intended that the positions stated concerning the Act 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). The Secretary of Labor and the Administrator will follow these interpretations 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.

**§ 783.4 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. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290). As included 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.

**§ 783.5 Interpretations made, continued, and superseded by this part.**

On and after publication of this part 783 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 783 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 by the Fair Labor Standards Amendments of 1961 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 interpretations 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 Office of the Division.

SOME BASIC DEFINITIONS

**§ 783.6 Definitions 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 statements of interpretations to which reference is made, and in the sections of this part where the particular provisions containing the defined terms are discussed.

### § 783.7 "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. 772). 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.

### § 783.8 "Person".

As used in the Act (including definition of ''enterprise'' set forth below in § 783.9), ''person'' is defined as meaning ''an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons'' (Act, section 3(a)).

### § 783.9 "Enterprise".

The term ''enterprise'' which may, in some situations, be pertinent in determining coverage of this Act of employees employed by employers on vessels, 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 and in §§ 779.200 through 779.235 of this chapter.

### § 783.10 "Establishment".

As used in the Act (including the provision quoted below in § 783.11), the term ''establishment'', which is not specifically 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* 334 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., 1st sess. p. 35). This is the meaning of the term as used in sections 3(r), 3(s), and 6(b) of the Act. An establishment may have employees employed away from the establishment as well as within it (H. Rept. No. 1453, supra).

### § 783.11 "Enterprise engaged in commerce or in the production of goods for commerce".

Portions of the definition of ''enterprise engaged in commerce or in the production of goods for commerce'' (Act section 3(s)) which may in some situations determine the application of provisions of the Act to employees employed by employers on vessels are as follows:

(s) ''Enterprise engaged in commerce or in the production of goods for commerce'' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

* * * * *

(3) any establishment of any such enterprise * * * which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000.

* * * * *

The application of this definition is considered in part 776 of this chapter.

### § 783.12 "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 § 783.15.) 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.

### § 783.13 "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 terms 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 § 783.15.)

### § 783.14 "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.

### § 783.15 "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 Acts' definition of ''commerce'' and ''produced'' (see §§ 783.12, 783.13) is discussed in part 776 of this chapter, dealing with general coverage.

### § 783.16 "Wage".

''Wage'' paid to an employee is defined in section 3(m) of the Act to include ''the reasonable cost, as determined by the Secretary of Labor, to

the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measure of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee''. Although there is some incidental discussion in this part of this definition and its impact, a fuller discussion of its meaning and the regulations pertaining thereto are set forth in part 531 of this chapter.

### § 783.17 "American vessel".

Section 3(p) of the Act, added by the 1961 Amendments, defines ''American vessel'' to include ''any vessel which is documented or numbered under the laws of the United States.'' This definition and its effect with respect to the application of the Act to employment of individuals as seamen are discussed in subsequent sections of this part.

## APPLICATION IN GENERAL OF THE ACT'S PROVISIONS

### § 783.18 Commerce activities of employees.

Prior to the 1961 Amendments, the Fair Labor Standards Act applied 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 §§ 783.12 to 783.15 for definitions governing the scope of this coverage). The Act as amended in 1961 continues this coverage. In general, employees of businesses concerned with the transportation of goods or persons on navigable waters 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)(14) and 13(b)(6) 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.

### § 783.19 Commerce activities of enterprises in which employee is employed.

Under amendments to the Fair Labor Standards Act effective September 3, 1961, employees not covered by reason of their personal engagement in interstate commerce activites, as explained in § 783.18, 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, or by an establishment described in section 3(s)(3) of the Act (see § 783.11). Such employees, if not exempt from the minimum wage and overtime pay requirements under section 13(a)(14) or exempt from the overtime pay requirements under section 13(b)(6), will have to be paid in accordance with those 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 a business concerned with transportation of goods or persons by vessels, where the enterprise has an annual gross sales volume of $1,000,000 or more. Enterprise coverage is more fully discussed in part 776 of this chapter, dealing with general coverage.

### § 783.20 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. Others are from the child labor 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), (h); 213 (a), (b), (c), (d). And see *Addison* v. *Holly Hill*, 322 U.S. 607; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866; *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 transportation or shipping (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)(6) of the Act for employees employed as seamen and the exemption from the mimimum wage and overtime pay requirements provided by section 13(a)(14) for employees so employed on vessels other than American vessels. These exemptions, which are subject to the general rules stated in § 783.21, are discussed at length in this part.

### § 783.21 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 (*Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616). ''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; and see *Walling* v. *Haden*, 153 F. 2d 196). 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 spirits.'' 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; *Helena Glendale Ferry Co.* v. *Walling*, supra; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Flemming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. 2d 346, certiorari denied 326 U.S. 760; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971, certiorari denied 326 U.S. 722; *Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678).

### § 783.22 Pay standards for employees subject to "old" coverage of the Act.

The 1961 amendments did not change the tests described in § 783.18 by which coverage based on the employee's individual activities is determined. Any employee whose employment satisfies these tests and would not have come within some exemption (such as section 13(a)(14)) in the Act prior to the 1961 amendments is subject to the ''old'' provisions of the law and entitled to a minimum wage of at least $1.15 an hour beginning September 3,

1961, and not less than $1.25 an hour beginning September 3, 1963 (29 U.S.C. 206(a)(1)), unless expressly exempted by some provision of the amended Act. Such an employee is also entitled to overtime pay for hours worked in excess of 40 in any workweek at a rate not less than one and one-half times his regular rate of pay (29 U.S.C. 207(a)(1)), unless expressly exempt from overtime by some exemption such as section 13(b)(6). (Minimum wage rates in Puerto Rico, the Virgin Islands, and American Samoa are governed by special provisions of the Act (26 U.S.C. 206(a)(3); 206(c)(2).) Information on these rates is available at any office of the Wage and Hour Division.

### § 783.23 Pay standards for "newly covered" employees.

There are some employees whose individual activities would not bring them within the minimum wage or overtime pay provisions of the Act as it was prior to the 1961 amendments, but who are brought within minimum wage or overtime coverage or both for the first time by the new ''enterprise'' coverage provisions or changes in exemptions, or both, which were enacted as part of the amendments and made effective September 3, 1961. Typical of such employees are those who, regardless of any engagement in commerce or in the production of goods for commerce, are employed as seamen and would therefore have been exempt from minimum wage as well as overtime pay requirements by virtue of section 13(a)(14) of the Act until the 1961 amendments if so employed during that period, but who by virtue of these amendments are exempt only from the overtime pay requirements on and after September 3, 1961, under section 13(b)(6) of the amended Act. These ''newly covered'' employees for whom no specific exemption has been retained or provided in the amendments must be paid not less than the minimum wages shown in the schedule below for hours worked, computed, in the case of employees employed as seamen, in accordance with the special provisions of section 6(b)(2) which are discussed in subsequent sections of this part. Any ''newly covered'' employees who are not exempted by section 13(b)(6) because of their employment as seamen must be paid, unless exempted by some other provision, not less than one and one-half times their regular rates of pay for overtime, as shown in the schedule below.

| Beginning | Minimum wage (29 U.S.C. 206(b)) | Overtime pay (29 U.S.C. 207(a)(2)) |
|---|---|---|
| Sept. 3, 1961 .. | $1 an hour ..... | None required. |
| Sept. 3, 1963 .. | No change ..... | After 44 hours in a workweek |
| Sept. 3, 1964 .. | $1.15 an hour ..... | After 42 hours in a workweek. |
| Sept. 3, 1965 [1] and thereafter. | $1.25 an hour ..... | After 40 hours in a workweek. |

[1] Requirements identical to those for employees under ''old'' coverage. (Minimum wage rates for newly covered employees, in Puerto Rico, the Virgin Islands, and American Samoa are set by wage order on recommendations of special industry committees (29 U.S.C. 206(a)(3); 206(c)(2). Information on these rates may be obtained at any office of the Wage and Hour and Public Contracts Divisions.)

## THE STATUTORY PROVISIONS REGARDING SEAMEN

### § 783.24 The section 13(a)(14) exemption.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage and overtime pay requirements of the Act, but not from its child labor provisions, ''any employee employed as a seaman on a vessel other than an American vessel''.

### § 783.25 The section 13(b)(6) exemption.

Section 13(b)(6) of the Act exempts from the overtime pay requirements of the Act, but not from its other requirements, ''any employee employed as a seaman''.

### § 783.26 The section 6(b)(2) minimum wage requirement.

Section 6(b), with paragraph (2) thereof, requires the employer to pay to an employee, ''if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by,

but not including off-duty periods which are provided pursuant to the employment agreement).'' The ''hourly rate prescribed by'' paragraph (1) of the subsection is the minimum wage rate applicable according to the schedule shown in § 783.23.

### § 783.27 Scope of the provisions regarding "seamen".

In accordance with the above provisions of the Act as amended, an employee employed as a seaman is exempt only from its overtime pay provisions under the new section 13(b)(6), unless the vessel on which he is employed is not an American vessel. Section 13(a)(14) as amended continues the prior exemption, from minimum wages as well as overtime pay, for any employees employed as a seaman on a vessel other than an American vessel. Thus, to come within this latter exemption an employee now must be ''employed as'' a ''seaman'' on a vessel other than an ''American vessel'', while to come within the overtime exemption provided by section 13(b)(6) an employee need only be ''employed as'' a ''seaman''. The minimum wage requirements of the Act, as provided in section 6(b) and paragraph (2) of that subsection apply if the employee is ''employed as'' a ''seaman'' on an ''American vessel''. The meaning and scope of these key words, ''employed as a seaman'' and ''American vessel'' are discussed in subsequent sections of this part. Of course, if an employee is not ''employed as'' a ''seaman'' within the meaning of this term as used in the Act, these exemptions and section 6(b)(2) would have no relevancy and his status under the Act would depend, as in the case of any other employee, upon the other facts of his employment, (§§ 783.18 through 783.20).

## LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF THE EXEMPTIONS

### § 783.28 General legislative history.

As originally enacted in 1938, section 13(a)(3) of the Fair Labor Standards Act exempted from both the minimum wage and overtime pay requirements ''any employee employed as a seaman'' (52 Stat. 1050). In 1949 when several amendments were made to the Act (63 Stat. 910), this exemption was not changed except that it was renumbered section 13(a)(14). In the 1961 amendments (75 Stat. 65), a like exemption was retained but it was limited to one employed as a seaman on a vessel other than an American vessel (section 13(a)(14)); an overtime exemption was provided for all employees employed as seamen (section 13(b)(6)), and those employed as seamen on an American vessel were brought within the minimum wage provisions (sec. 6(b)(2)).

### § 783.29 Adoption of the exemption in the original 1938 Act.

(a) The general pattern of the legislative history of the Act shows that Congress intended to exempt, as employees ''employed as'' seamen, only workers performing water transportation services. The original bill considered by the congressional committees contained no exemption for seamen or other transportation workers. At the joint hearings before the Senate and House Committees on Labor, representatives of the principal labor organizations representing seamen and other transportation workers testified orally and by writing that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise to bring them within the scope of the proposed legislation (see Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217). The committees evidently acquiesced in this view and amendments were accepted (81 Cong. Rec. 7875) and subsequently adopted in the law, exempting employees employed as seamen (sec. 13(a)(3)), certain employees of motor carriers (sec. 13(b)(1)), railroad employees (sec. 13(b)(2)), and employees of carriers by air (sec. 13(a)(4), now sec. 13(b)(3)).

(b) That the exemption was intended to exempt employees employed as ''seamen'' in the ordinary meaning of that word is evidenced by the fact that the chief proponents for the seamen's exemption were the Sailors Union of the Pacific and the National Maritime Union. The former wrote asking for an exemption for ''seamen'' for the reason

that they were already under the jurisdiction of the Maritime Commission pursuant to the Merchant Marine Act of 1936 (Joint Hearings before the Committees on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 1216, 1217). The representative of the latter union also asked that ''seamen'' be exempted for the same reason saying * * * ''We feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the government machinery now set up to handle these problems'' (id. at p. 545). And he went on to testify, ''What we would like is an interpretation of the bill which would provide a protective clause for the 'seamen' '' (id. at p. 547).

(c) Consonant with this legislative history, the courts in interpreting the phrase ''employee employed as a seaman'' for the purpose of the Act have given it its commonly accepted meaning, namely, one who is aboard a vessel necessarily and primarily in aid of its navigation (*Walling* v. *Bay State Dredging and Contracting Co.*, 149 F. 2d 346; *Walling* v. *Haden*, 153 F. 2d 196; *Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678). In arriving at this conclusion the courts recognized that the term ''seaman'' does not have a fixed and precise meaning but that its meaning is governed by the context in which it is used and the purpose of the statute in which it is found. In construing the Fair Labor Standards Act, as a remedial statute passed for the benefit of all workers engaged in commerce, unless exempted, the courts concluded that giving a liberal interpretation of the meaning of the term ''seaman'' as used in an exemptive provision of the Act would frustrate rather than accomplish the legislative purpose (*Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616; *Walling* v. *Bay State Dredging and Contracting Co.*, supra; *Sternberg Dredging Co.* v. *Walling*, supra; *Walling* v. *Haden*, supra).

### § 783.30 The 1961 Amendments.

One of the steps Congress took in the 1961 Amendments to extend the monetary provisions of the Act to more workers was to limit the scope of the exemption which excluded all employees employed as seamen from application of the minimum wage and overtime provisions. This it did by extending the minimum wage provisions of the Act to one employed as a seaman on an American vessel (section 6(b)(2)), by adding to the language of section 13(a)(14) to make the exemption applicable only to a seaman employed on a vessel other than an American vessel, and finally by the addition of a new exemption, section 13(b)(6), relieving employers of overtime pay requirements with respect to those employees employed as seamen who do not come within the scope of the amended section 13(a)(14). (H. Rep. No. 75, 87th Cong., 1st sess., pp. 33, 36; Sen. Rep. No. 145, 87th Cong., 1st sess., pp. 32, 50; Statement of the Managers on the part of the House, H. (Cong.) Rep. No. 327, 87th Cong., 1st sess., p. 16.) In view of the retention in the 1961 amendments of the basic language of the original exemption, ''employee employed as a seaman'', the legislative history and prior judicial construction (see § 783.29) of the scope and meaning of this phrase would seem controlling for purposes of the amended Act.

## WHO IS ''EMPLOYED AS A SEAMAN''

### § 783.31 Criteria for employment "as a seaman."

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as ''employed as a seaman'' if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels (*Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 328 U.S.

866; *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. 2d 9, certiorari denied 327 U.S. 722; *Douglas* v. *Dixie Sand and Gravel Co.*, (E.D. Tenn.) 9 WH Cases 285). The Act's provisions with respect to seamen apply to a seaman only when he is ''employed as'' such (*Walling* v. *Haden*, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

**§ 783.32 "Seaman" includes crew members.**

The term ''seaman'' includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases it may not be of that type, in which event the special provisions relating to seamen will not be applicable (*Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678; *Cuascut* v. *Standard Dredging Co.*, 94 F. Supp. 197; *Woods Lumber Co.* v. *Tobin*, 199 F. 2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.

**§ 783.33 Employment "as a seaman" depends on the work actually performed.**

Whether an employee is ''employed as a seaman'', within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed (*Walling* v. *Haden*, 153 F. 2d 196; *Cuascut* v. *Standard Dredging Corp.*, 94 F. Supp. 197). Merely because one works aboard a vessel (*Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616; *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. 2d 346), or may be articled as a seaman (see *Walling* v. *Haden*, supra), or performs some maritime duties (*Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. 2d 346; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971) one is not employed as a seaman within the meaning of the Act unless one's services are rendered primarily as an aid in the operation of the vessel as a means of transportation, as for example services performed substantially as an aid to the vessel in navigation. For this reason it would appear that employees making repairs to vessels between navigation seasons would not be ''employed as'' seamen during such a period. (See *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187; but see *Walling* v. *Keansburg Steamboat Co.*, 162 F. 2d 405 in which the seaman exemption was allowed in the case of an article employee provided he also worked in the ensuing navigation period but not in the case of unarticled employees who only worked during the lay-up period.) For the same and other reasons, stevedores and longshoremen are not employed as seamen. (*Knudson* v. *Lee & Simmons, Inc.*, 163 F. 2d 95.) Stevedores or roust-abouts traveling aboard a vessel from port to port whose principal duties require them to load and unload the vessel in port would not be employed as seamen even though during the voyage they may perform from time to time certain services of the same type as those rendered by other employees who would be regarded as seamen under the Act.

**§ 783.34 Employees aboard vessels who are not "seamen".**

Concessionaires and their employees aboard a vessel ordinarily do not perform their services subject to the authority, direction, and control of the master of the vessel, except incidentally, and their services are ordinarily not rendered primarily as an aid in the operation of the vessel as a means of transportation. As a rule, therefore, they are not employed as seamen for purposes of the Act. Also, other employees working aboard vessels, whose service is not rendered primarily as an aid to the operation of the vessel as a means of transportation are not employed as seamen (*Knudson* v. Lee & Simmons, Inc., 163 F. 2d 95; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 32 U.S. 866). Thus, employees on floating equipment who are engaged in the construction of docks, levees, revetments

or other structures, and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as seamen within the meaning of the Act but are engaged in performing essentially industrial or excavation work (*Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678; *Walling* v. *Haden*, supra; *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. 2d 346; *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. 2d 9, certiorari denied 327 U.S. 722). Thus, ''captains'' and ''deck hands'' of launches whose dominant work was industrial activity performed as an integrated part of harbor dredging operations and not in furtherance of transportation have been held not to be employed as seamen within the meaning of the Act (*Cuascut* v. *Standard Dredging Corp.* 94 F. Supp. 197).

### § 783.35 Employees serving as "watchmen" aboard vessels in port.

Various situations are presented with respect to employees rendering watchman or similar service aboard a vessel in port. Members of the crew, who render such services during a temporary stay in port or during a brief lay-up for minor repairs, are still employed as ''seamen''. Where the vessel is laid up for a considerable period, members of the crew rendering watchman or similar services aboard the vessel during this period would not appear to be within the special provisions relating to seamen because their services are not rendered primarily as an aid in the operation of the vessel as a means of transportation. See *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187. Furthermore, employees who are furnished by independent contractors to perform watchman or similar services aboard a vessel while in port would not be employed as seamen regardless of the period of time the vessel is in port, since such service is not of the type described in § 783.31. The same considerations would apply in the case of members of a temporary or skeleton crew hired merely to maintain the vessel while in port so that the regular crew may be granted shore leave. On the other hand, licensed relief officers engaged during relatively short stays in port whose duty it is to maintain the ship in safe and operational condition and who exercise the authority of the master in his absence, including keeping the log, checking the navigation equipment, assisting in the movement of the vessel while in port, are employed as seamen within the meaning of the exemptions. The same may be true of licensed relief engineers employed under the same circumstances whose duty it is to maintain the ship's auxiliary machinery in operation and repair (see *Pratt* v. *Alaska Packers Asso.* (N.D. Calif.) 9 WH Cases 61).

### § 783.36 Barge tenders.

Barge tenders on non-selfpropelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered to be employed as ''seamen'' for the purposes of the Act unless they do a substantial amount of ''non-seaman's'' work (*Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d) 27 (C.A. 5, 1940), cert. den. 313 U.S. 559 (1941)). However, there are employees who, while employed on vessels such as barges and lighters, are primarily or substantially engaged in performing duties such as loading and unloading or custodial service which do not constitute service performed primarily as an aid in the operation of these vessels as a means of transportation and consequently are not employed as ''seamen'' (*McCarthy* v. *Wright & Cobb Lighterage Co.*, 163 F. (2d) 92; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. (2d) 971, certiorari denied 326 U.S. 722; *Woods Lumber Co.* v. *Tobin,* 20 Labor Cases 66, 640 (W.D. Tenn, 1951), aff'd, 199 F. (2d) 455). Whether an employee is on board a vessel primarily to perform maritime services as a seaman or loading and unloading services typical of such shore-bases personnel as longshoremen is a question of fact and can be determined only after reviewing all the facts in the particular case.

### § 783.37 Enforcement policy for non-seaman's work.

In the enforcement of the Act, an employee will be regarded as ''employed as a seaman'' if his work as a whole

meets the test stated in § 783.31, even though during the workweek he performs some work of a nature other than that which characterizes the service of a seaman, if such nonseaman's work is not substantial in amount. For enforcement purposes, the Administrator's position is that such differing work is ''substantial'' if it occupies more than 20 percent of the time worked by the employee during the workweek.

WHAT IS AN ''AMERICAN VESSEL''

### § 783.38 Statutory definition of "American vessel".

The provisions of section 6(b)(2) prescribe special methods for computing minimum wages and hours worked under the Act which are applicable only to seamen who are employed on American vessels. An ''American vessel'', which would appear to signify a vessel of the United States as distinguished from a foreign vessel, ''includes'', under the terms of the definition in section 3(p) of the Act, ''any vessel which is documented or numbered under the laws of the United States.'' The Department of the Treasury, Bureau of Customs and the United States Coast Guard, respectively, are responsible for documentation and numbering of vessels.

### § 783.39 "Vessel" includes all means of water transportation.

Since the Act does not define ''vessel'' it is appropriate to apply the difinition of ''vessel'' as set forth in the United States Code (1 U.S.C. 3). The Code defines ''vessel'' as including ''every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water''. But the Federal Boating Act of 1958, (under which the U.S. Coast Guard is responsible for numbering vessels) and the Documentation Regulations administered by the Bureau of Customs, utilize this basic definition, with the addition of specific exclusions for ''seaplanes'' and ''aircraft'' (46 U.S.C. 527; 19 CFR 3.1(a)).

### § 783.40 "Documented" vessel.

A vessel ''documented * * * under the laws of the United States'' is typically a vessel which has been registered, enrolled and licensed, or licensed by the Bureau of Customs under the laws of the United States (46 U.S.C. 11, 193, 251–252, 258, 840). Although Bureau of Customs regulations provide for three types of documentations, distinctions between the categories of vessels subject to them are immaterial for the purposes of the Fair Labor Standards Act, since a vessel with any of the three kinds of documentation is an ''American vessel'' within the section 3(p) definition. Generally, any vessel of five net tons or more which is owned by a citizen of the United States is ''entitled to'' documentation. Complete information on the documentation requirements may be found in 19 CFR part 3.

### § 783.41 "Numbered" vessel.

A vessel ''numbered under the laws of the United States'' means a vessel numbered pursuant to the provisions of Federal law, including vessels numbered under any State numbering system approved by the Secretary of the Department under which the U.S. Coast Guard is operating, in accordance with section 2(c) of the Federal Boating Act of 1958 (46 U.S.C. 527–527h). Generally, any vessel, which is not required to have and does not have, a valid marine document issued by the Bureau of Customs and is propelled by machinery of more than 10 horsepower, whether or not such machinery is the principal source of propulsion, is required to be numbered in conformity with the Federal Boating Act of 1958 if it uses the navigable waters of the United States, its Territories, or the District of Columbia, or is owned in a State and uses the high seas (46 U.S.C. 527(a)). The requirements and procedures of this Act are explained in detail in 46 CFR part 170.

### § 783.42 Vessels neither "documented" nor "numbered".

An ''American vessel'' on which employment as a seaman is subject to the minimum wage under the provisions of section 6(b)(2) and section 13(a)(14) is not limited by the language of the Act to those vessels which are ''documented'' or ''numbered'' as described above in §§ 783.40 and 783.41. Since the

term ''American vessel'' has traditionally been applied to regularly documented vessels (see *U.S.* v. *Rogers,* 27 Fed. Cas. 890; *Badger* v. *Entierrez,* 111 U.S. 734; 18 Op. A.G. 234 (1885); 48 Am. Jur. 40), the inclusion of numbered vessels in the statutory definition of ''American vessel'' would indicate that the work ''includes'' is used in the sense of ''embracing'', as an enlargement and not as a word of limitation. The term may therefore apply to other vessels that do not fall within the illustrations given. For example, neither the documenting laws nor the numbering laws apply to vessels plying the purely internal waters of a State which do not join up with navigable waters touching on another State (19 CFR 3.5(a)(4); 33 CFR 2.10–5), but, nevertheless, the Fair Labor Standards Act does apply in those areas and it clearly would not comport with the remedial purpose of the Act to exclude from its minimum wage provisions seamen engaged in commerce or in the production of goods for commerce in those areas though the vessels are not documented or numbered. On the contrary, the legislative history shows the affirmative purpose to improve, though to a limited extent, the status of seamen (Sen. Rep. No. 145, 87th Cong., 1st sess., p. 32, 50).

COMPUTATION OF WAGES AND HOURS

### § 783.43 Computation of seaman's minimum wage.

Section 6(b) requires, under paragraph (2) of the subsection, that an employee employed as a seaman on an American vessel be paid wages at not less than the rate which will provide to the employee, for the period covered by the wage payment, wages which are equal to compensation for all hours on duty in such period at the hourly rate prescribed for employees newly covered by the Act's minimum wage requirements by reason of the 1961 Amendments (see §§ 783.23 and 783.26). Although the Act takes the workweek as the unit of time to be used in determining compliance with the minimum wage of overtime requirements and in applying the exemptions, Congress, in recognition of the unique working conditions of seamen and of the customs in the industry, made this special provision. Under section 6(b)(2) periods other than a workweek may be used, in accordance with established customs in the industry, as the basis for calculating wages for covered seamen provided the wages equal the compensation at the applicable minimum hourly rate which would be due to the employee for his hours actually spent on duty in the period. This would mean that the wage period may properly cover, for example, the period of a month or of a voyage so long as the seaman receives at the appropriate time compensation at least equal to the prescribed minimum rate for each compensable hour in that pay period. (See also § 531.26 of this chapter concerning requirements of other laws governing calculation of wages and frequency and manner of payment.) To illustrate, where seamen have customarily been paid monthly under an arrangement to perform seamen's duties during stipulated periods and to be off duty during stipulated periods during the month, if such a seaman works 300 hours during the month and receives his monthly compensation in an amount equal to a payment for that number of hours at the applicable minimum rate, there would be compliance with the requirements of section 6(b)(2). The fact that this seaman works a varying number of hours during the weeks comprising the monthly period or that the monthly compensation is disbursed in two or four partial payments to the seaman during the month would not warrant a contrary conclusion.

### § 783.44 Board and lodging as wages.

The wages for the period covered by the wage payment include all remuneration for employment paid to or on behalf of the employee for all hours actually on duty intended to be compensated by such wage payment. The reasonable cost or fair value, as determined by the Secretary of Labor pursuant to section 3(m) of the Act, of board and lodging furnished the employee during such period, if customarily furnished by the employer to his employees, is also included as part of the wages for the actual hours worked in the period (see § 783.16). However, the

cost of board and lodging would not be included as part of the wages paid to the employee to the extent it is excluded from the employee's wages under terms of a bona fide collective bargaining agreement applicable to such employee, whether or not customarily furnished to the employee. Where such an exclusion is not provided for in any bona fide collective bargaining agreement applicable to the employee, the reasonable cost or fair value thereof, whichever is appropriate, as determined in accordance with the standards set forth in the regulations in part 531 of this chapter, is included as part of the wage paid to such employee. Part 531 of this chapter also contains the official regulations and interpretations of the Department of Labor concerning the application of section 3(m) to other facilities as well as board and lodging furnished to an employee.

### § 783.45 Deductions from wages.

Where deductions are made from the wages of a seaman subject to section 6(b) of the Act, consideration must be given as to whether or not such deductions are permitted to be made when they result in the seaman receiving cash wages which are less than the applicable minimum wage rate for each hour actually on duty during the period covered by the wage payments. Such considerations are to be based upon the principles and interpretations governing such deductions. These are set forth and discussed in part 531 of this chapter. The methods of paying the compensation required by section 6 and the application thereto of the provisions of section 3(m) of the Act, which are set forth and explained in the said part 531, are applicable to seamen subject to the minimum wage provisions of the Act.

### § 783.46 Hours worked.

The provisions of section 6(b)(2) of the Act require that a seaman employed on an American vessel be paid wages equal to compensation at not less than the prescribed minimum wage rate for all of the hours the employee ''was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement)''. The Act in this portion of section 6(b)(2) is reflecting concepts that are well established in the law, and existing precedents (in such cases as *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Steiner* v. *Mitchell*, 350 U.S. 247; *Mitchell* v. *King Packing Co.*, 350 U.S. 260; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local N. 123*, 321 U.S. 590; and *General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951, 975) would be applicable in determining what time constitutes hours worked. See also the general discussion of hours worked in part 785 of this chapter.

### § 783.47 Off-duty periods.

Off-duty periods include not only such periods as shore leave but also generally those hours spent by a seaman on the vessel outside his watch or normal or regular working hours and his standby periods during which hours he is not required to perform and does not perform work of any kind but is free to utilize his time for his own purpose. The fact that during such off-duty periods the employee is subject to call in case of emergency situations affecting the safety and welfare of the vessel upon which he is employed, or of its passengers, crew, or cargo or for participation in life boat or fire drills will not render such off-duty periods, excluded by employment agreement applicable to the employee, ''hours worked''. Responding to such calls, however, as well as the performance of work in response thereto constitute compensable work time. For further and more detailed discussion on what generally are regarded as ''hours worked'' under the Act, see part 785 of this chapter.

## APPLICATION OF THE EXEMPTIONS

### § 783.48 Factors determining application of exemptions.

The application of the exemptions provided by section 13(a)(14) and section 13(b)(6) of the Act is determined in accordance with their language and scope as explained in §§ 783.24, 783.25, and 783.27, with regard to the principles

set forth in § 783.20 and the legislative history and judicial construction outlined in §§ 783.28 through 783.30. Whether a particular employee is exempt depends on what he does, as explained in §§ 783.31 through 783.37. Whether he is exempt from the overtime pay provisions only or from minimum wages as well depends on whether his employment is or is not on an American vessel, which is determined as indicated in §§ 783.38 through 783.42. In addition, sections 13(a)(14) and 13(b)(6), like other exemptions in the Act, apply on a workweek basis as mentioned in § 783.43 and explained in §§ 783.49 and 783.50.

### § 783.49 Workweek unit in applying the exemptions.

The unit of time to be used in determining the application of the exemption provided by section 13(b)(6) or 13(a)(14) to an employee is the workweek. (See *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572; *Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678.) This is the period used in determining whether a substantial amount of non-seaman's work has been performed so as to make the exemption inapplicable. See § 783.37. A workweek is a fixed and regularly recurring interval of 7 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 of the workweek for the purpose of escaping the requirements of the Act is not permitted.

### § 783.50 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 under section 13(b)(6), the employee is exempt that week from the overtime pay provisions but not from the minimum wage requirements.

### § 783.51 Seamen on a 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)(14) 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)(14), 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 (§§ 783.31–783.37). 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) 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

Sec.
784.0 Purpose.
784.1 General scope of the Act.
784.2 Matters discussed in this part.

784.3 Matters discussed in other interpretations.
784.4 Significance of official interpretations.
784.5 Basic support for interpretations.
784.6 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

784.7 Definition of terms used in the Act.
784.8 ''Employer,'' ''employee,'' and ''employ.''
784.9 ''Person.''
784.10 ''Enterprise.''
784.11 ''Establishment.''
784.12 ''Commerce.''
784.13 ''Production.''
784.14 ''Goods.''
784.15 ''State.''
784.16 ''Regular rate.''

APPLICATION OF COVERAGE AND EXEMPTIONS PROVISIONS OF THE ACT

784.17 Basic coverage in general.
784.18 Commerce activities of employees.
784.19 Commerce activities of enterprise in which employee is employed.
784.20 Exemptions from the Act's provisions.
784.21 Guiding principles for applying coverage and exemption provisions.

**Subpart B—Exemptions Provisions Relating to Fishing and Aquatic Products**

THE STATUTORY PROVISIONS

784.100 The section 13(a)(5) exemption.
784.101 The section 13(b)(4) exemption.

LEGISLATIVE HISTORY OF EXEMPTIONS

784.102 General legislative history.
784.103 Adoption of the exemption in the original 1938 Act.
784.104 The 1949 amendments.
784.105 The 1961 amendments.

PRINCIPLES APPLICABLE TO THE TWO EXEMPTIONS

784.106 Relationship of employee's work to the named operations.
784.107 Relationship of employee's work to operations on the specified aquatic products.
784.108 Operations not included in named operations on forms of aquatic ''life.''
784.109 Manufacture of supplies for named operations is not exempt.
784.110 Performing operations both on nonaquatic products and named aquatic products.
784.111 Operations on named products with substantial amounts of other ingredients are not exempt.
784.112 Substantial amounts of nonaquatic products; enforcement policy.
784.113 Work related to named operations performed in off- or dead-season.
784.114 Application of exemptions on a workweek basis.
784.115 Exempt and noncovered work performed during the workweek.
784.116 Exempt and nonexempt work in the same workweek.
784.117 Combinations of exempt work.

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

784.118 The exemption is intended for work affected by natural factors.
784.119 Effect of natural factors on named operations.
784.120 Application of exemption to ''offshore'' activities in general.
784.121 Exempt fisheries operations.
784.122 Operations performed as an integrated part of fishing.
784.123 Operations performed on fishing equipment.
784.124 Going to and returning from work.
784.125 Loading and unloading.
784.126 Operation of the fishing vessel.
784.127 Office and clerical employees under section 13(a)(5).

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

784.128 Requirements for exemption of first processing, etc., at sea.
784.129 ''Marine products.''
784.130 ''At sea.''
784.131 ''As an incident to, or in conjuction with,'' fishing operations.
784.132 The exempt operations.
784.133 ''First processing.''
784.134 ''Canning.''
784.135 ''Packing.''

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(b)(4) EXEMPTION

784.136 ''Shore'' activities exempted under section 13(b)(4).
784.137 Relationship of exemption to exemption for ''offshore'' activities.
784.138 Perishable state of the aquatic product as affecting exemption.
784.139 Scope of exempt operations in general.
784.140 Fabrication and handling of supplies for use in named operations.
784.141 Examples of nonexempt employees.

''CANNING''

784.142 Meaning and scope of ''canning'' as used in section 13(b)(4).
784.143 ''Necessary preparatory operations.''
784.144 Preliminary processing by the canner.
784.145 Preliminary processing by another employer as part of ''canning.''
784.146 ''Subsequent operations.''
784.147 Employees ''employed in'' canning.

PROCESSING, FREEZING, AND CURING

784.148 General scope of processing, freezing, and curing activities.
784.149 Typical operations that may qualify for exemption.
784.150 Named operations performed on previously processed aquatic products.
784.151 Operations performed after product is rendered nonperishable.
784.152 Operations performed on by-products.

MARKETING, STORING, PACKING FOR SHIPMENT, AND DISTRIBUTING

784.153 General scope of named operations.
784.154 Relationship to other operations as affecting exemption.
784.155 Activities performed in wholesale establishments.

APPLICATION OF SECTION 13(b)(4) IN CERTAIN ESTABLISHMENTS

784.156 Establishments exclusively devoted to named operations.

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 by-products 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

Sec.

785.1 Introductory statement.
785.2 Decisions on interpretations; use of interpretations.

785.3 Period of effectiveness of interpretations.
785.4 Application to Walsh-Healey Public Contracts Act.

Subpart B—Principles for Determination of Hours Worked

785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.
785.6 Definition of ''employ'' and partial defintion of ''hours worked''.
785.7 Judicial construction.
785.8 Effect of custom, contract, or agreement.
785.9 Statutory exceptions.

Subpart C—Application of Principles

785.10 Scope of subpart.

EMPLOYEES ''SUFFERED OR PERMITTED'' TO WORK

785.11 General.
785.12 Work performed away from the premises or job site.
785.13 Duty of management.

WAITING TIME

785.14 General.
785.15 On duty.
785.16 Off duty.
785.17 On-call time.

REST AND MEAL PERIODS

785.18 Rest.
785.19 Meal.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

785.20 General.
785.21 Less than 24-hour duty.
785.22 Duty of 24 hours or more.
785.23 Employees residing on employer's premises or working at home.

PREPARATORY AND CONCLUDING ACTIVITIES

785.24 Principles noted in Portal-to-Portal Bulletin.
785.25 Illustrative U.S. Supreme Court decisions.
785.26 Section 3(o) of the Fair Labor Standards Act.

LECTURES, MEETINGS AND TRAINING PROGRAMS

785.27 General.
785.28 Involuntary attendance.
785.29 Training directly related to employee's job.
785.30 Independent training.
785.31 Special situations.
785.32 Apprenticeship training.

TRAVELTIME

785.33 General.
785.34 Effect of section 4 of the Portal-to-Portal Act.
785.35 Home to work; ordinary situation.
785.36 Home to work in emergency situations.
785.37 Home to work on special one-day assignment in another city.
785.38 Travel that is all in the day's work.
785.39 Travel away from home community.
785.40 When private automobile is used in travel away from home community.
785.41 Work performed while traveling.

ADJUSTING GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS

785.42 Adjusting grievances.
785.43 Medical attention.
785.44 Civic and charitable work.
785.45 Suggestion systems.

Subpart D—Recording Working Time

785.46 Applicable regulations governing keeping of records.
785.47 Where records show insubstantial or insignificant periods of time.
785.48 Use of time clocks.

Subpart E—Miscellaneous Provisions

785.49 Applicable provisions of the Fair Labor Standards Act.
785.50 Section 4 of the Portal-to-Portal Act.

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## Subpart A—General Considerations

### § 785.1 Introductory statement.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes

working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or to any area or Regional Office of the Division.

[35 FR 15289, Oct. 1, 1970]

### § 785.2 Decisions on interpretations; use of interpretations.

The ultimate decisions on interpretations of the act are made by the courts. The Administrator must determine in the first instance the positions he will take in the enforcement of the Act. The regulations in this part seek to inform the public of such positions. It should thus provide a ''practical guide for 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 (1944).)

### § 785.3 Period of effectiveness of interpretations.

These interpretations will remain in effect until they are rescinded, modified or withdrawn. This will be done when and if the Administrator concludes upon reexamination, or in the light of judicial decision, that a particular interpretation, ruling or enforcement policy is incorrect or unwarranted. All other rulings, interpretations or enforcement policies inconsistent with any portion of this part are superseded by it. The Portal-to-Portal Bulletin (part 790 of this chapter) is still in effect except insofar as it may not be consistent with any portion hereof. The applicable statutory provisions are set forth in § 785.50.

### § 785.4 Application to Walsh-Healey Public Contracts Act.

The principles set forth in this part are also followed by the Administrator of the Wage and Hour Division in determining hours worked by employees performing work subject to the provisions of the Walsh-Healey Public Contracts Act.

[35 FR 15289, Oct. 1, 1970]

## Subpart B—Principles for Determination of Hours Worked

### § 785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.

Section 6 requires the payment of a minimum wage by an employer to his employees who are subject to the Act. Section 7 prohibits their employment for more than a specified number of hours per week without proper overtime compensation.

[26 FR 7732, Aug. 18, 1961]

### § 785.6 Definition of "employ" and partial definition of "hours worked".

By statutory definition the term ''employ'' includes (section 3(g)) ''to suffer or permit to work.'' The act, however, contains no definition of ''work''. Section 3(o) of the Fair Labor Standards Act contains a partial definition of ''hours worked'' in the form of a limited exception for clothes-changing and wash-up time.

### § 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in ''physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business.'' (*Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123,* 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that ''an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties

as a benefit to the employer.'' (*Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift*, 323 U.S. 134 (1944)) The workweek ordinarily includes ''all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place''. (*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

### § 785.8 Effect of custom, contract, or agreement.

The principles are applicable, even though there may be a custom, contract, or agreement not to pay for the time so spent with special statutory exceptions discussed in §§ 785.9 and 785.26.

[35 FR 15289, Oct. 1, 1970]

### § 785.9 Statutory exemptions.

(a) *The Portal-to-Portal Act*. The Portal-to-Portal Act (secs. 1–13, 61 Stat. 84–89, 29 U.S.C. 251–262) eliminates from working time certain travel and walking time and other similar ''preliminary'' and ''postliminary'' activities performed ''prior'' or ''subsequent'' to the ''workday'' that are not made compensable by contract, custom, or practice. It should be noted that ''preliminary'' activities do not include ''principal'' activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the ''workday''. ''Workday'' in general, means the period between ''the time on any particular workday at which such employee commences (his) principal activity or activities'' and ''the time on any particular workday at which he ceases such principal activity or activities.'' The ''workday'' may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his ''principal'' activities. With respect to time spent in any ''preliminary'' or ''postliminary'' activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The ''preliminary'' or ''postliminary'' activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin* v. *National Biscuit Co.*, 82 F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) *Section 3(o) of the Fair Labor Standards Act*. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

[26 FR 190, Jan. 11, 1961, as amended at 30 FR 9912, Aug. 10, 1965]

## Subpart C—Application of Principles

### § 785.10 Scope of subpart.

This subpart applies the principles to the problems which arise frequently.

EMPLOYEES ''SUFFERED OR PERMITTED'' TO WORK

### § 785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (*Handler* v. *Thrasher*, 191, F. 2d 120 (C.A. 10, 1951); *Republican Publishing Co.* v. *American Newspaper Guild*, 172 F. 2d 943 (C.A. 1, 1949; *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112 (S.D. Iowa 1945), aff'd 151 F. 2d 543 (C.A. 8, 1945); 327 U.S. 757 (1946); *Hogue* v. *National Automotive Parts Ass'n*. 87 F.

Supp. 816 (E.D. Mich. 1949); *Barker* v. *Georgia Power & Light Co.*, 2 W.H. Cases 486; 5 CCH Labor Cases, para. 61,095 (M.D. Ga. 1942); *Steger* v. *Beard & Stone Electric Co., Inc.*, 1 W.H. Cases 593; 4 Labor Cases 60,643 (N.D. Texas, 1941))

### § 785.12 Work performed away from the premises or job site.

The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

### § 785.13 Duty of management.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

WAITING TIME

### § 785.14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves ''scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.'' (*Skidmore* v. *Swift*, 323 U.S. 134 (1944)) Such questions ''must be determined in accordance with common sense and the general concept of work or employment.'' (*Central Mo. Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8, 1948))

### § 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Wright* v. *Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell* v. *Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell* v. *Nicholson*, 179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

### § 785.16 Off duty.

(a) *General*. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) *Truck drivers; specific examples*. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washingtion, DC to New York City, leaving at 6 a.m. and arriving at

12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty*, 40 Supp. 279 (D. Md. 1941))

**§ 785.17 On-call time.**

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while ''on call''. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Handler* v. *Thrasher*, 191 F. 2d 120 (C.A. 10, 1951); *Walling* v. *Bank of Waynesboro, Georgia*, 61 F. Supp. 384 (S.D. Ga. 1945))

REST AND MEAL PERIODS

**§ 785.18 Rest.**

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell* v. *Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard* v. *Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

**§ 785.19 Meal.**

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

**§ 785.20 General.**

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

**§ 785.21 Less than 24-hour duty.**

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (*Central Mo. Telephone Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8, 1948);

*Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943); *Whitsitt* v. *Enid Ice & Fuel Co.*, 2 W. H. Cases 584; 6 Labor Cases para. 61,226 (W.D. Okla. 1942).)

**§ 785.22 Duty of 24 hours or more.**

(a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (*Armour* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift*, 323 U.S. 134 (1944); *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); *Bowers* v. *Remington Rand*, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); *Bridgeman* v. *Ford, Bacon & Davis*, 161 F. 2d 962 (C.A. 8, 1947); *Rokey* v. *Day & Zimmerman*, 157 F. 2d 736 (C.A. 8, 1946); *McLaughlin* v. *Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); *Campbell* v. *Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) *Interruptions of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisons have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See *Eustice* v. *Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946).)

**§ 785.23 Employees residing on employer's premises or working at home.**

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (*Skelly Oil Co.* v. *Jackson*, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; *Thompson* v. *Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943).)

PREPARATORY AND CONCLUDING ACTIVITIES

**§ 785.24 Principles noted in Portal-to-Portal Bulletin.**

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8 (b) and (c) of this chapter said:

(b) The term ''principal activities'' includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such

activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ''preliminary'' or ''postliminary'' activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

### § 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner* v. *Mitchell*, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

### § 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

[30 FR 9912, Aug. 10, 1965]

## LECTURES, MEETINGS AND TRAINING PROGRAMS

### § 785.27 General.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

### § 785.28 Involuntary attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

### § 785.29 Training directly related to employee's job.

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in

stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

[30 FR 9912, Aug, 10, 1965]

### § 785.30 Independent training.

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

### § 785.31 Special situations.

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

### § 785.32 Apprenticeship training.

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

## TRAVELTIME

### § 785.33 General.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. The subject is discussed in §§ 785.35 to 785.41, which are preceded by a brief discussion in § 785.34 of the Portal-to-Portal Act as it applies to traveltime.

### § 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in ''walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.'' Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is

compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co.* v. *Musecoda Local*, 321 U.S. 590 (1946); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling* v. *Anaconda Copper Mining Co.*, 66 F. Supp. 913 (D. Mont. (1946).)

**§ 785.35 Home to work; ordinary situation.**

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

**§ 785.36 Home to work in emergency situations.**

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

**§ 785.37 Home to work on special one-day assignment in another city.**

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the ''principal'' activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in § 785.36), or like travel that is all in the day's work (see § 785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the ''home-to-work'' category. Also, of course, the usual meal time would be deductible.

**§ 785.38 Travel that is all in the day's work.**

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (*Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10, 1944))

**§ 785.39 Travel away from home community.**

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is

clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

### § 785.40 When private automobile is used in travel away from home community.

If an employee is offered public transporation but requests permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.

### § 785.41 Work performed while traveling.

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

ADJUSTING GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS

### § 785.42 Adjusting grievances.

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

### § 785.43 Medical attention.

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

### § 785.44 Civic and charitable work.

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

### § 785.45 Suggestion systems.

Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

## Subpart D—Recording Working Time

### § 785.46 Applicable regulations governing keeping of records.

Section 11(c) of the Act authorizes the Secretary to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment. These regulations are published in part 516 of this chapter. Copies of the regulations may be obtained on request.

### § 785.47 Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical

administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is ''not a trivial matter to a workingman,'' and was not de minimis; *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that ''To disregard workweeks for which less than a dollar is due will produce capricious and unfair results.'' *Hawkins* v. *E. I. du Pont de Nemours & Co.*, 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

### § 785.48 Use of time clocks.

(a) *Differences between clock records and actual hours worked.* Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) *''Rounding'' practices.* It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

## Subpart E—Miscellaneous Provisions

### § 785.49 Applicable provisions of the Fair Labor Standards Act.

(a) *Section 6.* Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage.

(b) *Section 7.* Section 7(a) of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours.

(c) *Section 3(g).* Section 3(g) of this act provides that: '' 'Employ' includes to suffer or permit to work.''

(d) *Section 3(o).* Section 3(o) of this act provides that: ''Hours worked—in determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from the measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employees.''

[26 FR 190, Jan. 11, 1961, as amended at 26 FR 7732, Aug. 18, 1961]

### § 785.50 Section 4 of the Portal-to-Portal Act.

Section 4 of this Act provides that:

(a) Except as provided in paragraph (b), of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Davis-Bacon Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on, or after May 14, 1947:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) Activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of paragraph (a) of this section which relieve an employer from liability and punishment with respect to an activity the employer shall not be so relieved if such activity is compensable by either:

(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of paragraph (b) of this section, an activity shall be considered as compensable, under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Davis-Bacon Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in paragraph (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of paragraphs (b) and (c) of this section.

# PART 786—MISCELLANEOUS EXEMPTIONS

## Subpart A—Carriers by Air

Sec.
786.1 Enforcement policy concerning performance of nonexempt work.

## Subpart B [Reserved]

## Subpart C—Switchboard Operator Exemption

786.100 Enforcement policy concerning performance of nonexempt work.

## Subpart D—Employers Subject to Part 1 of Interstate Commerce Act

786.150 Enforcement policy concerning performance of nonexempt work.

## Subpart E—Taxicab Operators

786.200 Enforcement policy concerning performance of nonexempt work.

## Subpart F—Newspaper Publishing

786.250 Enforcement policy.

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

## Subpart A—Carriers by Air

### § 786.1 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(3) of the Fair Labor Standards Act of 1938, as amended, will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is

substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employed during the workweek.

[21 FR 5056, July 7, 1956]

## Subpart B [Reserved]

## Subpart C—Switchboard Operator Exemption

### § 786.100 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(a)(10) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[32 FR 15426, Nov. 4, 1967]

## Subpart D—Employers Subject to Part 1 of Interstate Commerce Act

### § 786.150 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(2) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[13 FR 1377, Mar. 17, 1948]

## Subpart E—Taxicab Operators

### § 786.200 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(17) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[32 FR 15426, Nov. 4, 1967]

## Subpart F—Newspaper Publishing

### § 786.250 Enforcement policy.

The exemption provided by paragraph 13(a)(8) of the Fair Labor Standards Act of 1938 applies to ''any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto.'' For the purpose of enforcement, it is the Divisions' position that such an employee is within the exemption even though he is also engaged in job printing activities. if less than 50 percent of the employee's worktime during the workweek is spent in job printing work, some of which is subject to the Act. If none of the job printing activities are within the general coverage of the Act, the exemption applies even if the job printing activities equal or exceed 50 percent of the employee's worktime. However, this exemption is not applicable if the employee spends 50 percent or more of his worktime in a workweek on job printing, any portion of which is within the general coverage of the Act on an individual or enterprise basis.

[32 FR 15426, Nov. 4, 1967]

# PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

Sec.
788.1 Statutory provisions.
788.2 Matters not discussed in this part.
788.3 Purpose of this part.
788.4 Significance of official interpretations.
788.5 Reliance on official interpretations.
788.6 Scope of the section 13(a)(13) exemption.
788.7 ''Planting or tending trees.''
788.8 ''Cruising, surveying, or felling timber.''
788.9 ''Preparing * * * logs.''
788.10 ''Preparing * * * other forestry products.''
788.11 ''Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal.''
788.12 Limitation of exemption to specific operations in which ''number of employees * * * does not exceed eight.''
788.13 Counting the eight employees.
788.14 Number employed in other than specified operations.
788.15 Multiple crews.
788.16 Employment relationship.
788.17 Employees employed in both exempt and nonexempt work.
788.18 Preparing other forestry products.

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

SOURCE: 34 FR 15794, Oct. 14, 1969, unless otherwise noted.

## § 788.1 Statutory provisions.

Section 13(a)(13) of the Fair Labor Standards Act of 1938, as amended, provides an exemption from the minimum wage and overtime requirements of the Act, as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

This exemption, formerly section 13(a)(15) of the Act, was amended by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) to change the number of employees limitation from 12 to eight, and to redesignate it as section 13(a)(13).

## § 788.2 Matters not discussed in this part.

The exemption in section 13(a)(13) of the Act need not be considered unless the employee is ''engaged in commerce or the production of goods for commerce'' or is employed in an ''enterprise engaged in commerce or in the production of goods for commerce,'' as those words are defined in the Act, so as to come within the general scope of sections 6 and 7. The principles of coverage are discussed in part 776 of this chapter and the discussion will not be repeated in this part. Neither does this part discuss the exemptions provided in section 13(a)(6) and 13(b)(12), or section 3(f) which includes in the definition of agriculture forestry or lumbering operations performed by a farmer or on a farm as an incident to or in conjunction with certain farming operations. (See part 780 of this chapter.)

## § 788.3 Purpose of this part.

The purpose of this part is to make available in one place the views of the Department of Labor with respect to the application and meaning of the provisions of section 13(a)(13) of the Act which will provide ''a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it'' (*Skidmore* v. *Swift & Co.*, 324 U.S. 134).

## § 788.4 Significance of official interpretations.

The interpretations contained in this part indicate, with respect to section 13(a)(13) of the Act which refers to small forestry or lumbering operations, the construction of the law which the Secretary of Labor and the Administrator believes 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 authoratative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

### § 788.5 Reliance on offical interpretations.

Under section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259), official interpretation issued under the Fair Labor Standards Act of 1938 may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations of the law contained in this part are official interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act so long as they remain effective and are not modified, rescinded, or determined by judicial authority to be incorrect. However, the failure to discuss a particular problem in this part or in the 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.

### § 788.6 Scope of the section 13(a)(13) exemption.

Employees will not be held exempt under section 13(a)(13) unless they are clearly shown to come within its terms. (*Wirtz* v. *F. M. Sloan Co.*, 411 F. 2d 56 (C.A. 3), 18 WH Cases 878; *Gatlin Lumber Co.* v. *Mitchell*, 287 F. 2d 76 (C.A. 5) cert. denied, 366 U.S. 963.) By its terms, the exemption is limited to those employed in the named operations by an employer who employs not more than eight employees therein. The named operations are described in terms of ordinary speech and mean what they mean in ordinary intercourse in this context. These operations include the incidental activities normally performed by persons employed in them, but do not include mill operations.

### § 788.7 "Planting or tending trees."

Employees employed in ''planting or tending trees'' include those engaged in weeding, preparing firebreaks, removing ''seeding, planting seedlings, pruning, rot or rusts, spraying, and similar operations when the object is to bring about, protect, or foster the growth of trees.'' ''Tending trees'' would also include watching the timberland to guard against thefts and fire (*Gatlin Lumber Co.* v. *Mitchell*, 287 F. 2d 76, cert. den. 366 U.S. 963).

### § 788.8 "Cruising, surveying, or felling timber."

Employees engaged in ''cruising * * * timber'' include all those members of a field crew whose purpose is to estimate and report on the volume of marketable timber. Employees engaged in ''surveying * * * timber'' include the customary members of a crew accomplishing that function such as the chairmen, the transit men, the rodmen, and the axmen who clear the ground of brush or trees in order that the transit men may obtain a clear sight. Similarly, the usual members of a crew which go to the woods for the purpose of felling timber and preparing and transporting logs are engaged in operations described in the exemption. Typically included, when members of such a crew, are fellers, limbers, skidders, buckers, loaders, swampers, scalers, and log truck drivers.

### § 788.9 "Preparing * * * logs."

Preparing logs includes, where appropriate, removing the limbs and top, cutting them into lengths, removing the bark, and splitting or facing them when done at the felling site, but does not include such operations when done at a mill. Employees engaged in sawmill, tie mill, and other operations in connection with the processing of logs, such as the production of lumber, are not exempt.

### § 788.10 "Preparing * * * other forestry products."

As used in the exemption, ''other forestry products'' mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns and Christmas trees, roots, stems, leaves, Spanish moss, wild fruit, and brush. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations which change the natural physical or chemical condition of the

products or which amount to extracting as distinguished from gathering, such as shelling nuts, or mashing berries to obtain juices.

[74 FR 26015, May 29, 2009]

### § 788.11 "Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal."

The transportation or movement of logs or other forestry products to a ''mill processing plant, railroad, or other transportation terminal'' is among the described operations. Loading and unloading, when performed by employees employed in the named operations, are included as exempt operations. Loading logs or other forestry products onto railroad cars or other transportation facilities for further shipment if performed as part of the exempt transportation will be considered a step in the exempt transportation (*Woods Lumber Co.* v. *Tobin,* 199 F. 2d 455 (C.A.5)). However, any other loading, transportation, or other activities performed in connection with the logs or other forestry products after they have been unloaded at one of the described destinations is not exempt. ''Other transportation terminal'' refers to any place where there are established facilities or equipment for the shipment or transportation of logs or other forestry products. Motor carrier yards, docks, wharves, or similar facilities are examples of other transportation terminals, but the place where logs are picked up by contract motor carriers or haulers at the site of the woods operations for transportation to the mill, processing plant, or railroad is not such a terminal.

### § 788.12 Limitation of exemption to specific operations in which "number of employees * * * does not exceed eight."

Regardless of his duties, no employee is exempt under section 13(a)(13) unless ''the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.''

### § 788.13 Counting the eight employees.

The determination of the number of employees employed in the named operations is to be made on an occupational and a workweek basis. Thus the exemption will be available in one workweek when eight or less employees are employed in the exempt operations and not in another workweek when more than that number are so employed. For a discussion of the term ''workweek'' see part 778 of this chapter. The exemption will not be defeated, however, if one or more of the eight employees so engaged is replaced during the workweek, for example, by reason of illness. But if additional employees are employed during the workweek in the named operations, even if they work on a different shift, the exemption would no longer be available if the total number exceed eight. Similarly, all of an employer's employees employed in any workweek in the named operations must be counted in the eight regardless of where the work is performed or how it is divided. Thus if an employer employs four employees in felling timber and preparing logs at one location and five at another location in those operations, the exemption would not be available. Similarly, if he employs six employees in such operations and three other employees in transportation work as discussed in § 788.11, the exemption could not apply. Under such circumstances he would be employing more than eight employees in the named operations. The fact that some of these employees may not be engaged in commerce or the production of goods for commerce or may be engaged in other exempt operations will not affect these conclusions (*Woods Lumber Co.* v. *Tobin,* 199 F. 2d 455 (C.A. 5)). Except for replacements, therefore, all of an employer's employees employed in the named operations in a workweek must be counted, regardless of where they perform their work or in which of the named operations or combinations of such operations they are employed. The length of time an employee is employed in the named operations during a workweek is also immaterial for the purpose of applying the numerical limitation. Thus, even if an employee would not himself be exempt because he is engaged substantially in nonexempt work (see § 788.17), nevertheless, if, as a regular part of his

duties, he is also engaged in the operations named in the exemption, he must be counted in determining whether the eight employee limitation is satisfied.

### § 788.14 Number employed in other than specified operations.

The exemption is available to an employer, however, even if he has a total of nine or more employees, if only eight of them or less are employed in the named operations. Thus, if such an employer employs only eight employees in the named operations and others in operations not named in the exemption, such as sawmill operations, the exemption is not defeated because of the fact that he employs more than eight employees altogether. It will not apply, however, to those engaged in the operations not named in the exemption.

### § 788.15 Multiple crews.

In many cases an employer who operates a sawmill or concentration yard will be supplied with logs or other forestry products by several crews of persons who are engaged in the named operations. Frequently some or all of such crews, separately considered, do not employ more than eight persons but the total number of such employees is in excess of eight. Whether the exemption will apply to the members of the individual crews which do not exceed eight will depend on whether they are employees of the sawmill or concentration yard to which the logs or other forestry products are delivered or whether each such crew is a truly independently owned and operated business. If the number of employees in such a truly independently owned and operated business does not exceed eight, the exemption will apply. On the other hand, the Secretary and the Administrator will assume that the courts will be reluctant to approve as bona fide a plan by which an employer of a large number of woods employees splits his employees into several allegedly ''independent businesses'' in order to take advantage of the exemption.

### § 788.16 Employment relationship.

(a) The Supreme Court has made it clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the ''total situation controls'' (see *Rutherford Food Corp.* v. *McComb*, 331 United States 722; *United States* v. *Silk*, 331 United States 704; *Harrison* v. *Greyvan Lines*, 331 United States 704; *Bartels* v. *Birmingham*, 332 United States 126). In general an employee, as distinguished from a person who is engaged in a business of his own, is one who ''follows the usual path of an employee'' and is dependent on the business which he serves. As an aid in assessing the total situation the Court mentioned some of the characteristics of the two classifications which should be considered. Among these are: The extent to which the services rendered are an integral part of the principal's business, the permanency of the relationship, the opportunities for profit or loss, the initiative judgment or foresight exercised by the one who performs the services, the amount of investment, and the degree of control which the principal has in the situation. The Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied.

(b) At least in one situation it is possible to be specific: (1) Where the sawmill or concentration yard to which the products are delivered owns the land or the appropriation rights to the timber or other forestry products; (2) the crew boss has no very substantial investment in tools or machinery used; and (3) the crew does not transfer its relationship as a unit from one sawmill or concentration yard to another, the crew boss and the employees working under him will be considered employees of the sawmill or concentration yard. Other situations, where one or more of these three factors is not present, will be considered as they arise on the basis of the criteria mentioned in paragraph (a) of this section. Where all of these three criteria are present, however, it will make no difference if the crew boss receives the entire compensation for the production from the sawmill or concentration yard and distributes it in any way he chooses to the crew members. Similarly, it will make no difference if the hiring, firing, and supervising of the crew

members is left in the hands of the crew boss. (See *Tobin* v. *LaDuke*, 190 F. 2d 977 (C.A. 9); *Tobin* v. *Anthony-Williams Mfg. Co.*, 196 F. 2d 547 (C.A. 8).)

### § 788.17 Employees employed in both exempt and nonexempt work.

The exemption for an employee employed in exempt work will be defeated in any workweek in which he performs a substantial amount of nonexempt work. 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. Where two types of work cannot be segregated, however, so as to permit separate measurement of the time spent in each, the employee will not be exempt.

### § 788.18 Preparing other forestry products.

As used in the exemption, other forestry products means plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques. *See* 29 CFR 780.205 for further discussion. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

[73 FR 77239, Dec. 18, 2008. Redesignated at 74 FR 26015, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 26015, May 29, 2009, § 788.10 was redesignated as § 788.18 and newly designated § 788.18 was suspended, effective June 29, 2009.

## PART 789—GENERAL STATEMENT ON THE PROVISIONS OF SECTION 12(a) AND SECTION 15(a)(1) OF THE FAIR LABOR STANDARDS ACT OF 1938, RELATING TO WRITTEN ASSURANCES

Sec.
789.0 Introductory statement.
789.1 Statutory provisions and legislative history.
789.2 ''* * * in reliance on written assurance from the producer * * *''
789.3 ''* * * goods were produced in compliance with'' * * * the requirements referred to.
789.4 Scope and content of assurances of compliance.
789.5 ''* * * acquired * * * in good faith * * * for value without notice * * *''.

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

SOURCE: 15 FR 5047, Aug. 5, 1950, unless otherwise noted.

### § 789.0 Introductory statement.

(a) Section 12(a) and section 15(a)(1) of the Fair Labor Standards Act of 1938[1] (hereinafter referred to as the (Act) contain certain prohibitions against putting into interstate or foreign commerce any goods ineligible for shipment (commonly called ''hot goods''), in the production of which the child-labor or wage-hour standards of the Act were not observed. These sections were amended by the Fair Labor Standards Amendments of 1949[2] to provide, among other things, protection against these ''hot goods'' prohibitions with respect to purchasers ''who acquired such goods for value without notice of such violation'' if they did so

[1] Pub. L. 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the Act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (Pub. L. 393, 81st Cong., 1st sess., 63 Stat. 910); by Reorganization Plan No. 6 of 1950 (15 FR 3174), effective May 24, 1950; and by the Fair Labor Standards Amendments of 1955, approved August 12, 1955 (Pub. L. 381, 84th Cong., 1st sess., C. 867, 69 Stat. 711).

[2] Pub. L. 393, 81st Cong., 1st sess. 963 Stat. 910.

''in good faith in reliance on'' a specified ''written assurance.''

(b) These amendments to the Act relating to purchasers in good faith and written assurances are for the protection of purchasers. The Act does not provide that a purchaser must secure such an assurance or that a supplier must give it. The amendments confer no express authority for the Department of Labor to require the use of these assurances or to prescribe their form or content. Whether any particular written assurance affords the statutory protection to a purchaser who acquires his goods in good faith and for value without notice of an applicable violation, is left for determination by the courts. Opinions issued by the Department of Labor on this question are advisory only and represent simply the Department's best judgment as to what the courts may hold.

(c) The interpretations contained in this general statement are confined to the statutory protection accorded these purchasers in section 12(a) and section 15(a)(1) of the Act. These interpretations, with respect to this protection of purchasers, indicate the construction of the law which the Secretary of Labor and the Administrator of the Wage and Hour Division[3] believe to be correct and which will guide them in the performance of their administrative 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.

[15 FR 5047, Aug. 5, 1950, as amended at 21 FR 1450, Mar. 6, 1956]

### § 789.1 Statutory provisions and legislative history.

Section 12(a) of the Act provides, in part that no producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom, any oppressive child labor has been employed. Section 12(a) then provides an exception from this prohibition in the following language:

> *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection * * *.

Section 15(a)(1) provides, in part, that it shall be unlawful for any person to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or 7 of the Act or any regulation or order of the Administrator issued under section 14. Section 15(a)(1) also provides the following exception with respect to this ''hot goods'' restriction:

> * * * any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

The most important portion of the legislative history of those provisions in sections 12(a) and 15(a)(1) which relate to the protection of purchasers is found in the following discussion of the amendment to section 15(a)(1), contained in the Statement of the Managers on the part of the House appended to the Conference Report on the Fair Labor Standards Amendments of 1949:[4]

> This provision protects an innocent purchaser from an unwitting violation and also protects him from having goods which he has purchased in good faith ordered to be withheld from shipment in commerce by a ''hot goods'' injunction. An affirmative duty is imposed upon him to assure himself that *the goods in question were produced* in compliance with the Act, and he must have secured written assurance *to that effect* from the producer

[3] The functions of the Secretary and the Administrator under the Act are delineated in 13 FR 2195, 12 FR 6971, and 15 FR 3290.

[4] H. Rept. No. 1453, 81st Cong. 1st sess., p. 31.

of the goods. The requirement that he must have made the purchase in good faith is comparable to similar requirements imposed on purchasers in other fields of law, and is to be subjected to the test of what a reasonable, prudent man, acting with due diligence, would have done in the circumstances. (Emphasis supplied.)

This discussion would appear to be generally applicable also to the similar provisions of the Act contained in section 12(a).

### § 789.2 " * * * in reliance on written assurance from the producer * * *."

In order for a purchaser to be protected under these provisions of the Act, he must acquire the goods ''in reliance on written assurance * * *.'' The written assurance specified in section 15(a)(1) is one from the ''producer'' and in section 12(a) it is one from the ''producer, manufacturer or dealer.''

Since the acquisition of the goods by the purchaser must be ''in reliance'' upon such written assurance it is obvious that the Act contemplates a written assurance given to the purchaser as a part of the transaction by which the goods are acquired and on which he can rely at the time of their acquisition. Thus, where the purchaser does not receive a written assurance at the time he acquires particular goods, he cannot be said to have acquired the goods ''in reliance on'' the specified written assurance merely because the producer later furnishes an assurance that all goods which the purchaser has previously acquired from him were produced in compliance with the Fair Labor Standards Act.

The assurances described in the Act are assurances in writing ''from'' the producer or ''from'' the producer, manufacturer, or dealer, as the case may be. It is therefore clear that the following procedures will not amount to ''written assurance from the producer'' within the meaning of the Act:

(a) The purchaser stamps his purchase order with the statement that the order is valid only for goods produced in compliance with the requirements of the Fair Labor Standards Act. No written statement concerning the production of the goods is made to the purchaser by the producer. The producer ships the goods which the purchaser has ordered.

(b) The purchaser stamps the above statement on his purchase order and in addition notifies the producer that shipment of the goods so ordered will be construed by the purchaser as a guarantee by the producer that the goods were produced in compliance with the Act. The producer ships the goods to the purchaser.

In neither of these situations can the purchase order be deemed to contain a written assurance from the producer to the purchaser. A statement concerning the circumstances under which the order will be valid is sent to the producer, but no written instrument at all is given the purchaser by the producer. Although, in these situations, the shipment of the goods by the producer may establish a contractual relationship between the parties, the conditions of the statute are not satisfied because there is in neither situation any written assurance from the producer to the purchaser that the goods were produced in compliance with applicable provisions of the Act referred to in sections 12(a) and 15(a)(1).

### § 789.3 "* * * goods were produced in compliance with" * * * the requirements referred to.

It is apparent from the language of the statute and the statement appended to the Conference Report[5] that the written assurance referred to is one with respect to specific goods in being, assuring the purchaser that the ''goods in question were produced in compliance'' with the requirements referred to in sections 12(a) and 15(a) (1). A written statement made prior to production of the particular goods is not the type of assurance contemplated by the statute.

A so-called ''general and continuing'' assurance or ''blanket guarantee'' stating, for instance, that all goods to be shipped to the purchaser during a twelve-month period following a certain date ''will be or were produced'' in compliance with applicable provisions of the Act would not afford the purchaser the statutory protection with

[5] H. Rept. No. 1453, 81st Cong., 1st sess., p. 31.

respect to any production of such goods after the assurance is given. This type of assurance attempts to assure the purchaser concerning the future production of goods. With respect to any production of goods after the assurance is given, this ''general and continuing'' assurance would, at most, be an assurance that the goods will be produced in compliance with the Act.

The definitions of the terms ''goods'' and ''produced'' in sections 3(i) and 3(j) of the Act[6] respectively, should be considered in interpreting the requirement that the written assurance must relate to goods which were produced in compliance with applicable provisions of the Act. These definitions make it apparent, for instance that the raw materials from which a machine has been made retain their identity as ''goods'' even though these raw materials have been converted into an entirely different finished product in which the raw materials are merely a part.

Since ''goods,'' as defined in the Act, ''does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturing, or processor thereof,'' the ''hot goods'' restrictions of section 12(a) and section 15(a)(1) do not apply to such ultimate consumers. There appears to be no need, therefore, for such consumers to secure these written assurances from their suppliers.

[6] Section 3(i) defines ''goods'' to mean ''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.''

Section 3(j) defines ''produced'' to mean ''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.''

### § 789.4 Scope and content of assurances of compliance.

A question frequently asked is whether a single written assurance of compliance will suffice for purposes both of section 12(a), relating to child labor, and section 15(a)(1), relating to wage and hour standards. A single assurance would appear to be sufficient, provided it is specific enough to meet all the conditions of the two sections. Although it is possible that the courts might find assurances referring generally to compliance ''with the requirements of the Act'' adequate for all purposes, the safer course to pursue would be to phrase the assurance in terms of compliance with the specific sections of the Act whose violation would bar the goods from interstate or foreign commerce.

The language of the statute gives support to this view. It will be noted that the written assurance referred to in section 15(a)(1) is described as one of ''compliance with the requirements of the Act * * *,'' whereas the written assurance referred to in section 12(a) is described as one of ''compliance with this section.'' In view of the differences in wording of the two sections, a court might conclude that a general assurance of compliance with the Act is not sufficient to include a specific assurance of compliance with section 12, on the theory that if Congress had intended an assurance of compliance with the Act to be sufficient under the child-labor provisions, there would have been no reason for the use of the more specific language which it placed in section 12. Also, it is possible that a court might conclude that Congress intended, under section 15(a)(1), that the assurance should refer specifically to the particular sections of the Act mentioned therein, since unless there is some violation of one of those sections in the production of goods, a subsequent purchaser is not prohibited from putting them in commerce.

There is no prescribed form or language that must be followed in order for the written assurance of compliance to afford the desired protection. However, in view of the considerations

mentioned above, the following is suggested as a guide for the type of language which would appear to provide the maximum degreee of certainty that a purchaser who acquired the goods in good faith in reliance on the written assurance would receive the protection intended by the amendments:

> We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof:

The question has also arisen as to what method should be used to give a purchaser a proper written assurance which would adequately identify the particular goods to which such assurance relates. Although other means of giving proper written assurances may be found to be more practical and convenient, it appears that one simple and feasible method of giving such assurance is for the producer to stamp or print the assurance on the invoice which covers the particular goods and which is given to the purchaser as a part of the transaction whereby the goods are acquired.

### § 789.5 "* * * acquired * * * in good faith * * * for value without notice * * *."

Section 12(a) and section 15(a)(1) of the Act provide that a purchaser must acquire the goods in good faith in reliance on the specified written assurance in order to be accorded the statutory protection.

The legislative history of the amendments indicates that a purchaser's good faith is not to be determined merely from the actual state of his mind but that good faith also depends upon an objective test—that of what a ''reasonable, prudent man, acting with due diligence, would have done in the circumstances.'' This good faith requirement is, in the words of the House Managers, ''comparable to similar requirements imposed on purchasers in other fields of law.'' The final determination of what will amount to good faith can be made only upon the basis of the pertinent facts in each situation.

It is clear, however, that good faith as used in the Act, not only requires honesty of intention but also that a purchaser must not know, have reason to know, or have knowledge of circumstances which ought to put him on inquiry that the goods in question were produced in violation of any of the provisions of the Act referred to in sections 12(a) and 15(a)(1).

These good faith provisions are reinforced by the requirement in sections 12(a) and 15(a)(1) that the purchaser must also acquire his goods ''for value without notice'' of an applicable violation of the Act.

To illustrate the application of the above principles, let us assume that a purchaser of goods for value acquires them in reliance upon a written assurance from the producer, manufacturer, or dealer that the particular goods were produced in compliance with all applicable requirements of the Act, and that the form and content of the assurance is sufficient to meet the conditions of sections 12 and 15(a)(1) of the Act. If a reasonable, prudent man in the purchaser's position, acting with the diligence, would have no reason to question the truth of the assurance that the applicable requirements has been complied with, the purchaser's reliance on such written assurance would be considered to be in good faith and without notice of any violation, and the purchaser would be protected in the event that violations of the child-labor or the wage-hour standards of the Act had actually occurred in the production of such goods by the vendor or by prior producers of the goods. In such circumstances, the purchaser's protection would not be contingent on his securing separate written assurances from the prior producers or on his assuring himself that his vendor had secured specific guarantees from them with respect to compliance.

## PART 790—GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938

GENERAL

Sec.
790.1 Introductory statement.
790.2 Interrelationship of the two Acts.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

790.3 Provisions of the statute.
790.4 Liability of employer; effect of contract, custom, or practice.
790.5 Effect of Portal-to-Portal Act on determination of hours worked.
790.6 Periods within the ''workday'' unaffected.
790.7 ''Preliminary'' and ''postliminary'' activities.
790.8 ''Principal'' activities.
790.9 ''Compensable * * * by an express provision of a written or nonwritten contract.''
790.10 ''Compensable * * * by a custom or practice.''
790.11 Contract, custom or practice in effect ''at the time of such activity.''
790.12 ''Portion of the day.''

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

790.13 General nature of defense.
790.14 ''In conformity with.''
790.15 ''Good faith.''
790.16 ''In reliance on.''
790.17 ''Administrative regulation, order, ruling, approval, or interpretation.''
790.18 ''Administrative practice or enforcement policy.''
790.19 ''Agency of the United States.''

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

790.20 Right of employees to sue; restrictions on representative actions.
790.21 Time for bringing employee suits.
790.22 Discretion of court as to assessment of liquidated damages.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*

SOURCE: 12 FR 7655, Nov. 18, 1947, unless otherwise noted.

## GENERAL

### § 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 4, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,[2] the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three Acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these Acts.

For the sake of brevity, this Act is referred to in the following discussion as the Portal Act.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the Act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair

[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes (61 Stat. 84; 29 U.S.C., Sup., 251 *et seq.*).

[2] 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this Act, see footnote 17.

[3] Sections 790.23 through 790.29 in the prior edition of this part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he makes these conclusions known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administration believes to be correct[5] and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in[6] enforcement of the law will seek to apply it. As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained in this part.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

[4] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two Acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

[6] *Skidmore* v. *Swift & Co.*, 323 U.S. 134. See also *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *American Trucking Assn.*, 310 U.S. 534; *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572.

## § 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions ''detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'' The legislative history indicates that the Portal Act was not intended to change this general policy.[9] The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both

[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provision of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, ''employer,'' ''employee,'' and ''wage'', when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter Act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12. Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 93 Cong. Rec. 2098; colloquy between Senators Donnell and Ferguson, 93 Cong. Rec. 2127; statement of Representative Gwynne, 93 Cong. Rec. 1557.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 93 Cong. Rec. 2177; see also statement of Senator Morse, 93 Cong. Rec. 2274; statement of Representative Walter, 93 Cong. Rec. 4389.

retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it ''in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act''[11] that it ''protects the legitimate claims'' under that Act,[12] and that one of the objectives of the sponsors was to ''preserve to the worker the rights he has gained under the Fair Labor Standards Act.''[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation[14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come ''plainly and unmistakably within (the) terms and spirit'' of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of ''hot'' goods produced by employees not paid in accordance with the Act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the Act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in this part in connection with the discussion of specific provisions of the 1947 Act.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

### § 790.3 Provisions of the statute.

Section 4 of the Portal Act, which relates to so-called ''portal-to-portal'' activities engaged in by employees on or after May 14, 1947, provides as follows:

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) Activities which are preliminary to or postliminary to said principal activity or activities

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 93 Cong. Rec. 4390; statement of Senator Wiley, 93 Cong. Rec. 4269, 4270; statement of Representative Gwynne, 93 Cong. Rec. 1572; statements of Senator Donnell, 93 Cong. Rec. 2133–2135, 2176–2178; statement of Representative Robison, 93 Cong. Rec. 1499; Message of the President to Congress, May 14, 1947 on approval of the Act (93 Cong. Rec. 5281).

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 and 4371. See also statement of Senator Cooper, 93 Cong. Rec. 2295; statement of Representative Robsion, 93 Cong. Rec. 1499, 1500.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4391. See also statement of Representative Keating, 93 Cong. Rec. 1512.

[13] Statement of Senator Cooper, 93 Cong. Rec. 2300; see also statements of Senator Donnell, 93 Cong. Rec. 2361, 2362, 2364; statements of Representatives Walter and Robsion, 93 Cong. Rec. 1496, 1498.

[14] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *Rosenwasser*, 323 U.S. 360; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697.

[15] See *Phillips Co.* v. *Walling*, 324 U.S. 490; *Walling* v. *General Industries Co.*, 330 U.S. 545.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either:

(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

### § 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were:

(1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or pratice;[19] and

(2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to

[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the Act); and, if his Act or omission is willful, subjects him to criminal penalties (section 16(a) of the Act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the Act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in ''physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business'' (*Tennessee Coal Iron & R.R. Co.* v. *Muscoda Local,* 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (*Armour & Co.* v. *Wantock,* 323 U.S. 126, 132–134; *Skidmore* v. *Swift & Co.,* 323, U.S. 134, 136–137).

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46–49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292–2300.

the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute ''walking, riding, or traveling'' of the kind described in the statute, or other activities ''preliminary'' or ''postliminary'' to the ''principal activity or activities'' which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's ''principal activities'' in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that ''the employer shall not be so relieved'' if such activities are so compensable;[21] it does not matter in such a situation that they are so-called ''portal-to-portal'' activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;[23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, ''preliminary'' or ''postliminary'' activities which take place outside the workday ''before the morning whistle'' or ''after the evening whistle'' are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

### § 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

> . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described

[20] Senate Report, pp. 46–49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270.

[21] Section 4(b) of the Act (quoted in § 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181–2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also § 790.12.

(in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such ''preliminary'' or ''postliminary'' activities, performed before or after the employee's ''principal activities'' for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

### § 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the ''workday'' proper, roughly described as the period ''from whistle to whistle,'' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under

[26] The full text of section 4 of the Act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296–2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297–2298. See also Senate Report, p. 48.

[33] See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

[34] The report of the Senate Judiciary Committee states (p. 47), ''Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be

the provisions of section 4, one of the conditions that must be present before ''preliminary'' or ''postliminary'' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the ''workday'' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the ''workday'' in activities of the kind described in section 4.[37]

(b) ''Workday'' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the ''workday'', and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his ''workday'' commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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### § 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in ''preliminary'' or ''postliminary'' activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the

compensable or not without regard to the provisions of this section.''

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293–2294, 2296–2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not ''preliminary'' or ''postliminary'' activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a ''preliminary'' or ''postliminary'' activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words ''preliminary activity'' mean an activity engaged in by an employee before the commencement of his ''principal'' activity or activities, and the words ''postliminary activity'' means an activity engaged in by an employee after the completion of his ''principal'' activity or activities. No categorical list of ''preliminary'' and ''postliminary'' activities except those named in the Act can be made, since activities which under one set of circumstances may be ''preliminary'' or ''postliminary'' activities, may under other conditions be ''principal'' activities. The following ''preliminary'' or ''postliminary'' activities are expressly mentioned in the Act: ''Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.''[43]

(c) The statutory language and the legislative history indicate that the ''walking, riding or traveling'' to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of ''walking, riding or traveling'' described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be ''walking, riding, or traveling'' of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these,

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178–2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, ''to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform,'' which follows the term ''walking, riding or traveling'' in section 4(a), and by the additional limitation applicable to all ''preliminary'' and ''postliminary'' activities to the effect that the Act may affect them only if they occur ''prior to'' or ''subsequent to'' the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of

where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel ''to and from the actual place of performance'' of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as ''Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out.'' The phrase, actual place of performance,'' as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a ''trouble-shooter'' in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered ''preliminary'' or ''postliminary'' activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered ''preliminary'' or ''postliminary'' activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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the Act ''does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday.''

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the ''principal'' activities referred to include activities which are an integral part of a ''principal'' activity (Senate Report, pp. 47, 48), that is, those which ''are indispensable to the performance of the productive work,'' summarized this provision as it appeared in the Senate Bill by stating: ''We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer.'' 93 Cong. Rec. 2299.

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's ''principal activity''. See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298.

*Continued*

(h) As indicated above, an activity which is a ''preliminary'' or ''postliminary'' activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

### § 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the ''principal'' activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is ''preliminary or postliminary to (the) principal activity or activities'' which the employee is employed to perform, it is generally necessary to determine what are such ''principal'' activities.[54]

The use by Congress of the plural form ''activities'' in the statute makes it clear that in order for an activity to be a ''principal'' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several ''principal'' activities during the workday. The ''principal'' activities referred to in the statute are activities which the employee is ''employed to perform'';[56] they do not include noncompensable ''walking, riding, or traveling'' of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute ''principal activities'' was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that ''the realities of industrial life,'' rather than arbitrary standards, ''are intended to be applied in defining the term 'principal activity or activities','' and that these words should ''be interpreted with due regard to generally established compensation practices in the particular industry and trade.''[58] The legislative history further indicates that Congress intended the words

See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

[53] See §§ 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain ''preliminary'' and ''postliminary'' activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as ''principal'' activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136–137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

''principal activities'' to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered ''sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.''[60]

(b) The term ''principal activities'' includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ''preliminary'' or ''postliminary'' activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[12 FR 7655, Nov, 18, 1947, as amended at 35 FR 7383, May 12, 1970]

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[59] See statements of Senator Cooper, 93 Cong. Rec. 2296–2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297–2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that ''There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.'' In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297–2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305–2306,

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### § 790.9 "Compensable * * * by an express provision of a written or nonwritten contract."

(a) Where an employee engages in a ''preliminary'' or ''postliminary'' activity of the kind described in section 4(a) of the Portal Act and this activity is ''compensable * * * by an express provision of a written or nonwritten contract'' applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,[68] and does not relieve the employer of any obligation he would otherwise have under that Act to include time spent in such activity in computing hours worked.[69]

(b) The word ''compensable,'' is used in subsections (b), (c), and (d) of section 4 without qualification.[70] It is apparent from these provisions that ''compensable'' as used in the statute, means compensable in any amount.[71]

(c) The phrase ''compensable by an express provision of a written or nonwritten contract'' in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.[72] The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words ''compensable by an express provision'' indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not ''compensable by * * * a written or nonwritten contract'' within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one ''between such employee,[72] his agent, or collective-bargaining representative and his employer.''[73] Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by ''contract'' of an activity, for purposes of section 4.

### § 790.10 "Compensable * * * by a custom or practice."

(a) A ''preliminary'' or ''postliminary'' activity of the type described in section 4(a) of the Portal Act may be ''compensable'' within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,[74] and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair Labor Standards Act.[75] Accordingly, in the event that no ''express provision of a written or nonwritten contract'' makes compensable the activity in question, it is necessary to determine whether the activity is made compensable by a custom or practice, not inconsistent with such a contract, in effect at the establishment or other place where the employee was employed.[76]

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2362; statements of Senator Cooper, 93 Cong. Rec. 2296–2297, 2298.

[68] See § 790.4.

[69] See §§ 790.5 and 790.7.

[70] The word is also so used throughout section 2 of the Act which relates to past claims. See §§ 790.28–790.25.

[71] Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[72] See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181–2182.

[73] The terms ''employee'' and ''employer'' have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

[74] See § 790.4.

[75] See §§ 790.5 and 790.7.

[76] See Senate Report, p. 49.

The same is true with respect to the activities referred to in section 2 of the Portal Act in an action or proceeding relating to activities performed before May 14, 1947. See Senate Report, p. 45. See also § 790.23.

(b) The meaning of the word ''compensable'' is the same, for purposes of the statute, whether a contract or a custom or practice is involved.[77]

(c) The phrase, ''custom or practice,'' is one which, in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the Congressional intent, with such aid as may be had from the many judicial decisions interpreting the words ''custom'' and ''practice'' as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the Congressional reference to contract, custom or practice was a deliberate use of non-technical words which are commonly understood and broad enough to cover every normal situation under which an employee works or an employer for compensation.[78] Accordingly, ''custom'' and ''practice,'' as used in section 4(b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only ''to protect every collective bargaining agreement about these activities'' but ''to protect the agreement between one workman and his employer'' and ''every practice or custom which we assume must have entered into the minds of the people when they made the contract.''[79]

(d) The words, ''custom or practice,'' as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase ''in effect * * * at the establishment or other place where such employee was employed.'' The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the ''particular place of business,'' ''plant,'' ''mine,'' ''factory,'' ''forest,'' etc.[80]

(e) ''The custom or practice'' by which compensability of an activity is tested under the statute is one ''covering such activity.'' Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering ''such activity''; there is no provision, as there is with regard to contracts, that the custom or practice be one ''between such employee, his agent, or collective-bargaining representative, and his employer.''[81]

(f) Another qualification of the ''custom or practice'' referred to in the statute is that it be ''not inconsistent with a written or non-written contract'' of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.[82] However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.[83]

### § 790.11 Contract, custom or practice in effect "at the time of such activity."

The ''contract,'' ''custom'' or ''practice'' on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect ''at the time of such activity.'' Thus, the

[77] See § 790.9(b).

[78] See colloquy between Senators Donnell and Tydings, 93 Cong. Rec. 2125, 2126; colloquy between Senators Donnell, Lodge, and Hawkes, 93 Cong. Rec. 2178, 2179; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2181, 2182. Statements of Senator Cooper, 93 Cong. Rec. 2293.

[79] Statements of Representative Gwynne, 93 Cong. Rec. 1566.

[80] Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[81] See § 790.9(d).

[82] Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[83] Senate Report, pp. 45, 49.

compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

### § 790.12 "Portion of the day."

A ''preliminary'' or ''postliminary'' activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section ''only when it is engaged in during the portion of the day with respect to which it is so made compensable.''[84] This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;[85] the provision is applicable only to walking, riding, traveling or other ''preliminary'' or ''postliminary'' activities of the kind described in section 4(a) of the Portal Act,[86] which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.[87]

## DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

### § 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that ''the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation'' or ''any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged.'' In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the ''Administrator of the Wage and Hour Division of the Department of Labor,'' and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.[88] But where the acts or omissions complained of occurred before May 14, 1947, the employer may show that they were in good faith in conformity with and in reliance on ''any'' (written or nonwritten) administrative regulation, order, ruling, or interpretation of ''any agency of the United States,'' or any administrative practice or enforcement policy of ''any such agency'' with respect to the class of employers to which he belonged.[89] In all cases, however, the act or omission complained of must be both ''in conformity with''[90] and ''in reliance on''[91] the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be

[84] Section 4(c) of the Portal Act (set out in full in § 790.3).

[85] See §§ 790.4–790.6.

[86] Conference Report, pp. 12, 13.

[87] See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

[88] Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17 and 790.19.

[89] Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, 93 Cong. Rec. 4388, 4389. See also § 790.19.

[90] See § 790.14.

[91] See § 790.16.

''in good faith.''[92] The relief from liability or punishment provided by sections 9 and 10 of the Portal Act is limited by the statute to employers who both plead and prove all the requirements of the defence.[93]

(b) The distinctions mentioned in paragraph (a) of this section, depending on whether the acts or omissions complained of occurred before or after May 14, 1947, may be illustrated as follows: Assume that an employer, on commencing performance of a contract with X Federal Agency extending from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working under the contract were not covered by the Fair Labor Standards Act. Assume further that the employer may be said to have relied in good faith upon this opinion and therefore did not compensate such employees during the period of the contract in accordance with the provisions of the Act. After completion of the contract on January 1, 1948, the employees, who have learned that they are probably covered by the Act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the Act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X Agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947 to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

### § 790.14 "In conformity with."

(a) The ''good faith'' defense is not available to an employer unless the acts or omissions complained of were ''in conformity with'' the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied.[94] This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting ''in conformity with'' an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator of the Wage and Hour Division, stating that if certain specified circumstances and facts regarding the work performed by the employer's employees exist, the employees are, in his opinion, exempt from provisions of the Fair Labor Standards Act. One of these hypothetical circumstances upon which the opinion was based does not exist regarding these employees, but the employer, erroneously assuming that this circumstance is irrelevant, relies upon the Administrator's ruling and fails to compensate the employees in accordance with the Act. Since he did not act ''in conformity'' with that opinion, he has no defense under section 9 or 10 of the Portal Act.

(c) As a further example of the requirement of conformity, reference is made to the illustration given in § 790.13(b), where an employer, who had a contract with the X Federal Agency covering the period from January 1,

[92] See § 790.15.

[93] Conference Report, pp. 15, 16; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389; statements of Senators Cooper and Donnell, 93 Cong. Rec. 4372, 4451, 4452. See also the President's message of May 14, 1947, to the Congress on approval of the Act (93 Cong. Rec. 5281).

The requirements of the statute as to pleading and proof emphasize the continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the protection which Congress intended it to afford employees. See § 790.2; of. statements of Senator Wiley, 93 Cong. Rec. 4270; Senator Donnell, 93 Cong. Rec. 4452, and Representative Walter, 93 Cong. Rec. 4388, 4389.

[94] Statement of Senator Cooper, 93 Cong. Rec. 4451; message of the President to Congress on approval of the Act, May 14, 1947, 93 Cong. Rec. 5281.

1947 to January 1, 1948, received an opinion from the agency that employees working on the contract were not covered by the Fair Labor Standards Act. Assume (1) that the X Agency's opinion was confined solely and exclusively to activities performed under the particular contract held by the employer with the agency and made no general statement regarding the status under the Act of the employer's employees while performing other work; and (2) that the employer, erroneously believing the reasoning used in the agency's opinion also applied to other and different work performed by his employees, did not compensate them for such different work, relying upon that opinion. As previously pointed out, the opinion from the X Agency, if relied on and conformed with in good faith by the employer, would form the basis of a ''good faith'' defense for the period prior to May 14, 1947, insofar as the work performed by the employees on this particular contract with that agency was concerned. The opinion would not, however, furnish the employer a defense regarding any other activities of a different nature performed by his employees, because it was not an opinion concerning such activities, and insofar as those activities are concerned, the employer could not act ''in conformity'' with it.

### § 790.15 "Good faith."

(a) One of the most important requirements of sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer's ''good faith'' is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that ''good faith'' also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances.[95] ''Good faith'' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.[96]

(b) Some situations illustrating the application of the principles stated in paragraph (a) of this section may be mentioned. Assume that a ruling from the Administrator, stating positively that the Fair Labor Standards Act does not apply to certain employees, is received by an employer in response to a request which fully described the duties of the employees and the circumstances surrounding their employment. It is clear that the employer's employment of such employees in such duties and under such circumstances in reliance on the Administrator's ruling, without compensating them in accordance with the Act, would be in good faith so long as the ruling remained unrevoked and the employer had no notice of any facts or circumstances which would lead a reasonably prudent man to make further inquiry as to whether the employees came within the Act's provisions. Assume, however, that the Administrator's ruling was expressly based on certain court decisions holding that employees so engaged in commerce or in the production of goods for commerce, and that the employer subsequently learned from his attorney that a higher court had reversed these decisions or had cast doubt on their correctness by holding employees similarly situated to be engaged in an occupation necessary to the production of goods for interstate commerce. Assume further that the employer, after learning of this, made no further inquiry but continued to pay the employees without regard to the requirements of the Act in reliance on the Administrator's earlier ruling. In such a situation, if the employees later brought an action against the employer, the court might determine that they were entitled to

[95] Colloquy between Representatives Reeves and Devitt, 93 Cong. Rec. 1593; colloquy between Senators Ferguson and Donnell, 93 Cong. Rec. 4451–4452.

[96] See statement of Senator McGrath, 93 Cong. Rec. 2254–2255; statement of Representative Keating, 93 Cong. Rec. 4391; statement of Representative Walter, 93 Cong. Rec. 4389.

the benefits of the Act and might decide that the employer, after learning of the decision of the higher court, knew facts which would put a reasonably prudent man upon inquiry and therefore had not provided his good faith in relying upon the Administrator's ruling after receiving this advice.

(c) In order to illustrate further the test of ''good faith,'' suppose that the X Federal Agency published a general bulletin regarding manufacturing, which contained the erroneous statement that all foremen are exempt under the Fair Labor Standards Act as employed in a ''bona fide executive * * * capacity.'' Suppose also that an employer knowing that the Administrator of the Wage and Hour Division is charged with the duties of administering the Fair Labor Standards Act and of defining the phrase ''bona fide executive * * * capacity'' in that Act, nevertheless relied upon the above bulletin without inquiring further and, inconformity with this advice, failed to compensate his nonexempt foremen in accordance with the overtime provisions of the Fair Labor Standards Act for work subject to that Act, performed before May 14, 1947. If the employer had inquired of the Administrator or had consulted the Code of Federal Regulations, he would have found that his foremen were not exempt. In a subsequent action brought by employees under section 16(b) of the Fair Labor Standards Act, the court may decide that the employer knew facts which ought to have put him as a reasonable man upon further inquiry, and, consequently, that he did not rely ''in good faith'' within the meaning of section 9, upon the bulletin published by the X Agency.[97]

(d) Insofar as the period prior to May 14, 1947, is concerned, the employer may have received an interpretation from an agency which conflicted with an interpretation of the Administrator of the Wage and Hour Division of which he was also aware. If the employer chose to reply upon the interpretation of the other agency, which interpretation worked to his advantage, considerable weight may well be given to the fact that the employer ignored the interpretation of the agency charged with the administration of the Fair Labor Standards Act and chose instead to rely upon the interpretation of an outside agency.[98] Under these circumstances ''the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him.''[99] This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.[100]

### § 790.16 "In reliance on."

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation,

[97] See statement of Representative Gwynne, 93 Cong. Rec. 1563, and colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4453.

[98] This view was expressed several times during the debates. See statements of Representative Keating, 93 Cong. Rec. 1512 and 4391; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; statement of Representative Walter, 93 Cong. Rep. 4389; statement of Representative MacKinnon, 93 Cong. Rec. 4391; statement of Representative Gwynne, 93 Cong. Rec. 1563; statement of Senator Cooper, 93 Cong. Rec. 4451; colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4452–4453.

[99] Statement of Senator Cooper, 93 Cong. Rec. 4451. Representative Walter, a member of the Conference Committee, made the following explanatory statement to the House of Representatives (93 Cong. Rec. 4390): ''The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by Government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.'' Representative Gwynne made a similar statement (93 Cong. Rec. 1563).

[100] Statement of Senator Wiley explaining Conference agreement to the Senate, 93 Cong. Rec. 4270; statement of Representative Walter, 93 Cong. Rec. 4389.

order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been ''in reliance on'' that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

### § 790.17 "Administrative regulation, order, ruling, approval, or interpretation."

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the ''good faith'' defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms ''regulation'' and ''order'' are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[102]

(c) The term ''interpretation'' has been used to describe a statement ''ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.''[103] This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term ''ruling'' commonly refers to an interpretation made by an agency ''as a consequence of individual requests for rulings upon particular questions.''[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term ''approval'' includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority.[105]

(f) The terms ''administrative regulation order, ruling, approval, or interpretation'' connote affirmative action on the part of an agency.[106] A failure

[101] In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4451), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act ''grew out of reliance upon'' the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4372.

[102] See Final Report of Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong. 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; sections 2(c), 2(d) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. section 1001.

[103] Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess. (1941), p. 27.

[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

[105] See section 2(e) of the Administrative Procedure Act, 5 U.S.C.A. sec. 1001.

[106] See Final Report of Attorney General's Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference

to act or a failure to reply to an inquiry on the part of an administrative agency is not a ''regulation, order, ruling, approval, or interpretation'' within the meaning of sections 9 and 10.[107] Thus, suppose that an employer writes a letter to the Administrator of the Wage and Hour Division, setting forth the facts concerning his business. He goes on to state in his letter that he believes his employees are not covered by the Fair Labor Standards Act, and that unless he hears to the contrary from the Administrator, he will not pay them in accordance with its provisions. When the employer does not receive a reply to his letter within what he regards as a reasonable time, he assumes that the Administrator agrees with his (the employer's) interpretation of the Act and he acts accordingly. The employer's reliance under such circumstances is not a reliance upon an administrative regulation, order, ruling, approval or interpretation, within the meaning of sections 9 and 10.

(g) The affirmative action taken by the agency must be one which actually results in a ''regulation, order, ruling, approval, or interpretation.'' If for example, the agency declines to express an opinion as to the application of the law in a particular fact situation, the agency is refraining from interpreting the law rather than giving an interpretation.[108]

(h) An employer does not have a defense under these two sections unless the regulation, order, ruling, approval, or interpretation, upon which he relies, is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified, or determined by judicial authority to be invalid, it is no longer a ''regulation, order, ruling, approval, or interpretation,'' and, consequently, an employer's subsequent reliance upon it offers him no defense under section 9 and 10.[109] On the other hand, the last sentence in section 9 and in section 10 expressly provides that where the employer's good faith reliance on a regulation, order, ruling, approval or interpretation occurs before it is rescinded, modified, or determined by judicial authority to be invalid, his claim of a ''good faith'' defense for such earlier period is not defeated by the subsequent rescission or modification or by the subsequent determination of invalidity.

(i) To illustrate these principles, assume that the Administrator of the Wage and Hour Division, in reply to an inquiry received from a particular employer, sends him a letter, in which the opinion is expressed that employees performing a particular type of work are not covered by the Fair Labor Standards Act. The employer relied upon the Administrator's letter and did not pay his employees who were engaged in such work, in accordance with the provisions of the Fair Labor Standards Act. Several months later the Administrator issues a general statement, published in the FEDERAL REGISTER and given general distribution, that recent court decisions have persuaded him that the class of employees referred to above are within the coverage of the Fair Labor Standards Act. Accordingly, the statement continues, the Administrator hereby rescinds all his previous interpretations and rulings to the contrary. The employer who had received the Administrator's

Report, p. 16; statements of Representative Walter, 93 Cong. Rec. 4389; statements of Representative Gwynne, 93 Cong. Rec. 1491; statements of Senator Donnell, 93 Cong. Rec. 2185; President's message of May 14, 1947, on approval of the Portal-to-Portal Act (93 Cong. Rec. 5281).

[107] That this is true on and after the effective date of the Act is clear from the requirement in section 10 that the regulation, order, ruling, approval or interpretation relied on must be that of the Administrator in writing. As to section 9, the terms appear to have no different meaning.

[108] See Final Report of Attorney General's Committee on Administrative Procedure, p. 33.

[109] See House Report, p. 7, and statements of Representative Gwynne, 93 Cong. Rec. 1491, 1492, 1563. It will be noted that the provisions of section 12 of the Act, affording relief of employers who acted in conformity with the invalidated ''area of production'' regulations, would have been unnecessary if reliance could be placed on a regulation no longer in effect. See statement of Representative Gwynne, 93 Cong. Rec. 4388, and cf. remarks of Senator McCarran, discussing the bill before section 12 was added by the conference committee, 93 Cong. Rec. 2247.

letter, not learning of the Administrator's subsequent published statement rescinding his contrary interpretations, continued to rely upon the Administrator's letter after the effective date of the published statement. Under these circumstances, the employer would, from the date he received the Administrator's letter to the effective date of the published statement rescinding the position expressed in the letter, have a defense under section 9 or 10, assuming he relied upon and conformed with that letter in good faith. However, in spite of the fact that this employer did not receive actual notice of the subsequent published statement, he has no defense for his reliance upon the letter during the period after the effective date of the public statement, because the letter, having been rescinded, was no longer an ''administrative * * * ruling * * * or interpretation'' within the meaning of sections 9 and 10.[110]

### § 790.18 "Administrative practice or enforcement policy."

(a) The terms ''administrative practice or enforcement policy'' refer to courses of conduct or policies which an agency has determined to follow[111] in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations.[112] Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public.[113] Although they may be, and frequently are, based upon decisions or views which the agency has set forth in its regulations, orders, rulings, approvals, or interpretations, nevertheless administrative practices and enforcement policies differ from these forms of agency action in that such practices or policies are not limited to matters concerned with the meaning or legal effect of the statutes administered by the agency and may be based wholly or in part on other considerations.

(b) To illustrate this distinction, suppose the Administrator of the Wage and Hour Division issues a general statement indicating that in his opinion a certain class of employees come within a specified exemption from provisions of the Fair Labor Standards Act in any workweek when they do not engage in a substantial amount of nonexempt work. Such a statement is an ''interpretation'' within the meaning of sections 9 and 10 of the Portal Act. Assume that at the same time, the Administrator states that for purposes of enforcement, until further notice such an employee will be considered as engaged in a substantial amount of nonexempt work in any workweek when he spends in excess of a specified percentage of his time in such nonexempt work. This latter type of statement announces an ''administrative practice or

[110] See Final Report of Attorney General's Gwynne, 93 Cong. Rec. 1563; colloquy between Representative Gwynne and Lee Pressman, Hearings before House Subcommittee on the Judiciary, pp. 156–7.

The fact that an employer has no defense under section 9 or 10 of the Portal Act in the situation stated in the text would not, of course, preclude a court from finding that he acted in good faith having reasonable grounds to believe he was not in violation of the law. In such event, section 11 of the Act would permit the court to reduce or eliminate the employer's liability for liquidated damages in an employee suit. See § 790.22.

[111] The agency may have determined to follow the course of conduct or policy for a limited time only (see paragraphs (c) and (f), this section) or for an indefinite time (see paragraph (b), this section), or for a period terminable by the happening of some contingency, such as a final decision in pending litigation.

[112] See *United States* v. *Minnesota,* 270 U.S. 181 (1926); *United States* v. *Boston & Maine R.R. Co.,* 279 U.S. 732 (1929); *Lucas* v. *American Code Co.,* 280 U.S. 445 (1930); *Estate of Sanford* v. *Commissioner of Internal Revenue,* 308 U.S. 39 (1939). See also Final Report of Attorney General's Committee on Administrative Procedure in Government Agencies, pp. 26–29; 1 Von Baur, Federal Administrative Law (1942), p. 474.

As to requirement that practice or policy be one with respect to a ''class of employers,'' see paragraph (g) of this section.

[113] Pursuant to section 3 of the Administrative Procedure Act, statements of general policy formulated and adopted by the agency for the guidance of the public are published in the FEDERAL REGISTER. An example is the statement of the Secretary of Labor and the Administrator of the Wage and Hour Division, dated June 16, 1947, published in 12 FR 3915.

enforcement policy'' within the meaning of sections 9 and 10 of the Portal Act.

(c) An administrative practice or enforcement policy may, under certain circumstances be at variance with the agency's current interpretation of the law. For example, suppose the Administrator announces that as a result of court decisions he has changed his view as to coverage of a certain class of employees under the Fair Labor Standards Act. However, he may at the same time announce that in order to give affected employers an opportunity to make the adjustments necessary for compliance with the changed interpretation, the Wage and Hour Division will not commence to enforce the Act on the basis of the new interpretation until the expiration of a specified period.

(d) In the statement of the managers on the part of the House, accompanying the report of the Conference Committee on the Portal-to-Portal Act, it is indicated (page 16) that under sections 9 and 10 ''an employer will be relieved from liability, in an action by an employee, because of reliance in good faith on an administrative practice or enforcement policy only (1) where such practice or policy was based on the ground that an act or omission was not a violation of the (Fair Labor Standards) Act, or (2) where a practice or policy of not enforcing the Act with respect to acts or omissions led the employer to believe in good faith that such acts or omissions were not violations of the Act.''

(e) The statement explaining the Conference Committee Report goes on to say, ''However, the employer will be relieved from criminal proceedings or injunctions brought by the United States, not only in the cases described in the preceding paragraph, but also where the practice or policy was such as to lead him in good faith to believe that he would not be proceeded against by the United States.''

(f) The statement explaining the Conference Committee Report gives the following illustrations of the above rules:

An employer will not be relieved from liability under the Fair Labor Standards Act of 1938 to his employees (in an action by them) for the period December 26, 1946, to March 1, 1947, if he is not exempt under the ''Area of Production'' regulations published in the FEDERAL REGISTER of December 25, 1946, notwithstanding the press release issued by the Administrator of the Wage and Hour Division of the Department of Labor, in which he stated that he would not enforce the Fair Labor Standards Act of 1938 on account of acts or omissions occurring prior to March 1, 1947. On the other hand, he will, by reason of the enforcement policy set forth in such press releases, have a good defense to a criminal proceeding or injunction brought by the United States based on an act or omission prior to March 1, 1947.

(g) It is to be noted that, under the language of sections 9 and 10, an employer has a defense for good faith reliance on an administrative practice or an enforcement policy only when such practice or policy is ''with respect to the class of employers to which he belonged.''[114] Thus where an enforcement policy has been announced pertaining to laundries and linen-supply companies serving industrial or commercial establishments the operator of an establishment furnishing window-washing service to industrial and commercial concerns, who relied upon that policy in regard to his employees, has no defense under sections 9 and 10. The enforcement policy upon which he claimed reliance did not pertain to ''the class of employers to which he belonged.''

(h) Administrative practices and enforcement policies, similar to administrative regulations, orders, rulings, approvals and interpretations required affirmative action by an administrative agency.[115] This should not be construed

[114] This provision, which appeared for the first time in the conference bill, to which the term ''practice'' was restored after elimination by the Senate, was apparently designed to meet some of the objections which led to elimination of the word ''practice'' from the bill reported by the Senate judiciary Committee. Cf. remarks of Senator Murray, 93 Cong. Rec. 2238; remarks of Senator Johnston, 93 Cong. Rec. 2373; colloquy between Senators Lucas and Donnell, 93 Cong. Rec. 2185; remarks of Senator McGrath, 93 Cong. Rec. 2254–2256.

[115] See *Union Stockyards & Transit Co.* v. *United States*, 308 U.S. 213, 223 (1939); and *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 454 (1946). Cf. *Federal Trade*

*Continued*

as meaning that an agency may not have administrative practices or policies to refrain from taking certain action as well as practices or policies contemplating positive acts of some kind.[116] But before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.[117] Suppose, for example, that shoe factories in a particular area were not investigated by Wage and Hour Division inspectors operating in the area. This fact would not establish the existence of a practice or policy of the Administrator to treat the employees of such establishments, for enforcement purposes, as not subject to the provisions of the Fair Labor Standards Act, in the absence of proof of some affirmative action by the Administrator adopting such a practice or policy. A failure to inspect might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area.

(i) It was pointed out above that sections 9 and 10 do not offer a defense to the employer who relies upon a regulation, order, ruling, approval or interpretation which at the time of his reliance has been rescinded, modified or determined by judicial authority to be invalid. The same is true regarding administrative practices and enforcement policies.[118] However, a plea of a ''good faith'' defense is not defeated by the fact that after the employer's reliance, the practice or policy is rescinded, modified, or declared invalid.

### § 790.19 "Agency of the United States."

(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of an ''agency of the United States.'' Insofar as acts or omissions occurring on or after May 14, 1947 are concerned, it must be that of the ''agency of the United States specified in'' section 10(b), which, in the case of the Fair Labor Standards Act, is ''the Administrator of the Wage and House Division of the Department of Labor.'' However, with respect to acts or omissions occurring prior to May 14, 1947, section 9 of the Act permits the employer to show that he relied upon and conformed with a regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of ''any agency of the United States.''[119]

(b) The Portal Act contains no comprehensive definition of ''agency'' as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the ''agency'' whose regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy may be relied on is confined to ''the agency of the United States'' specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved.[120]

*Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941). See also President's message of May 14, 1947, 93 Cong. Rec. 5281.

[116] See, for example, *Mintz* v. *Baldwin*, 289 U.S. 346, 349 (1933), where the Department of Agriculture announced ''its policy for the present is to leave the control (of Bang's disease) with the various States.'' See also in this connection the statement of June 23, 1947, by the Senate Committee on the Judiciary regarding the President's message of May 14, 1947, on the Portal-to-Portal Act, 93 Cong. Rec. 5281.

[117] *Union Stockyards & Transit Co.* v. *United States*, supra. It may be noted in this connection that examples given by the sponsors of the legislation, in discussing the terms ''administrative practice or enforcement policy,'' involved situations in which affirmative action had been taken by the agency. Conference Report, p. 16; 93 Cong. Rec. 2185, 2198, 4389–4391.

[118] See § 790.17 (h) and (i), and footnotes 111 and 112.

[119] The differences in the provisions of the two sections are explained and illustrated in § 790.13.

[120] In regard to the Walsh-Healey Act, ''agency'' is defined in section 10 of the Portal-to-Portal Act as including, in addition to the Secretary of Labor, ''any Federal officer utilized by him in the administration of such Act.'' The legislative history of the Portal-

Similarly, the definitions of ''agency'' in other Federal statutes[121] indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment.[122] furthermore, it appears from the statement of the managers on the part of the House accompanying the Conference Committee Report, that the term ''agency'' as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, ruling, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with ''must be those of an 'agency' and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the (Fair Labor Standards) Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretations, unless it is in fact the interpretation of the agency.''[123] Similarly, the Chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the ''good faith'' defense. ''It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling.''[124]

(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of a final nature as the official act or policy of the agency.[125] Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of the agency within the meaning of sections 9 and 10.

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

### § 790.20 Right of employees to sue; restrictions on representative actions.

Section 16(b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (other than a member of the affected group) to maintain, an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16(b). With respect to these actions, the amendment provides that no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and

to-Portal Act (93 Cong. Rec. 2239–2240) reveals that this clause was added because of the language in the Walsh-Healey Act authorizing the Secretary of Labor to administer the Act ''and to utilize such Federal officers and employees * * * as he may find necessary in the administration.''

[121] FEDERAL REGISTER Act, 44 U.S.C. 304; Federal Reports Act, 5 U.S.C. 139; Administrative Procedure Act, 5 U.S.C. 1001.

[122] See *Cudahy Packing Co.* v. *Holland,* 315 U.S. 357 (1942); *United States* v. *Watashe,* 102 F. (2d) 428 (C.A. 10, 1939); 39 Opinions Attorney General 15 (1925). Cf. *Keyser* v. *Hitz,* 133 U.S. 138 (1890); 39 Opinions Attorney General 541 (1933); 13 George Washington Law Review 144 (1945).

[123] See also statement by Representative Gwynne, 93 Cong. Rec. 1563; and statement by Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4270.

[124] Statement of Senator Wiley, 93 Cong. Rec. 4270.

[125] Statement by Representative Gwynne, 93 Cong. Rec. 1563; statements by Representative Walter, 93 Cong. Rec. 1496–1497, 4389; statement by Representative Robsion, 93 Cong. Rec. 1500; statement by Senator Thye, 93 Cong. Rec. 4452.

such consent is filed in the court in which such action is brought. The amendment is expressly limited to actions which are commenced on or after the date of enactment of the Portal Act. Representative actions which were pending on May 14, 1947 are not affected by this amendment.[126] However, under sections 6 and 8 of the Portal Act, a collective or representative action commenced prior to such date will be barred as to an individual claimant who was not specifically named as a party plaintiff to the action on or before September 11, 1947, if his written consent to become such a party is not filed with the court within a prescribed period.[127]

### § 790.21 Time for bringing employee suits.

(a) The Portal Act[128] provides a statute of limitations fixing the time limits within which actions by employees under section 16(b) of the Fair Labor Standards Act[129] may be commenced, as follows:

(1) Actions to enforce causes of action accruing on or after May 14, 1947; two years.

(2) Actions to enforce causes of action accruing before May 14, 1947.[130] Two years or period prescribed by applicable State statute of limitations, whichever is shorter.

These are maximum periods for bringing such actions, measured from the time the employee's cause of action accrues to the time his action is commenced.[131]

(b) The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages ''accrues'' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.[132] The Portal Act[133] provides that an action to enforce such a cause of action shall be considered to be ''commenced'':

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant.

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.[134]

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[126] Conference Report, p. 13.

[127] Conference Report, pp. 14, 15. The claimant must file this consent within the shorter of the following two periods: (1) Two years, or (2) the period prescribed by the applicable State Statute of limitations. See Conference Report, p. 15.

[128] See sections 6–8 inclusive.

[129] Sponsors of the legislation stated that the time limitations prescribed therein apply only to the statutory actions, brought under the special authority contained in section 16(b), in which liquidated damages may be recovered, and do not purport to affect the usual application of State statutes of limitation to other actions brought by employees to recover wages due them under contract, at common law, or under State statutes. Statements of Representative Gwynne, 93 Cong. Rec. 1491, 1557–1588; colloquy between Representative Robsion, Vorys, and Celler, 93 Cong. Rec. 1495.

[130] This refers to actions commenced after September 11, 1947. Such actions commenced on or between May 14, 1947 and September 11, 1947 were left subject to State statutes of limitations. As to collective and representatives actions commenced before May 14, 1947, section 8 of the Portal Act makes the period of limitations stated in the text applicable to the filing, by certain individual claimants, of written consents to become parties plaintiff. See Conference Report, p. 15; § 790.20 of this part.

[131] Conference Report, pp. 13–15.

[132] *Reid* v. *Solar Corp.*, 69 F. Supp. 626 (N.D. Iowa); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. (2d) 310, 316 (C.A. 8). See also *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C.A. 2).

In some instances an employee may receive, as a part of his compensation, extra payments under incentive or bonus plans, based on factors which do not permit computation and payment of the sums due for a particular workweek or pay period until some time after the pay day for that period. In such cases it would seem that an employee's cause of action, insofar as it may be based on such payments, would not accrue until the time when such payment should be made. Cf. *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427.

[133] Section 7. See also Conference Report, p. 14.

[134] This is also the rule under section 8 of the Portal Act as to individual claimants, in

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the two-year period of limitations may be suspended for any cause.[135] In this connection, attention is directed to section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940,[136] as amended, which provides that the period of military service shall not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

### § 790.22 Discretion of court as to assessment of liquidated damages.

(a) Section 11 of the Portal Act provides that in any action brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime, compensation, or liquidated damages, the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16 (b) of the Fair Labor Standards Act.[137]

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.[138]

(c) What constitutes good faith on the part of an employer and whether he had reasonable grounds for believing

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collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

[135] A limited suspension provision was contained in section 2(d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report, indicate the reason for this. While the courts have held that in a proper case, a statute of limitations may be suspended by causes not mentioned in the statute itself (*Braun* v. *Sauerwein,* 10 Wall. 218, 223; see also *Richards* v. *Maryland Ins. Co.,* 8 Cranch 84, 92; *Bauserman* v. *Blunt,* 147 U.S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim. *Bauserman* v. *Blunt,* 147 U.S. 647, 657; *Smith* v. *Continental Oil Co.,* 59 F. Supp. 91, 94.

[136] Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U.S.C.A. App. sec. 525).

[137] Section 16(b) of the Fair Labor Standards Act provides that an employer who violates the minimum—wage or overtime provisions of the act shall be liable to the affected employees not only for the amount of the unpaid minimum wages or unpaid overtime compensation, as the case may be, but also for an additional equal amount as liquidated damages. The courts have held that this provision is ''not penal in its nature'' but rather that such damages ''constitute compensation for the retention of a workman's pay'' where the required wages are not paid ''on time.'' Under this provision of the law, the courts have held that the liability of an employer for liquidated damages in an amount equal to his underpayments of required wages become fixed at the time he fails to pay such wages when due, and the courts were given no discretion, prior to the enactment of the Portal-to-Portal Act, to relieve him of any portion of this liability. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697; *Overnight Motor Transp. Co.* v. *Missel,* 316 U.S. 572.

[138] See Conference Report, p. 17; remarks of Representative Walter, 93 Cong. Rec. 1496–1497; President's message of May 14, 1947, to the Congress on approval of the Portal Act, 93 Cong. Rec. 5281.

that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests.[139] Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.

(d) Section 11 of the Portal Act does not change the provisions of section 16(b) of the Fair Labor Standards Act under which attorney's fees and court costs are recoverable when judgment is awarded to the plaintiff.

## PART 791—JOINT EMPLOYMENT RELATIONSHIP UNDER FAIR LABOR STANDARDS ACT OF 1938

Sec.
791.1 Introductory statement.
791.2 Joint employment.

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

### § 791.1 Introductory statement.

The purpose of this part is to make available in one place the general interpretations of the Department of Labor pertaining to the joint employment relationship under the Fair Labor Standards Act of 1938.[1] 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.''[2] These interpretations contain the construction of the law which the administrator believes to be correct and which will guide him in the performance of his duties under the Act, unless and until he is otherwise directed by authoritative decisions of the courts or he concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, and enforcement policies relating to sections 3 (d), (e) and (g) of the Act, which define the terms ''employer'', ''employee'', and ''employ'', are inconsistent or in conflict with the principles stated in this part they are hereby rescinded. The interpretations contained in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act,[3] so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

[23 FR 5905, Aug. 5, 1958]

### § 791.2 Joint employment.

(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.[4] On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In

[139] Cf. §§ 790.13 to 790.16.

[1] 29 U.S.C. 201–219. Under Reorganization Plan No. 6 of 1950 and pursuant to General Order No. 45–A, issued by the Secretary of Labor on May 24, 1950, interpretations of the provisions (other than the child labor provisions) of the act are issued by the Administrator of the Wage and Hour Division on the advice of the Solicitor of Labor. See 15 FR 3290.

[2] *Skidmore* v. *Swift and Company*, 323 U.S. 134, 138.

[3] 61 Stat. 84; 29 U.S.C. 251–262.

[4] *Walling* v. *Friend, et al.*, 156 F. 2d 429 (C. A. 8).

this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[5] In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;[6] or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;[7] or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[8]

[23 FR 5905, Aug. 5, 1958, as amended at 26 FR 7732, Aug. 18, 1961]

[5] Both the statutory language (section 3(d) defining ''employer'' to include anyone acting directly or indirectly in the interest or an employer in relation to an employee) and the Congressional purpose as expressed in section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of ''joint employers'' and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.

[6] *Mid-Continent Pipeline Co., et al.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4); *Mitchell* v. *Bowman*, 131 F. Supp., 520 (M.D. Ala. 1954); *Mitchell* v. *Thompson Materials & Construction Co., et al.*, 27 Labor Cases Para. 68, 888; 12 WH Cases 367 (S.D. Calif. 1954).

[7] Section 3(d) of the Act; *Greenberg* v. *Arsenal Building Corp., et al.*, 144 F. 2d 292 (C.A. 2).

[8] *Dolan* v. *Day & Zimmerman, Inc., et al.*, 65 F. Supp. 923 (D. Mass. 1946); *McComb* v. *Midwest Rust Proof Co., et al.*, 16 Labor Cases Para. 64, 927; 8 WH Cases 460 (E.D. Mo. 1948); *Durkin* v. *Waldron., et al.*, 130 F. Supp., 501 (W.D. La. 1955). See also *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (C.A. 6).

# PART 793—EXEMPTION OF CERTAIN RADIO AND TELEVISION STATION EMPLOYEES FROM OVERTIME PAY REQUIREMENTS UNDER SECTION 13(b)(9) OF THE FAIR LABOR STANDARDS ACT

INTRODUCTORY

Sec.
793.0 Purpose of interpretative bulletin.
793.1 Reliance upon interpretations.
793.2 General explanatory statement.

REQUIREMENTS FOR EXEMPTION

793.3 Statutory provision.
793.4 General requirements for exemption.
793.5 What determines application of the exemption.
793.6 Exemption limited to employees in named occupations.
793.7 ''Announcer.''
793.8 ''News editor.''
793.9 ''Chief engineer.''
793.10 Primary employment in named occupations.
793.11 Combination announcer, news editor and chief engineer.
793.12 Related and incidental work.
793.13 Limitation on related and incidental work.
793.14 Employed by.
793.15 Duties away from the station.
793.16 ''Radio or television station.''
793.17 ''Major studio.''
793.18 Location of ''major studio.''

WORKWEEK APPLICATION OF EXEMPTION

793.19 Workweek is used in applying the exemption.
793.20 Exclusive engagement in exempt work.
793.21 Exempt and nonexempt work.

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

SOURCE: 26 FR 10275, Nov. 2, 1961, unless otherwise noted.

INTRODUCTORY

### § 793.0 Purpose of interpretative bulletin.

This part 793 constitutes the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(9) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for certain employees employed by certain small market radio and television stations. This exemption was added to the Act by the 1961 amendments. It is the purpose of this bulletin to make available in one place the interpretations of the provisions in section 13(b) (9) which will guide the Secretary of Labor and the Administrator 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.

### § 793.1 Reliance upon interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. All prior opinions, rulings and interpretations which are inconsistent with the interpretations in this bulletin are rescinded and withdrawn.

### § 793.2 General explanatory statement.

Some employees of radio and television stations perform work which may be exempt from the minimum wage and overtime requirements under section 13(a)(1) of the Act. This 13(a)(1) exemption applies to employees employed in a bona fide executive, administrative or professional capacity, or in the capacity of outside salesman, as these terms are defined and delimited by regulations of the Secretary. This exemption continues to be available for employees of radio and television stations who meet the requirements for exemption specified in part 541 of this chapter. The section 13(b) (9) exemption, which is an exemption from the overtime provisions of the Act, but not from the minimum wage requirements, applies to a limited classification of employees employed by small market radio and television stations whose employment meets the requirements for the exemption. These requirements and their meaning and application are discussed in this bulletin.

REQUIREMENTS FOR EXEMPTION

### § 793.3 Statutory provision.

Section 13(b) (9) of the Act exempts from the overtime requirements of section 7, but not from the minimum wage provisions of section 6, of the Act:

> any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.

### § 793.4 General requirements for exemption.

All of the following requirements must be met in order that an employee may be exempt under section 13(b) (9):

(a) The employee must be ''employed as'' an announcer, or a news editor, or a chief engineer.

(b) The employee must be employed ''by'' a radio or television station.

(c) The major studio of such radio or television station must be located in a city or town which meets the prescribed population and locality tests.

### § 793.5 What determines application of the exemption.

The exemption applies only to an employee who is ''employed as'' an announcer, news editor, or chief engineer under the conditions specified in section 13(b) (9). Although the nature of the employer's business is important in applying the exemption to a particular employee in one of the named occupations, employment in the named occupation is an essential prerequisite for

exemption. Whether an employee is exempt therefore depends upon an examination of his duties as well as the nature of the employer's activities. Some employees of the employer may be exempt and others may not.

### § 793.6 Exemption limited to employees in named occupations.

The legislative history of section 13(b)(9) makes it clear that the exemption is specifically limited to employees employed in the specified occupations (S. Rept. 145, 87th Cong. 1st sess., p. 37). To be exempt, therefore, an employee must be employed in the named occupations of announcer, a news editor, or a chief engineer. In applying this test to an employee, his title or job description is not determinative. His aggregate duties, as evidenced by the work which he actually performs in his everyday activities, determines the nature of his occupation. The employee's duties, taken as a whole, must characterize the occupation of the employee as that of announcer, news editor, or chief engineer, if the statutory requirement that he be ''employed as'' such an employee is to be satisfied (see *Walling* v. *Haden*, 153 F. 2d 196, cert. denied 328 U.S. 866). This exemption does not apply to employees who are employed in occupations other than those of announcer, news editor, or chief engineer.

### § 793.7 "Announcer."

An announcer is an employee who appears before the microphone or camera to introduce programs, read news announcements, present commercial messages, give station identification and time signals, and present other similar routine on-the-air material. In small stations, an announcer may, in addition to these duties, operate the studio control board, give cues to the control room for switching programs, make recordings, make the necessary preparations for the day's programs, play records, or write advertising, promotional or similar type copy. An employee who is primarily engaged in the above described activities and in activities which are an integral part thereof will be considered to be employed as an announcer within the meaning of the exemption in section 13(b)(9).

### § 793.8 "News editor."

A news editor is an employee who gathers, edits and rewrites the news. He may also select and prepare news items for broadcast and present the news on the air. An employee who is primarily engaged in the above duties and in activities which are an integral part thereof will be considered to be employed as a news editor within the meaning of the exemption in section 13(b)(9).

### § 793.9 "Chief engineer."

A chief engineer is an employee who primarily supervises the operation maintenance and repair of all electronic equipment in the studio and at the transmitter and is licensed by the Federal Communications Commission as a Radio Telephone Operator First Class. In small stations, only one such engineer may be employed, and in some cases he may be assisted by part-time workers from other departments. The engineer in such cases will be regarded as employed as the ''chief engineer'' for purposes of the section 13(b) (9) exemption provided that he performs the duties described above and is properly licensed by the Federal Communications Commission. Where two or more engineers are employed by a station, only one may qualify as ''chief engineer''—that one who, on the basis of the factual situation, is in charge of the engineering work.

### § 793.10 Primary employment in named occupation.

The legislative history of the exemption is explicit that the exemption applies only to an employee who is employed ''primarily'' as an announcer, news editor, or chief engineer. Thus the Senate Report states: ''The exemption is specifically limited to those employees who are employed primarily in the named occupations * * *'' (S. Rept. 145, 87th Cong., 1st sess., p. 37). No specific rule can be established for determining whether in any given case an employee is employed ''primarily'' in the named occupations. Generally, however, where an employee spends more than half of the hours he works in a workweek in a

named occupation, he will be considered to be primarily employed in such occupation during that workweek. The answer will necessarily depend upon the facts in each case.

### § 793.11 Combination announcer, news editor and chief engineer.

The 13(b)(9) exemption, as was made clear during the debate on the amendment, is intended to apply to employees employed in the named occupations by small market radio and television stations. It is known at the time of such debate that these stations employ only a small number of employees and that, at times, an employee of such a station may perform a variety of duties in connection with the operation of the station. For example, an employee may perform work both as an announcer and as a news editor. In such cases, the primary employment test under the section 13(b)(9) exemption will be considered to be met by an employee who is employed primarily in any one or any combination of the named occupations. Thus an employee who works both as an announcer and news editor for the greater part of the workweek will be considered to be primarily employed in the named occupations during that week.

### § 793.12 Related and incidental work.

An employee who is employed primarily in one or more of the named occupations may also be engaged in other duties pertaining to the operation of the station by which he is employed. The Senate Report states that, for purposes of this exemption, employees who are primarily employed in the named occupation ''may engage in related activities, including the sale of broadcasting time for the broadcasting company by which they are employed, as an incident to their principal occupation'', (S. Rept. 145, 87th Cong., 1st sess., p. 37). Time spent in such duties will not be considered to defeat the exemption if the employee is primarily employed in the named occupations and if the other requirements of the exemption are met.

### § 793.13 Limitation on related and incidental work.

The related work which an employee may perform is clearly limited in nature and extent by a number of requirements. One limitation is that the work must be an incident to the employee's primary occupation. The work therefore may not predominate over his primary job. He is not ''employed as'' an announcer, news editor, or chief engineer if his dominant employment is in work outside such occupations (see *Walling* v. *Haden*, 153 F. 2d 196, cert. denied 328 U.S. 866). For instance, an announcer who spends 40 hours of his 48 hour workweek in selling broadcasting time would not be considered to be ''incidentally'' engaged in such selling. Selling would in such circumstances be his primary occupation. His duties as an announcer must constitute his primary job. Another requirement is that the work of the employees must be performed ''for the broadcasting company by which they are employed * * *'' (see S. Rept. cited in § 793.12). Sale of broadcasting time for a company which does not employ the employee as an announcer, news editor, or chief engineer, is not exempt work. Work which is not performed for the station by which the employee is employed, is not intended to be exempt. For a discussion of the effect on the exemption of nonexempt work see §§ 793.19 to 793.21.

### § 793.14 Employed by.

The application of the exemption is limited to employees ''employed by'' a radio or television station. The question whether a worker is employed ''by'' a radio or television station depends on the particular facts. (See *Rutherford Food Corporation* v. *McComb*, 331 U.S. 722; *U.S.* v. *Silk*, 331 U.S. 704.) In general, however, an employee is so employed where he is hired by the radio or television station, engages in its work, is paid by the radio or television station and is under its supervision and control. Employees of independent contractors and of others who work for a radio or television station but who are not ''employed by'' such station are not exempt under this exemption even if they engage in the named occupation. (*Mitchell* v. *Kroger*, 248, F. 2d 935.)

### § 793.15 Duties away from the station.

An employee who is ''employed by'' a radio or television station in one or more of the named occupations may perform his work at the station or away from the station so long as his activities meet the requirements for exemption.

### § 793.16 "Radio or television station."

The employee must be employed by a ''radio or television station.'' A radio or television station is one which is designated and licensed as such by the Federal Communications Commission.

### § 793.17 "Major studio."

The exemption further depends on whether ''the major studio'' of the radio or television station which employes the employee is in a city or town as defined in section 13(b)(9). The location of secondary studios of the radio or television station is immaterial. It is the location of the ''major'' studio that determines the qualification of the employer for the exemption. A major studio for purposes of the exemption is the main studio of the radio or television station as designated on the station's license by the Federal Communications Commission. It is this major studio which must be located in the city or town as defined in section 13(b)(9) of the Act.

### § 793.18 Location of "major studio."

Section (b)(9) specifies that the ''major studio'' must be located ''(A) in a city or town of one hundred thousand population or less according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.'' These tests may be summarized as follows:

(a) *A city or town with more than 100,000 population.* The exemption does not apply to any employee of a radio or television station the major studio of which is located in any city or town with a population in excess of 100,000.

(b) *A city or town with 100,000 population or less.* The exemption may apply if the major studio is located in a city or town of not more than 100,000 population: *Provided,* That the city or town is not within a standard metropolitan statistical area which has more than 100,000 population.

(c) *A city or town with 25,000 population or less.* The exemption may apply even if the major studio is located in a city or town that is within a standard metropolitan statistical area which has more than 100,000 population: *Provided,* That such city or town has a population or not more than 25,000 and the city or town is at least 40 airline miles from the principal city in such area.

(d) *Sources of information.* The Bureau of the Budget issues periodically a booklet entitled ''Standard Metropolitan Statistical Areas'', which lists and describes these areas in the United States and Puerto Rico. The booklet lists the standard metropolitan statistical areas by name and shows their population according to the latest available decennial census figures as compiled by the Bureau of the Census. The booklet also lists the major cities within each standard metropolitan statistical area and the population of these cities. From time to time, new areas are designated as ''standard metropolitan statistical areas'' and areas once designated as such are deleted from the area definitions. This booklet may be purchased, for 25 cents, from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(e) *Principal city.* The term ''principal city'', as used in section 13(b)(9), means the ''central city'', or cities, of the standard metropolitan statistical area, which are defined and designated as such by the Bureau of the Census. The name of the ''central city'' is incorporated in the name of the standard metropolitan statistical area. Where two or more cities are designated by the Bureau of the Census as the ''central cities'', the names of such cities appear in the title of the standard metropolitan statistical area. For example,

the ''Duluth-Superior'' standard metropolitan statistical area, has two ''central'' cities, namely Duluth and Superior; both appear in the title of the standard metropolitan statistical area, and both are regarded as ''principal'' cities for purposes of the section 13(b)(9) exemption. Where, as in the example, more than one city is designated as the ''central'' city airline mileage will be measured from that ''central'' city which is nearest to the city or town in which the major studio of the radio or television station is located.

(f) *Determining the population.* The population of a city or town, or of a standard metropolitan statistical area, will be determined by the latest available decennial census figures as compiled by the U.S. Bureau of the Census.

(g) *Measuring airline miles.* Airline miles for purposes of the section 13(b)(9) exemption are measured, with a straight edge on a map, from the zero milestone, or the city hall, of the ''central'' city, to the zero milestone, or city or town hall, of the city or town in which the major studio of the radio or television station is located.

WORKWEEK APPLICATION OF EXEMPTION

### § 793.19 Workweek is used in applying the exemption.

The unit of time to be used in determining the application of the exemption under section 13(b)(9) to an employee is the workweek. (See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572; *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, affirmed, 181 F. 2d 697.) A workweek is a fixed and regularly recurring period of 7 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. The workweek may not be changed for the purpose of evading the requirements of the Act.

### § 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.

794.1 General scope of the Act.
794.2 Purpose of this part.
794.3 Matters discussed in this part.
794.4 Significance of official interpretations.
794.5 Basic support for interpretations.
794.6 Reliance on interpretations.

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

## 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.
794.101 Intended scope of exemption.
794.102 Guides for construing exemptions.
794.103 Dependence of exemption on engagement in described distribution.
794.104 Enterprises engaged in described distribution and in other activities.
794.105 Other requirements for exemption.

THE ''ENTERPRISE''

794.106 Statutory definition of ''enterprise.''
794.107 ''Establishment'' distinguished.
794.108 Scope of enterprise must be known before exemption tests can be applied.
794.109 Statutory basis for inclusion of activities in enterprise.
794.110 Activities excluded from the enterprise by the statute.
794.111 General characteristics of the statutory enterprise.

''INDEPENDENTLY OWNED AND CONTROLLED LOCAL ENTERPRISE''

794.112 Only independent and local enterprises qualify for exemption.
794.113 The enterprise must be ''local.''
794.114 The enterprise must be ''independently owned and controlled.''
794.115 ''Independently owned.''
794.116 ''Independently * * * controlled.''
794.117 Effect of franchises and other arrangements.
794.118 Effect of unrelated activities.

ANNUAL GROSS VOLUME OF SALES

794.119 Dependence of exemption on sales volume of the enterprise.
794.120 Meaning of ''annual gross volume of sales.''
794.121 Exclusion of excise taxes.
794.122 Ascertainment of ''annual'' gross sales volume.
794.123 Method of computing annual volume of sales.
794.124 Computations on a fiscal year basis.
794.125 Grace period of 1 month for compliance.
794.126 Computations for a new business.

SALES MADE WITHIN THE STATE

794.127 Exemption conditioned on making 75 percent of sales within the State.
794.128 Sales made to out-of-State customers.
794.129 Sales ''made within the State'' not limited to noncovered activity.

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.
794.131 ''Customer * * * engaged in bulk distribution.''
794.132 ''Petroleum products.''
794.133 ''Bulk'' distribution.
794.134 Distribution ''for resale.''

APPLICATION OF EXEMPTION TO EMPLOYEES

794.135 Employees who are exempt.
794.136 Employees whose activities may qualify them for exemption.
794.137 Effect of activities other than ''wholesale or bulk distribution of petroleum products.''
794.138 Workweek unit in applying the exemption.
794.139 Exempt and nonexempt activities in the workweek.
794.140 Compensation requirements for a workweek under section 7(b)(3).
794.141 Workweeks when hours worked do not exceed 12 in any day or 56 in the week; compensation requirements.
794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.
794.143 Work exempt under another section of the Act.

RECORDS TO BE KEPT BY EMPLOYERS

794.144 Records to be maintained.

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 ''trade-ins''), 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.

# SUBCHAPTER C—OTHER LAWS

## PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

### Subpart A—General

Sec.
801.1 Purpose and scope.
801.2 Definitions.
801.3 Coverage.
801.4 Prohibitions on lie detector use.
801.5 Effect on other laws or agreements.
801.6 Notice of protection.
801.7 Authority of the Secretary.
801.8 Employment relationship.

### Subpart B—Exemptions

801.10 Exclusion for public sector employers.
801.11 Exemption for national defense and security.
801.12 Exemption for employers conducting investigations of economic loss or injury.
801.13 Exemption for employers authorized to manufacture, distribute, or dispense controlled substances.
801.14 Exemption for employers providing security services.

### Subpart C—Restrictions on Polygraph Usage Under Exemptions

801.20 Adverse employment action under ongoing investigation exemption.
801.21 Adverse employment action under security service and controlled substance exemptions.
801.22 Rights of examinee—general.
801.23 Rights of examinee—pretest phase.
801.24 Rights of examinee—actual testing phase.
801.25 Rights of examinee—post-test phase.
801.26 Qualifications of and requirements for examiners.

### Subpart D—Recordkeeping and Disclosure Requirements

801.30 Records to be preserved for 3 years.
801.35 Disclosure of test information.

### Subpart E—Enforcement

801.40 General.
801.41 Representation of the Secretary.
801.42 Civil money penalties—assessment.
801.43 Civil money penalties—payment and collection.

### Subpart F—Administrative Proceedings

GENERAL

801.50 Applicability of procedures and rules.

PROCEDURES RELATING TO HEARING

801.51 Written notice of determination required.
801.52 Contents of notice.
801.53 Request for hearing.

RULES OF PRACTICE

801.58 General.
801.59 Service and computation of time.
801.60 Commencement of proceeding.
801.61 Designation of record.
801.62 Caption of proceeding.

REFERRAL FOR HEARING

801.63 Referral to Administrative Law Judge.
801.64 Notice of docketing.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

801.65 Appearances; representation of the Department of Labor.
801.66 Consent findings and order.
801.67 Decision and Order of Administrative Law Judge.

MODIFICATION OR VACATION OF DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

801.68 Authority of the Secretary.
801.69 Procedures for initiating review.
801.70 Implementation by the Secretary.
801.71 Filing and service.
801.72 Responsibility of the Office of Administrative Law Judges.
801.73 Final decision of the Secretary.

RECORD

801.74 Retention of official record.
801.75 Certification of official record.

APPENDIX A TO PART 801—NOTICE TO EXAMINEE

AUTHORITY: Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009.

SOURCE: 56 FR 9064, Mar. 4, 1991, unless otherwise noted.

## Subpart A—General

### § 801.1 Purpose and scope.

(a) Effective December 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) prohibits most private employers (Federal, State, and

local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. Polygraph tests, but no other types of lie detector tests, are permitted under limited circumstances subject to certain restrictions. The purpose of this part is to set forth the regulations to carry out the provisions of EPPA.

(b) The regulations in this part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on the disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

### § 801.2 Definitions.

For purposes of this part:

(a) *Act* or *EPPA* means the Employee Polygraph Protection Act of 1988 (Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009).

(b) (1) The term *commerce* has the meaning provided in section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). As so defined, *commerce* means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(2) The term *State* means any of the fifty States and the District of Columbia and any Territory or possession of the United States.

(c) The term *employer* means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an *employer* with respect to the examinees.

(d) (1) The term *lie detector* means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual. Voice stress analyzers, or psychological stress evaluators, include any systems that utilize voice stress analysis, whether or not an opinion on honesty or dishonesty is specifically rendered.

(2) The term *lie detector* does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of *lie detector* are written or oral tests commonly referred to as ''honesty'' or ''paper and pencil'' tests, machine-scored or otherwise; and graphology tests commonly referred to as handwriting tests.

(e) The term *polygraph* means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(f) The terms *manufacture, dispense, distribute,* and *deliver* have the meanings set forth in the Controlled Substances Act, 21 U.S.C. 812.

(g) The term *Secretary* means the Secretary of Labor or authorized representative.

(h) *Employment Standards Administration* means the agency within the Department of Labor, which includes the Wage and Hour Division.

(i) *Wage and Hour Division* means the organizational unit in the Employment Standards Administration of the Department of Labor to which is assigned primary responsibility for enforcement and administration of the Act.

(j) *Administrator* means the Administrator of the Wage and Hour Division, or authorized representative.

### § 801.3 Coverage.

(a) The coverage of the Act extends to ''any employer engaged in or affecting commerce or in the production of goods for commerce.'' (Section 3 of EPPA; 29 U.S.C. 2002.) In interpreting the phrase ''affecting commerce'' in other statutes, courts have found coverage to be coextensive with the full scope of the Congressional power to regulate commerce. See, for example, *Godwin* v. *Occupational Safety and Health Review Commission*, 540 F. 2d 1013, 1015 (9th Cir. 1976). Since most employers engage in one or more types of activities that would be regarded as ''affecting commerce'' under the principles established by a large body of court cases, virtually all employers are deemed subject to the provisions of the Act, unless otherwise exempt pursuant to section 7 (a), (b), or (c) of the Act and §§ 801.10 or 801.11 of this part.

(b) The Act also extends to all employees of covered employers regardless of their citizenship status, and to foreign corporations operating in the United States. Moreover, the provisions of the Act extend to any actions relating to the administration of lie detector, including polygraph, tests which occur within the territorial jurisdiction of the United States, e.g., the preparation of paperwork by a foreign corporation in a Miami office relating to a polygraph test that is to be administered on the high seas or in some foreign location.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.4 Prohibitions on lie detector use.

(a) Section 3 of EPPA provides that, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part, covered employers are prohibited from:

(1) Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test;

(2) Using, accepting, or inquiring about the results of a lie detector test of any employee or prospective employee; and

(3) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee to take such action for refusal or failure to take or submit to such test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the Act.

(b) An employer who reports a theft or other incident involving economic loss to police or other law enforcement authorities is not engaged in conduct subject to the prohibitions under paragraph (a) of this section if, during the normal course of a subsequent investigation, such authorities deem it necessary to administer a polygraph test to an employee(s) suspected of involvement in the reported incident. Employers who cooperate with police authorities during the course of their investigations into criminal misconduct are likewise not deemed engaged in prohibitive conduct provided that such cooperation is passive in nature. For example, it is not uncommon for police authorities to request employees suspected of theft or criminal activity to submit to a polygraph test during the employee's tour of duty since, as a general rule, suspect employees are often difficult to locate away from their place of employment. Allowing a test on the employer's premises, releasing an employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as ''requiring, requesting, suggesting, or causing, directly or indirectly, any employee * * * to take or submit to a lie detector test.'' Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of a test by the employer at the request or direction of police authorities, or through employer reimbursement of tests administered by police authorities to employees. In some communities, it may be a practice of police authorities to request employer testing of employees before a police investigation is initiated on a reported

incident. In other communities, police examiners are available to employers, on a cost reimbursement basis, to conduct tests on employees suspected by an employer of wrongdoing. All such conduct on the part of employers is deemed within the Act's prohibitions.

(c) The receipt by an employer of information from a polygraph test administered by police authorities pursuant to an investigation is prohibited by section 3(2) of the Act. (See paragraph (a)(2) of this section.)

(d) The simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed (e.g., to elicit confessions or admissions of guilt) constitutes conduct prohibited by paragraph (a) of this section. Such use includes the connection of an employee or prospective employee to the instrument without any intention of a diagnostic purpose, the placement of the instrument in a room used for interrogation unconnected to the employee or prospective employee, or the mere suggestion that the instrument may be used during the course of the interview.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.5 Effect on other laws or agreements.

(a) Section 10 of EPPA provides that the Act, except for subsections (a), (b), and (c) of section 7, does not preempt any provision of a State or local law, or any provision of a collective bargaining agreement, that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b)(1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employers.

(2) For example, if the State prohibits the use of polygraphs in all private employment, polygraph examinations could not be conducted pursuant to the limited exemptions provided in section 7 (d), (e) or (f) of the Act; a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in the Act; or more stringent licensing or bonding requirements in a State law would apply in addition to the Federal bonding requirement.

(3) On the other hand, industry exemptions and applicable restrictions thereon, provided in EPPA, would preempt less restrictive exemptions established by State law for the same industry, e.g., random testing of current employees in the drug industry not prohibited by State law but limited by this Act to tests administered in connection with ongoing investigations.

(c) EPPA does not impede the ability of State and local governments to enforce existing statutes or to enact subsequent legislation restricting the use of lie detectors with respect to public employees.

(d) Nothing in section 10 of the Act restricts or prohibits the Federal Government from administering polygraph tests to its own employees or to experts, consultants, or employees of contractors, as provided in subsections 7(b) and 7(c) of the Act, and § 801.11 of this part.

### § 801.6 Notice of protection.

Every employer subject to EPPA shall post and keep posted on its premises a notice explaining the Act, as prescribed by the Secretary. Such notice must be posted in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment. Copies of such notice may be obtained from local offices of the Wage and Hour Division.

### § 801.7 Authority of the Secretary.

(a) Pursuant to section 5 of the Act, the Secretary is authorized to:

(1) Issue such rules and regulations as may be necessary or appropriate to carry out the Act;

(2) Cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of the Act; and

(3) Make investigations and inspections as necessary or appropriate,

through complaint or otherwise, including inspection of such records (and copying or transcription thereof), questioning of such persons, and gathering such information as deemed necessary to determine compliance with the Act or these regulations; and

(4) Require the keeping of records necessary or appropriate for the administration of the Act.

(b) Section 5 of the Act also grants the Secretary authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with any investigation or hearing under the Act. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any investigation or hearing provided for in the Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary.

(c) In case of disobedience to a subpoena, the Secretary may invoke the aid of a United States District Court which is authorized to issue an order requiring the person to obey such subpoena.

(d) Any person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or any authorized representative of the Administrator. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, Employment Standards Administration, for the region or area in which the reported violation is alleged to have occurred.

(e) The Secretary shall conduct investigations in a manner which, to the extent practicable, protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(f) It is a violation of these regulations for any person to resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to the Act during the performance of such duties.

### § 801.8 Employment relationship.

(a) EPPA broadly defines ''employer'' to include ''any person acting directly or indirectly in the interest of an employer in relationship to an employee or prospective employee'' (EPPA section 2(2)).

(b) EPPA restrictions apply to State Employment Services, private employment placement agencies, job recruiting firms, and vocational trade schools with respect to persons who may be referred to potential employers. Such entities are not liable for EPPA violations, however, where the referrals are made to employers for whom no reason exists to know that the latter will perform polygraph testing of job applicants or otherwise violate the provisions of EPPA.

(c) EPPA prohibitions against discrimination apply to former employees of an employer. For example, an employee may quit rather than take a lie detector test. The employer cannot discriminate or threaten to discriminate in any manner against that person (such as by providing bad references in the future) because of that person's refusal to be tested, or because that person files a complaint, institutes a proceeding, testifies in a proceeding, or exercises any right under EPPA.

## Subpart B—Exemptions

### § 801.10 Exclusion for public sector employers.

(a) Section 7(a) provides an exclusion from the Act's coverage for the United States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. This exclusion from the Act also extends to any interstate governmental agency.

(b) The term *United States Government* means any agency or instrumentality, civilian or military, of the executive, legislative, or judicial branches of the Federal Government, and includes independent agencies, wholly-owned government corporations, and nonappropriated fund instrumentalities.

(c) The term *any political subdivision of a State or local government* means any entity which is either.

(1) Created directly by a state or local government, or

(2) Administered by individuals who are responsible to public officials (i.e., appointed by an elected public official(s) and/or subject to removal procedures for public officials, or to the general electorate.

(d) This exclusion from the Act applies only to the Federal, State, and local government entity with respect to its own public employees. Except as provided in sections 7 (b) and (c) of the Act, and § 801.11 of the regulations, this exclusion does not extend to contractors or nongovernmental agents of a government entity, nor does it extend to government entities with respect to employees of a private employer with which the government entity has a contractual or other business relationship.

### § 801.11 Exemption for national defense and security.

(a) The exemptions allowing for the administration of lie detector tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow private employers/contractors to administer such tests.

(b) Section 7(b)(1) of the Act provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor under contract with the Department of Defense; or with the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, assigned to, or detailed to any such agency; or any expert or consultant under contract to any such agency; or any employee of a contractor to such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive Order).

(e) Section 7(c) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under a contract with the Bureau.

(f) *Counterintelligence* for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(g) Lie detector tests of persons described in the above paragraphs will be administered in accordance with applicable Department of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

### § 801.12 Exemption for employers conducting investigations of economic loss or injury.

(a) Section 7(d) of the Act provides a limited exemption from the general

prohibition on lie detector use in private employment settings for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employer may request an employee, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.20, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

(2) The employee had access to the property that is the subject of the investigation;

(3) The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employer provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the business of the employer;

(ii) A description of the employee's access to the property that is the subject of the investigation;

(iii) A description in detail of the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employer; and

(5) The employer retains a copy of the statement and proof of service described in paragraph (a)(4) of this section for at least 3 years and makes it available for inspection by the Wage and Hour Division on request. (See § 801.30(a).)

(Approved by the Office of Management and Budget under control number 1225–0170)

(b) For the exemption to apply, the condition of an ''ongoing investigation'' must be met. As used in section 7(d) of the Act, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employer may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employer is precluded by the Act. Further, because the exemption is limited to a specific incident or activity, an employer is precluded from using the exemption in situations where the so-called ''ongoing investigation'' is continuous. For example, the fact that items in inventory are frequently missing from a warehouse would not be a sufficient basis, standing alone, for administering a polygraph test. Even if the employer can establish that unusually high amounts of inventory are missing from the warehouse in a given month, this, in and of itself, would not be a sufficient basis to meet the specific incident requirement. On the other hand, polygraph testing in response to inventory shortages would be permitted where additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion that the employee to be polygraphed was involved in the incident under investigation. Administering a polygraph test in circumstances where the missing inventory is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the inventory shortages and a ''reasonable suspicion that the employee was involved,'' would amount to little more than a fishing expedition and is prohibited by the Act.

(c)(1)(i) The terms *economic loss or injury to the employer's business* include both direct and indirect economic loss or injury.

(ii) Direct loss or injury includes losses or injuries resulting from theft, embezzlement, misappropriation, industrial espionage or sabotage. These examples, cited in the Act, are intended to be illustrative and not exhaustive. Another specific incident

which would constitute direct economic loss or injury is the misappropriation of confidential or trade secret information.

(iii) Indirect loss or injury includes the use of an employer's business to commit a crime, such as check-kiting or money laundering. In such cases, the ongoing investigation must be limited to criminal activity that has already occurred, and to use of the employer's business operations (and not simply the use of the premises) for such activity. For example, the use of an employer's vehicles, warehouses, computers or equipment to smuggle or facilitate the importing of illegal substances constitutes an indirect loss or injury to the employer's business operations. Conversely, the mere fact that an illegal act occurs on the employer's premises (such as a drug transaction that takes place in the employer's parking lot or rest room) does not constitute an indirect economic loss or injury to the employer.

(iv) Indirect loss or injury also includes theft or injury to property of another for which the employer exercises fiduciary, managerial or security responsibility, or where the firm has custody of the property (but not property of other firms to which the employees have access by virtue of the business relationship). For example, if a maintenance employee of the manager of an apartment building steals jewelry from a tenant's apartment, the theft results in an indirect economic loss or injury to the employer because of the manager's management responsibility with respect to the tenant's apartment. A messenger on a delivery of confidential business reports for a client firm who steals the reports causes an indirect economic loss or injury to the messenger service because the messenger service is custodian of the client firm's reports, and therefore is responsible for their security. Similarly, the theft of property protected by a security service employer is considered an economic loss or injury to that employer.

(v) A theft or injury to a client firm does not constitute an indirect loss or injury to an employer unless that employer has custody of, or management, or security responsibility for, the property of the client that was lost or stolen or injured. For example, a cleaning contractor has no responsibility for the money at a client bank. If money is stolen from the bank by one of the cleaning contractor's employees, the cleaning contractor does not suffer an indirect loss or injury.

(vi) Indirect loss or injury does not include loss or injury which is merely threatened or potential, e.g., a threatened or potential loss of an advantageous business relationship.

(2) Economic losses or injuries which are the result of unintentional or lawful conduct would not serve as a basis for the administration of a polygraph test. Thus, apparently unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash register shortages would not meet the economic loss or injury requirement. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement. It makes no difference that an employer may be obligated to directly or indirectly incur the cost of the incident, as through payment of a ''deductible'' portion under an insurance policy or higher insurance premiums.

(3) It is the business of the employer which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employer would not satisfy the requirement.

(d) While nothing in the Act prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer (e.g., an accident involving a company vehicle).

(e) Section 7(d)(2) provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word *access*, as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation. The

term ''access'', thus, includes more than direct or physical contact during the course of employment. For example, as a general matter, all employees working in or with authority to enter a warehouse storage area have ''access'' to unsecured property in the warehouse. All employees with the combination to a safe have ''access'' to the property in a locked safe. Employees also have ''access'' who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records. In such a situation, it is clear that the bookkeeper effectively has ''access'' to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), *property* refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary, financial or technical information, such as trade secrets, which by its availability to competitors or others would cause economic harm to the employer.

(f)(1) As used in section 7(d)(3), the term *reasonable suspicion* refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for ''reasonable suspicion''. Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employer asked the employee to bring the piece of jewelry to his or her office at 7:30 a.m., and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident unless access to the safe was limited solely to the employee. If no one other than the employee possessed the combination to the safe, and all other possible explanations for the loss are ruled out, such as a break-in, the employer may formulate a basis for reasonable suspicion based on sole access by one employee.

(3) The employer has the burden of establishing that the specific individual or individuals to be tested are ''reasonably suspected'' of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the Act sets forth what information, at a minimum, must be provided to an employee if the employer wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours, excluding weekend days and holidays, prior to the time of the examination. The statement must set forth the time and date of receipt by the employee and be verified by the employee's signature. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. Section 7(d)(4)(A) requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employer's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the ''with particularity'' criterion. If the basis for an employer's requesting an employee (or employees) to take a polygraph test is not articulated with particularity, and reduced to writing, then the standard is not met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by the employer, or an employee or other representative of the employer with authority to legally bind the employer. The person signing the statement must not be a polygraph examiner unless the examiner is acting solely in the capacity of an employer with respect to his or her own employees and does not conduct the examination. The standard would not be met, and the exemption would not apply if the person signing the statement is not authorized to legally bind the employer.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.20, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

### § 801.13 Exemption of employers authorized to manufacture, distribute, or dispense controlled substances.

(a) Section 7(f) provides an exemption from the Act's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. 812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms *manufacture, distribute, distribution, dispense, storage,* and *sale,* for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. 812 et seq.), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the Act applies only to employers who are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 202 of the Controlled Substances Act (21 U.S.C. 812) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their

business or employment are not required to register. Since this exemption is intended to apply only to employees and prospective employees of persons or entities registered with DEA, and is not intended to apply to truck drivers employed by persons or entities who are not so registered, it has no application to employees of common or contract carriers or public warehouses. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have ''direct access'' to the controlled substance(s) manufactured, dispensed, or distributed by the employer. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have ''access'' to the person or property that is the subject of the investigation.

(1) A prospective employee would have ''direct access'' if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have ''direct access'' if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have ''access'' within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in § 801.12(e) of this part. Thus, to test a current employee, the employee need not have had ''direct'' access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. For example, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have ''access'', but normally not ''direct access'', to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have ''direct access'' to such controlled substances. A pharmacy department in a supermarket is another common situation which is useful in illustrating the distinction between ''direct access'' and ''access''. Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have ''direct access'' to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have ''access''. Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have ''access.'' However, any current employee, regardless of described job duties, may be polygraphed if the employer's investigation of criminal or other misconduct discloses that such employee in fact took action to obtain

''access'' to the person or property that is the subject of the investigation—e.g., by actually entering the drug storage area in violation of company rules. In the case of ''direct access'', the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's ''access'' to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term *prospective employee*, for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a ''prospective employee'' for the purposes of this exemption, and thus could be subject to preemployment polygraph screening, prior to such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is considered a ''prospective employee'' for purposes of this section may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(e) Section 7(f) of the Act makes no specific reference to a requirement that employers provide current employees with a written statement prior to polygraph testing. Thus, employers to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the Act and § 801.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer.

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation of criminal or other misconduct, relating to a specific incident or activity, or potential incident or activity. Thus, an employer is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring. However, unlike the exemption in section 7(d) of the Act for employers conducting ongoing investigations of economic loss or injury, the section 7(f) exemption includes ongoing investigations of misconduct involving potential drug losses. Nor does the latter exemption include the requirement for ''reasonable suspicion'' contained in the section 7(d) exemption. Thus, a drug store employer is permitted to polygraph all current employees who have access to a controlled substance stolen from the inventory, or where there is evidence that such a theft is planned. Polygraph testing based on an inventory shortage of the drug during a particular accounting period would not be permitted unless there is extrinsic evidence of misconduct.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The noncontrolled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such noncontrolled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning

products other than controlled substances might be initiated under section 7(d) of the Act and § 801.12 of this part. However, the exemption in section 7(f) of the Act and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.40 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.14 Exemption for employers providing security services.

(a) Section 7(e) of the Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. Subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, section 7(e) permits the use of polygraph tests on certain prospective employees provided that such employers have as their primary business purpose the providing of armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel; and provided the employer's function includes protection of:

(1) Facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, such as—

(i) Facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) Public water supply facilities,

(iii) Shipments or storage of radioactive or other toxic waste materials, and

(iv) Public transportation; or

(2) Currency, negotiable securities, precious commodities or instruments, or proprietary information.

(b)(1) Section 7(e) permits the administration of polygraph tests only to prospective employees. However, security service employers may administer polygraph tests to current employees in connection with an ongoing investigation, subject to the conditions of section 7(d) of the Act and § 801.12 of this part.

(2) The term *prospective employee* generally refers to an individual who is not currently employed by and who is being considered for employment by an employer. However, the term ''prospective employee'' also includes current employees under circumstances similar to those discussed in paragraph (d) of § 801.13 of this part, i.e., if the employee was initially hired for a position which was not within the exemption provided by section 7(e) of the Act, and subsequently applies for, and is under consideration for, transfer to a position for which pre-employment testing is permitted. Thus, for example, a security guard may be hired for a job outside the scope of the exemption's provisions for pre-employment polygraph testing, such as a position at a supermarket. If subsequently this guard is under consideration for transfer or promotion to a job at a nuclear power plant, this currently-employed individual would be considered to be a ''prospective employee'' for purposes of this exemption, prior to such proposed transfer or promotion. However, any adverse action which is based in part on a polygraph test against a current employee who is considered to be a ''prospective employee'' for purposes of this exemption may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(c) Section 7(e) applies to certain private employers whose ''primary business purpose'' consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel. Thus, the exemption is limited to firms primarily in the business of providing such security services, and does not apply to firms primarily in some other business who employ their own security personnel. (For example, a utility company which employs its own security personnel could not qualify.) In the case of diversified firms, the term *primary business purpose* shall mean that at least 50% of the employer's annual dollar volume of business is derived from the provision of the types of security services specifically identified in section 7(e). Where a parent corporation includes a subsidiary corporation engaged in providing security services, the annual dollar volume of business test is applied to the legal entity (or entities) which is the employer, i.e., the subsidiary corporation, not the parent corporation.

(d)(1) As used in section 7(e)(1)(A), the terms *facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States* include protection of electric or nuclear power plants, public water supply facilities, radioactive or other toxic waste shipments or storage, and public transportation. These examples are intended to be illustrative, and not exhaustive. However, the types of ''facilities, materials, or operations'' within the scope of the exemption are not to be construed so broadly as to include low priority or minor security interests. The ''facilities, materials, or operations'' in question consist only of those having a ''significant impact'' on public health or safety, or national security. However, the ''facilities, materials, or operations'' may be either privately or publicly owned.

(2) The specific ''facilities, materials, or operations'' contemplated by this exemption include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could significantly impact on the general public's safety or health, or national security. In addition to the specific examples set forth in the Act and in paragraph (d)(1) of this section, the terms would include:

(i) Facilities, materials, and operations owned or leased by Federal, State, or local governments, including instrumentalities or interstate agencies thereof, for which an authorized public official has determined that a need for security exists, as evidenced by the establishment of security requirements utilizing private armored car, security alarm system, or uniformed or plainclothes security personnel, or a combination thereof. Examples of such facilities, materials and operations include:

(A) Government office buildings;

(B) Prisons and correction facilities;

(C) Public schools;

(D) Public libraries;

(E) Water supply;

(F) Military reservations, installations, posts, camps, arsenals, laboratories, Government-owned and contractor operated (GOCO) or Government-owned and Government-operated (GOGO) industrial plants, and other similar facilities subject to the custody, jurisdiction, or administration of any Department of Defense (DOD) component;

(ii) Commercial and industrial assets and operations which—

(A) Are protected pursuant to security requirements established in contracts with the United States or other directives by a Federal agency (such as those of defense contractors and researchers), including factories, plants, buildings, or structures used for researching, designing, testing, manufacturing, producing, processing, repairing, assembling, storing, or distributing products or components related to the national defense; or

(B) Are protected pursuant to security requirements imposed on registrants under the Controlled Substances Act; or

(C) Would pose a serious threat to public health or safety in the event of a breach of security (this would include, for example, a plant engaged in the manufacture or processing of hazardous materials or chemicals but

would not include a plant engaged in the manufacture of shoes);

(iii) Public and private energy and precious mineral facilities, supplies, and reserves, including—

(A) Public or private power plants and utilities;

(B) Oil or gas refineries and storage facilities;

(C) Strategic petroleum reserves; and

(D) Major dams, such as those which provide hydroelectric power;

(iv) Major public or private transportation and communication facilities and operations, including—

(A) Airports;

(B) Train terminals, depots, and switching and control facilities;

(C) Major bridges and tunnels;

(D) Communications centers, such as receiving and transmission centers, and control centers;

(E) Transmission and receiving operations for radio, television, and satellite signals; and

(F) Network computer systems containing data important to public health and safety or national security;

(v) The Federal Reserve System and stock and commodity exchanges;

(vi) Hospitals and health research facilities;

(vii) Large public events, such as political conventions and major parades, concerts, and sporting events; and

(viii) Large enclosed shopping centers (malls).

(3) If an employer believes that ''facilities, materials, or operations'' which are not listed in this subsection fall within the contemplated purview of this exemption, a request for a ruling may be filed with the Administrator. A ruling that such ''facilities, materials, or operations'' are included within this exemption must be obtained prior to the administration of a polygraph test or any other action prohibited by section 3 of the Act. It is not possible to exhaustively account for all ''facilities, materials, or operations'' which fall within the purview of section 7(e) (1) (A). While it is likely that additional entities may fall within the exemption's scope, any such ''facilities, materials, or operations'' must meet the ''significant impact'' test. Thus, ''facilities, materials, or operations'' which would be of vital importance during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term ''significant impact''.

(e)(1) Section 7(e)(1)(B) of the Act extends the exemption to firms whose function includes protection of ''currency, negotiable securities, precious commodities or instruments, or proprietary information''. These terms collectively are construed to include assets primarily handled by financial institutions such as banks, credit unions, savings and loan institutions, stock and commodity exchanges, brokers, or security dealers.

(2) The terms ''currency, negotiable securities, precious commodities or instruments or proprietary information'' refer to assets which are typically handled by, protected for and transported between and among commercial and financial institutions. Services provided by the armored car industry are thus clearly within the scope of the exemption, as are security alarm and security guard services provided to financial and similar institutions of the type referred to above. Also included are the cash assets handled by casinos, racetracks, lotteries, or other businesses where the cash constitutes the inventory or stock in trade. Similarly, security services provided to businesses engaged in the sale or exchange of precious commodities such as gold, silver, or diamonds, including jewelry stores that stock such precious commodities prior to transformation into pieces of jewelry, are also included. The term ''proprietary information'' generally refers to business assets such as trade secrets, manufacturing processes, research and development data, and cost/pricing data. Security alarm or guard services provided to protect the premises of private homes, or businesses not primarily engaged in handling, trading, transferring, or storing currency, negotiable securities, precious commodities or instruments, or proprietary information, on the other hand, are normally outside the scope of the exemption. This is true even though such places may physically house some such assets. However, where such security alarm or guard service is specifically designed or limited to the protection of

the types of assets identified above, whether located in businesses or residences, or elsewhere, the security services provided are within the scope of the exemption. For example, a security system specially designed to protect diamonds kept in a home vault of a diamond merchant would be within the exemption. However, a security system installed generally to protect the premises of the home of the same merchant would not be within the exemption. A guard sent to a client firm to secure a restricted office in which only proprietary research data is developed and stored is within the scope of the exemption. Another guard sent to the same firm to protect the building entrance from unwanted intruders is not within the scope of the exemption even though the building contains the restricted room in which the proprietary research data is developed and stored, since the security system is not specifically designed to protect the proprietary information.

(f) An employer who falls within the scope of the exemption is one ''whose function includes'' protection of ''facilities, materials, or operations'', discussed in paragraph (d) of this section or of ''currency, negotiable securities, precious commodities or instruments, or proprietary information'' discussed in paragraph (e) of this section. Thus, assuming that the employer has met the ''primary business purpose'' test, as set forth in paragraph (c) of this section, the employer's operations then must simply ''include'' protection of at least one of the facilities within the scope of the exemption.

(g)(1) Section 7(e)(2) provides that the exemption shall not apply if a polygraph test is administered to a prospective employee who would not be employed to protect the ''facilities, materials, operations, or assets'' referred to in section 7(e)(1) of the Act, and discussed in paragraphs (d) and (e) of this section. Thus, while the exemption applies to employers whose function ''includes'' protection of certain facilities, employers would not be permitted to administer polygraph tests to prospective employees who are not being employed to protect such functions.

(2) The phrase ''employed to protect'' in section 7(e)(2) has reference to a wide spectrum of prospective employees in the security industry, and includes any job applicant who would likely protect the security of any qualifying ''facilities, materials, operations, or assets.''

(3) In many cases, it will be readily apparent that certain positions within security companies would, by virtue of the individual's official job duties, entail ''protection''. For example, armored car drivers and guards, security guards, and alarm system installers and maintenance personnel all would be employed to protect in the most direct and literal sense of the term.

(4) The scope of the exemption is not limited, however, to those security personnel having direct, physical access to the facilities being protected. Various support personnel may also, as a part of their job duties, have access to the process of providing security services due to the position's exposure to knowledge of security plans and operations, employee schedules, delivery schedules, and other such activities. Where a position entails the opportunity to cause or participate in a breach of security, an employee to be hired for the position would also be deemed to be ''employed to protect'' the facility.

(i) For example, in the armored car industry, the duties of personnel other than guards and drivers may include taking customer orders for currency and commodity transfers, issuing security badges to guards, coordinating routes of travel and times for pick-up and delivery, issuing access codes to customers, route planning and other sensitive responsibilities. Similarly, in the security alarm industry, several types of employees would have access to the process of providing security services, such as designers of security systems, system monitors, service technicians, and billing clerks (where they review the system design drawings to ensure proper customer billing). In the security industry, generally, administrative employees may have access to customer accounts, schedules, information relating to alarm system failures, and other security information, such as security employee absences due to illness that create ''holes'' in a security plan. Employees

of this type are a part of the overall security services provided by the employer. Such employees possess the ability to affect, on an opportunistic basis, the security of protected operations, by virtue of the knowledge gained through their job duties.

(ii) On the other hand, there are certainly some types of employees in the security industry who ''would not be employed to protect'' the facilities or assets within the purview of the exemption, and who would not be in the process of providing exempt security services. For example, custodial and maintenance employees typically would not have access, either directly or indirectly as a part of their job duties, to the operations or clients of the employer. Any employee whose ''access'' to secured areas or to sensitive information is on a controlled basis, such as by escort, would also be outside the scope of the exemption. In cases where security service companies also provide janitorial, food and beverage, or other services unrelated to security, the exemption would clearly not extend to any employee considered for employment in such activity.

(5) The phrase ''employed to protect'' includes any job applicant who, if not hired specifically to protect the listed facilities or assets, would likely be so employed, as through a systematic assignment process, such as rotation of work assignments or selection from a pool of available employees, even if selection for such work is unpredictable or infrequent. A prospective employee whose job assignment to perform qualifying protective functions would be made by selection from a pool of available employees (all of whom have an equal chance of being selected), or an employee who is to be rotated through different job assignments which include some qualifying protective functions, is included within the exemption. However, if there is only a remote possibility that a prospective employee, if hired, would perform exempt protective functions, such as on an emergency basis, or if a prospective employee by reason of his or her position, qualifications, or level of experience or for other reasons, would when hired, not ordinarily be assigned to protect qualifying facilities, such an employee would be deemed to have not been hired to protect such facilities and would be excluded from the exemption.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detectors test, or contain more restrictive provisions with respect to polygraph testing.

## Subpart C—Restrictions on Polygraph Usage Under Exemptions

### § 801.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a) (1) of the Act provides that the limited exemption in section 7(d) of the Act and § 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) ''Additional supporting evidence'', for purposes of section 8(a) of the Act, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the Act, as described in §§ 801.12, 801.22, 801.23, 801.24, and 801.25 of this part.

### § 801.21 Adverse employment action under security service and controlled substance exemptions.

(a) Section 8(a) (2) of the Act provides that the security service exemption in section 7(e) of the Act and § 801.14 of this part and the controlled substance exemption in section 7(f) of the Act and § 801.13 of this part shall not apply if an employer discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, provided that the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employer observes all the requirements of section 7 (e) or (f) of the Act, as appropriate, and section 8(b) of the Act, as described in §§ 801.13, 801.14, 801.22, 801.23, 801.24, and 801.25 of this part.

### § 801.22 Rights of examinee—general.

(a) Pursuant to section 8(b) of the Act, the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substance exemptions in 7(e) and (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part) shall not apply unless all of the requirements set forth in this section and §§ 801.23 through 801.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

(i) Religious beliefs or affiliations;

(ii) Beliefs or opinions regarding racial matters;

(iii) Political beliefs or affiliations;

(iv) Sexual preferences or behavior; or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. ''Sufficient written evidence'' shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in §§ 801.20 and 801.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test

phases, which must be conducted in accordance with the rights of examinees described in §§ 801.23 through 801.25 of this part.

### § 801.23 Rights of examinee—pretest phase.

(a) The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument. During the initial pretest phase, the examinee must be:

(1) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be received by the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination, except that a prospective employee may, at the employee's option, give written consent to administration of a test anytime within 48 hours but no earlier than 24 hours after receipt of the written notice. The written notice or proof of service must set forth the time and date of receipt by the employee or prospective employee and be verified by his or her signature. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. Provision shall also be made for a convenient place on the premises where the examination will take place at which the examinee may consult privately with an attorney or an employee representative before each phase of the test. The attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(2) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(3) Provided with a written notice prior to the testing phase, in a language understood by the examinee, which shall be read to and signed by the examinee. Use of appendix A to this part, if properly completed, will constitute compliance with the contents of the notice requirement of this paragraph. If a format other than in appendix A is used, it must contain at least the following information:

(i) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(ii) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(iii) That both the examinee and the employer have the right, with the other's knowledge, to make a recording of the entire examination;

(iv) That the examinee has the right to terminate the test at any time;

(v) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(vi) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(vii) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(viii) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(ix) That the test is not and cannot be required as a condition of employment;

(x) That the employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(xi)(A) In connection with an ongoing investigation, that the additional evidence required for the employer to

take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(B) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (a)(3)(x) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(xii) That information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(A) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(B) To the employer that requested the test;

(C) To a court, governmental agency, arbitrator, or mediator pursuant to a court order;

(D) To a U.S. Department of Labor official when specifically designated in writing by the examinee to receive such information;

(E) By the employer, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(xiii) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to obtain compliance with the Act, and may assess civil money penalties against the employer;

(xiv) That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is administered during the actual testing phase.

(xv) That the employee's rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, agreed to and signed by the parties.

(b) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase. Such questions may be presented at any point in time prior to the testing phase.

### § 801.24 Rights of examinee—actual testing phase.

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such ''test period'' begins at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the Act and § 801.23 (a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in § 801.25 of this part. The ninety-minute minimum duration shall not apply if

the examinee voluntarily acts to terminate the test before the completion thereof, in which event the examiner may not render an opinion regarding the employee's truthfulness.

### § 801.25 Rights of examinee—post-test phase.

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employer must:

(1) Further interview the examinee on the basis of the test results; and

(2) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term ''corresponding charted responses'' refers to copies of the entire examination charts recording the employee's physiological responses, and not just the examiner's written report which describes the examinee's responses to the questions as ''charted'' by the instrument.

### § 801.26 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the Act provides that the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substances exemptions in section 7 (e) and (f) of the Act, shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employer pursuant to § 801.30(c) of this part:

(1) Observe all rights of examinees, as set out in §§ 801.22, 801.23, 801.24, and 801.25 of this part;

(2) Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPPA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;

(3) Administer no polygraph examination subject to the provisions of the Act which is less than ninety minutes in duration, as described in § 801.24(b) of this part;

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee; and

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including statements signed by examinees advising them of rights under the Act (as described in § 801.23 (a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See § 801.30 of this part for recordkeeping requirements.)

## Subpart D—Recordkeeping and Disclosure Requirements

### § 801.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employer who requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific

incident or activity under investigation and the basis for testing that particular employee, as required by section 7(d)(4) of the Act and described in § 801.12 (a)(4) of this part.

(2) Each employer who administers a polygraph examination under the exemption provided by section 7(f) of the Act (described in § 801.13 of this part) in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution or dispensing of a controlled substance, shall retain records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.

(3) Each employer who requests an employee or prospective employee to submit to a polygraph examination pursuant to any of the exemptions under section 7(d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14) shall retain a copy of the written statement that sets forth the time and place of the examination and the examinee's right to consult with counsel, as required by section 8 (b)(2)(A) of the Act and described in § 801.23(a)(1) of this part.

(4) Each employer shall identify in writing to the examiner persons to be examined pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part), and shall retain a copy of such notice.

(5) Each employer who retains an examiner to administer examinations pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part) shall maintain copies of all opinions, reports or other records furnished to the employer by the examiner relating to such examinations.

(6) Each examiner retained to administer examinations to persons identified by employers under paragraph (a)(4) of this section shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons. In addition, the examiner shall maintain records of the number of examinations conducted during each day in which one or more tests are conducted pursuant to the Act, and, with regard to tests administered to persons identified by their employer under paragraph (a)(4) of this section, the duration of each test period, as defined in § 801.24(b) of this part.

(b) Each employer shall keep the records required by this part safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where employment records are customarily maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(c) Each examiner shall keep the records required by this part safe and accessible at the place or places of business or at one or more established central recordkeeping offices where examination records are customarily maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of business, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(d) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information for which disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

(Approved by the Office of Management and Budget under control number 1215–0170)

### § 801.35 Disclosure of test information.

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer (other than an employer exempt under section 7 (a), (b), or (c) of the Act (described in §§ 801.10 and 801.11 of this

part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employer that requested the polygraph test pursuant to the provisions of this Act (including management personnel of the employer where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

(b) An employer may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

## Subpart E—Enforcement

### § 801.40 General.

(a) Whenever the Secretary believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including the following:

(1) Petitioning any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person, and to require compliance with the Act and this part, including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits;

(2) Assessing a civil penalty against any employer who violates any provision of the Act or this part in an amount of not more than $10,000 for each violation, in accordance with regulations set forth in this part; or

(3) Referring any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b)(1) Any employer who violates this Act shall be liable to the employee or prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) An action under this subsection may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee and others similarly situated. Such action must be commenced within a period not to exceed 3 years after the date of the alleged violation. The court, in its discretion, may allow reasonable costs (including attorney's fees) to the prevailing party.

(c) The taking of any one of the actions referred to in paragraph (a) of this section shall not be a bar to the concurrent taking of any other appropriate action.

### § 801.41 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 6 of the Act, as described in § 801.40 of this part.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator in all administrative hearings under the provisions of section 6 of the Act and this part.

### § 801.42 Civil money penalties—assessment.

(a) A civil money penalty in an amount not to exceed $10,000 for any violation may be assessed against any employer for:

(1) Requiring, requesting, suggesting or causing an employee or prospective employee to take a lie detector test or using, accepting, referring to or inquiring about the results of any lie detector test of any employee or prospective employee, other than as provided in the Act or this part;

(2) Taking an adverse action or discriminating in any manner against any employee or prospective employee on the basis of the employee's or prospective employee's refusal to take a lie detector test, other than as provided in the Act or this part;

(3) Discriminating or retaliating against an employee or prospective employee for the exercise of any rights under the Act;

(4) Disclosing information obtained during a polygraph test, except as authorized by the Act or this part;

(5) Failing to maintain the records required by the Act or this part;

(6) Resisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the Act or this part; or

(7) Violating any other provision of the Act or this part.

(b) In determining the amount of penalty to be assessed for any violation of the Act or this part, the Administrator will consider the previous record of the employer in terms of compliance with the Act and regulations, the gravity of the violations, and other pertinent factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of investigation(s) or violation(s) of the Act or this part;

(2) The number of employees or prospective employees affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and this part;

(5) If the violations resulted from the actions or inactions of an examiner, the steps taken by the employer to ensure the examiner complied with the Act and the regulations in this part, and the extent to which the employer could reasonably have foreseen the examiner's actions or inactions;

(6) The explanation of the employer, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(7) The extent to which the employee(s) or prospective employee(s) suffered loss or damage;

(8) Commitment to future compliance, taking into account the public interest and whether the employer has previously violated the provisions of the Act or this part.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.43 Civil money penalties—payment and collection.

Where the assessment is directed in a final order of the Department, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of ''Wage and Hour Division, Labor''. The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

## Subpart F—Administrative Proceedings

GENERAL

### § 801.50 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative process for assessment of civil money penalties for violations of the Act or of these regulations.

PROCEDURES RELATING TO HEARING

### § 801.51 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty for a violation of the Act or this part, the person against whom such penalty is assessed shall be notified in writing of such determination. Such notice shall be served in person or by certified mail.

### § 801.52 Contents of notice.

The notice required by § 801.51 of this part shall:

(a) Set forth the determination of the Administrator and the reason or reasons therefor;

(b) Set forth a description of each violation and the amount assessed for each violation;

(c) Set forth the right to request a hearing on such determination;

(d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable; and

(e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 801.53 of this part.

### § 801.53 Request for hearing.

(a) Any person desiring to request an administrative hearing on a civil money penalty assessment pursuant to this part shall make such request in writing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, no later than 30 days after the date of receipt of the notice referred to in § 801.51 of this part.

(b) The request for hearing must be received by the Administrator at the address set forth in the notice issued pursuant to § 801.52 of this part, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail, return receipt requested.

(c) No particular form is prescribed for any request for hearing permitted by this subpart. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991, as amended at 60 FR 46531, Sept. 7, 1995]

RULES OF PRACTICE

### § 801.58 General.

Except as provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

### § 801.59 Service and computation of time.

(a) Service of documents under this subpart shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

(b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this part shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case

the time period includes the next business day.

(d) When a request for hearing is served by mail, five (5) days shall be added to the prescribed period during which the party has the right to request a hearing on the determination.

### § 801.60 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 801.53 of this part.

### § 801.61 Designation of record.

(a) Each administrative proceeding instituted under the Act and this part shall be identified of record by a number preceded by the year and the letters ''EPPA''.

(b) The number, letter, and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

### § 801.62 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In Matter of _____, Respondent.

(b) For the purposes of administrative proceedings under the Act and this part the ''Secretary of Labor'' shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

REFERRAL FOR HEARING

### § 801.63 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 801.53 of this part, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

### § 801.64 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

### § 801.65 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, or Regional Solicitor shall represent the Department in any proceeding under this part.

### § 801.66 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into, in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

### § 801.67 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers, a decision on the issues referred by the Secretary.

(b) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations and the appropriateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to § 801.53 of this part which involve the imposition of a civil money penalty assessed for a violation of the Act or this part.

(d) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(e) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(f) If any party desires review of the decision of the Administrative Law Judge, a petition for issuance of a Notice of Intent shall be filed in accordance with § 801.69 of this subpart.

(g) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless the Secretary, pursuant to § 801.70 of this subpart issues a Notice of Intent to Modify or Vacate the Decision and Order.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

## MODIFICATION OR VACATION OF DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

### § 801.68 Authority of the Secretary.

(a) The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever the Secretary concludes that the Decision and Order:

(1) Is inconsistent with a policy or precedent established by the Department of Labor;

(2) Encompasses determinations not within the scope of the authority of the Administrative Law Judge;

(3) Awards attorney fees and/or other litigation expenses pursuant to the

Equal Access to Justice Act which are unjustified or excessive; or

(4) Otherwise warrants modifying or vacating.

(b) The Secretary may modify or vacate a finding of fact only where the Secretary determines that the finding is clearly erroneous.

### § 801.69 Procedures for initiating review.

(a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 801.70. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.

(b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.70 Implementation by the Secretary.

(a) Review of the Decision and Order by the Secretary shall not be a matter of right but of the sound discretion of the Secretary. At any time within 30 days after the issuance of the Decision and Order of the Administrative Law Judge the Secretary may, upon the Secretary's own motion or upon the acceptance of a party's petition, issue a Notice of Intent to modify or vacate the Decision and Order in question.

(b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

### § 801.71 Filing and service.

(a) Filing. All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) Number of copies. An original and two copies of all documents shall be filed.

(c) Computation of time for delivery by mail. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time thereafter was made by mail.

(d) Manner and proof of service. A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.72 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within fifteen (15) days, forward a copy of the complete hearing record to the Secretary.

### § 801.73 Final decision of the Secretary.

The Secretary's final Decision and Order shall be served upon all parties and the Chief Administrative Law Judge.

RECORD

### § 801.74 Retention of official record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

### § 801.75 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court of a Decision and Order issued under this part, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

## APPENDIX A TO PART 801—NOTICE TO EXAMINEE

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor regulations (29 CFR 801.22, 801.23, 801.24, and 801.25) require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employer have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employer to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employer's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employer that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(4) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

6. Your rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or

complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date)

(Signature)

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

# PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

## Subpart A—Coverage Under the Family and Medical Leave Act

Sec.
825.100 The Family and Medical Leave Act.
825.101 Purpose of the Act.
825.102–825.103 [Reserved]
825.104 Covered employer.
825.105 Counting employees for determining coverage.
825.106 Joint employer coverage.
825.107 Successor in interest coverage.
825.108 Public agency coverage.
825.109 Federal agency coverage.
825.110 Eligible employee.
825.111 Determining whether 50 employees are employed within 75 miles.
825.112 Qualifying reasons for leave, general rule.
825.113 Serious health condition.
825.114 Inpatient care.
825.115 Continuing treatment.
825.116–825.118 [Reserved]
825.119 Leave for treatment of substance abuse.
825.120 Leave for pregnancy or birth.
825.121 Leave for adoption or foster care.
825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member or covered servicemember.
825.125 Definition of health care provider.
825.126 Leave because of a qualifying exigency.
825.127 Leave to care for a covered servicemember with a serious injury or illness.

## Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

825.200 Amount of leave.
825.201 Leave to care for a parent.
825.202 Intermittent leave or reduced leave schedule.
825.203 Scheduling of intermittent or reduced schedule leave.
825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.
825.205 Increments of FMLA leave for intermittent or reduced schedule leave.
825.206 Interaction with the FLSA.
825.207 Substitution of paid leave.
825.208 [Reserved]
825.209 Maintenance of employee benefits.
825.210 Employee payment of group health benefit premiums.
825.211 Maintenance of benefits under multi-employer health plans.
825.212 Employee failure to pay health plan premium payments.
825.213 Employer recovery of benefit costs.
825.214 Employee right to reinstatement.
825.215 Equivalent position.
825.216 Limitations on an employee's right to reinstatement.
825.217 Key employee, general rule.
825.218 Substantial and grievous economic injury.
825.219 Rights of a key employee.
825.220 Protection for employees who request leave or otherwise assert FMLA rights.

## Subpart C—Employee and Employer Rights and Obligations Under the Act

825.300 Employer notice requirements.
825.301 Designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
825.303 Employee notice requirements for unforeseeable FMLA leave.
825.304 Employee failure to provide notice.
825.305 Certification, general rule.
825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.
825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.309 Certification for leave taken because of a qualifying exigency.
825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
825.311 Intent to return to work.
825.312 Fitness-for-duty certification.
825.313 Failure to provide certification.

### Subpart D—Enforcement Mechanisms

825.400 Enforcement, general rules.
825.401 Filing a complaint with the Federal Government.
825.402 Violations of the posting requirement.
825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

### Subpart E—Recordkeeping Requirements

825.500 Recordkeeping requirements.

### Subpart F—Special Rules Applicable to Employees of Schools

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, limitations on leave near the end of an academic term.
825.603 Special rules for school employees, duration of FMLA leave.
825.604 Special rules for school employees, restoration to ''an equivalent position.''

### Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

825.700 Interaction with employer's policies.
825.701 Interaction with State laws.
825.702 Interaction with Federal and State anti-discrimination laws.

### Subpart H—Definitions

825.800 Definitions.
APPENDIX A TO PART 825—INDEX [RESERVED]
APPENDIX B TO PART 825—CERTIFICATION OF HEALTH CARE PROVIDER (FORMS WH–380E & WH–380F)
APPENDIX C TO PART 825—NOTICE TO EMPLOYEES OF RIGHTS UNDER FMLA (WH PUBLICATION 1420)
APPENDIX D TO PART 825—NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES (FORM WH–381)
APPENDIX E TO PART 825—DESIGNATION NOTICE TO EMPLOYEE OF FMLA LEAVE (FORM WH–382)
APPENDIX F TO PART 825 [RESERVED]
APPENDIX G TO PART 825—CERTIFICATION OF QUALIFYING EXIGENCY FOR MILITARY FAMILY LEAVE (FORM WH–384)
APPENDIX H TO PART 825—CERTIFICATION FOR SERIOUS INJURY OR ILLNESS OF COVERED SERVICEMEMBER FOR MILITARY FAMILY LEAVE (FORM WH–385)

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## Subpart A—Coverage Under the Family and Medical Leave Act

### § 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows ''eligible'' employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*see* § 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. In addition, ''eligible'' employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness (*see* § 825.127(c)). In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a

reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

### § 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status in support of a contingency operation. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

### §§ 825.102–825.103 [Reserved]

### § 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or

indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the ''joint employment'' test discussed in § 825.106, or the ''integrated employer'' test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the ''integrated employer'' test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of ''employer'' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

### § 825.105 Counting employees for determining coverage.

(a) The definition of ''employ'' for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work.'' The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer,'' both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on ''isolated factors'' or upon a single characteristic or ''technical concepts,'' but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day

of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, *etc.*, are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2008) calendar year.

**§ 825.106 Joint employer coverage.**

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a ''Professional Employer Organization'' (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions.

On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. *See* § 825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

### § 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of

any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

### § 825.108 Public agency coverage.

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at *http://www.census.gov/govs/www/index.html*. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

### § 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by

Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of this part 825 include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by this part 825 if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by this part 825.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

**§ 825.110 Eligible employee.**

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(b) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment,

the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. (*See* 29 CFR part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) Pursuant to USERRA, an employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.

(d) The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on ''non-FMLA leave'' at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be ''FMLA leave.'' (*See* § 825.300(b) for rules governing the content of the eligibility notice given to employees.)

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

### § 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with

one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year

when school is not in session. *See* § 825.105(c).

### § 825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave*. Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation (*see* §§ 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (*see* §§ 825.122 and 825.127).

(b) *Equal application*. The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee*. In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

### § 825.113 Serious health condition.

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term ''incapacity'' means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term ''treatment'' includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

### § 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in

§ 825.113(b), or any subsequent treatment in connection with such inpatient care.

### § 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term ''extenuating circumstances'' in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because

the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

### §§ 825.116–825.118 [Reserved]

### § 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

### § 825.120 Leave for pregnancy or birth.

(a) *General rules*. Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth

of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. *See* § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.121 for rules governing leave for adoption or foster care. *See* § 825.601 for special rules applicable to instructional employees of schools.

### § 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or

foster care to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newly placed child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.120 for general rules governing leave for pregnancy and birth of a child. *See* § 825.601 for special rules applicable to instructional employees of schools.

### § 825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides,

including common law marriage in States where it is recognized.

(b) *Parent*. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents ''in law.''

(c) *Son or daughter*. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc*.

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*., define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) *Next of kin of a covered servicemember*. ''Next of kin of a covered servicemember'' means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* § 825.127(b)(3).

(e) *Adoption*. ''Adoption'' means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g*., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* § 825.121 for rules governing leave for adoption.

(f) *Foster care*. Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* § 825.121 for rules governing leave for foster care.

(g) *Son or daughter on active duty or call to active duty status*. ''Son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom

the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See* § 825.126(b)(1).

(h) *Son or daughter of a covered servicemember*. ''Son or daughter of a covered servicemember'' means the servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age. *See* § 825.127(b)(1).

(i) *Parent of a covered servicemember*. ''Parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* § 825.127(b)(2).

(j) *Documenting relationships*. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc*. The employer is entitled to examine documentation such as a birth certificate, *etc*., but the employee is entitled to the return of the official document submitted for this purpose.

### § 825.123 Unable to perform the functions of the position.

(a) *Definition*. An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq*., and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions*. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. *See* § 825.306.

### § 825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is ''needed to care for'' a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member

of the family or a third party. *See* §§ 825.202 through 825.205 for rules governing the use of intermittent or reduced schedule leave.

### § 825.125 Definition of health care provider.

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

### § 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave while the employee's spouse, son, daughter, or parent (the ''covered military member'') is on active duty or call to active duty status as defined in § 825.126(b)(2) for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;

(3) *Childcare and school activities.* (i) To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of

self-care because of a mental or physical disability at the time that FMLA leave is to commence;

(ii) To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence;

(iii) To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member;

(6) *Rest and recuperation.* (i) To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

(ii) Eligible employees may take up to five days of leave for each instance of rest and recuperation;

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status; and

(ii) To address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements;

(8) *Additional activities.* To address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that

such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

(b) A ''covered military member'' means the employee's spouse, son, daughter, or parent on active duty or call to active duty status.

(1) A ''son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

(2) ''Active duty or call to active duty status'' means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

(i) Employees are eligible to take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (b)(2) of this section as either a member of the reserve components (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency.

(ii) A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (b)(2) of this section in support of a contingency operation.

(3) The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation. A military operation qualifies as a contingency operation if it:

(i) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(ii) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. 101(a)(13).

**§ 825.127 Leave to care for a covered servicemember with a serious injury or illness.**

(a) Eligible employees are entitled to FMLA leave to care for a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list. Eligible employees may not take leave under this provision to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

(1) A ''serious injury or illness'' means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

(2) ''Outpatient status,'' with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(b) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) A ''son or daughter of a covered servicemember'' means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) A ''parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) The ''next of kin of a covered servicemember'' is the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(j).

(c) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a ''single 12-month period.''

(1) The ''single 12-month period'' described in paragraph (c) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-

qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this ''single 12-month period,'' the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (c) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any ''single 12-month period.'' An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the ''single 12-month periods'' corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each ''single 12-month period.''

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the ''single 12-month period'' described in paragraph (c) of this section, provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the ''single 12-month period,'' take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the ''single 12-month period,'' even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section, the employer must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered servicemember pursuant to § 825.301(d).

(d) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the ''single 12-month period'' described in paragraph (c) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken

for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

## Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

### § 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

(b) An employer is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on

such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine ''any 12 months'' for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. An employer shall determine the ''single 12-month period'' in which the 26-weeks-of-leave-entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* § 825.127(d)(1).

(g) During the ''single 12-month period'' described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* § 825.127(d)(2).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

### § 825.201 Leave to care for a parent.

(a) *General rule*. An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the

FMLA. *See* § 825.122(b) for definition of parent.

(b) *''Same employer'' limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a parent, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* § 825.127(d).

### § 825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking

leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* §§ 825.113 and 825.127.

(c) *Birth or placement*. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

(d) *Qualifying exigency*. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

### § 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. *See* § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

### § 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment*. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance*. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

(c) *Equivalent pay and benefits*. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is

medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations*. An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee*. When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

### § 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment*. (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

(b) *Calculation of leave*. (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off 8 hours, the employee would use ⅕ of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour

days under a reduced leave schedule, the employee would use ½ week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third (⅓) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. *See also*, §§ 825.601 and 825.602, special rules for schools.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime*. If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($\frac{8}{48} = \frac{1}{6}$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

### § 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 CFR part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 CFR 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being

taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by FMLA. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

**§ 825.207 Substitution of paid leave.**

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term ''substitute'' means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness

does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112–825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job.'' As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See also* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. This section of the FLSA limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

### § 825.208 [Reserved]

### § 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ''group health plan'' is set forth in § 825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which

employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc.* *See* § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ''key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the

end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

### § 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* § 825.300(c).

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

### § 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

### § 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1) through (5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

### § 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires,

unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL forms developed for these purposes (*see* §§825.306(b), 825.310(c)–(d) and Appendices B and H of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid,

recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

### § 825.214 Employee right to reinstatement.

*General rule.* On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

### § 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* ''Benefits'' include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick

leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the

same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception*. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

### § 825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (''key employees,'' as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *See* § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

### § 825.217 Key employee, general rule.

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

### § 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (*see also* § 825.702).

### § 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated

from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

### § 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.

An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against ''interference'' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (*see* § 825.702(d)). An employee's acceptance of such ''light duty'' assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

## Subpart C—Employee and Employer Rights and Obligations Under the Act

### § 825.300 Employer notice requirements.

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also

provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the notice contained in Appendix C of this part or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at *http://www.wagehour.dol.gov*. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) *Eligibility notice*. (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* § 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period (*see* §§ 825.127(c) and 825.200(b)). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110(a). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use Appendix D of this part 825 to provide such notification to employees. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (*e.g.*, if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice*. (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*see* §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so (*see* §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*see* § 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.*, the circumstances under which coverage may lapse);

(v) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* §§ 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

(2) The notice of rights and responsibilities may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities is contained in appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.wagehour.dol.gov*. Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.*, after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (*e.g.*, if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave,

the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *http://www.wagehour.dol.gov*. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (*e.g.*, the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)).

### § 825.301 Designation of FMLA leave.

(a) *Employer responsibilities.* The employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated,

the employee's spouse, adult child, parent, doctor, *etc.*, may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) *Retroactive designation.* If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and

the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

**§ 825.302 Employee notice requirements for foreseeable FMLA leave.**

(a) *Timing of notice.* An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, and that the requested leave is for one of the reasons listed in § 825.126(a); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be

taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (*see* § 825.305). An employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave (*see* §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy*. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment*. When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. *See* § 825.304.

### § 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice*. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave

that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. *See* § 825.303(c). Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

### § 825.304 Employee failure to provide notice.

(a) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's

provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice.* An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

### § 825.305 Certification, general rule.

(a) *General.* An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing.* In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under

the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* §§ 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in § 825.307, including second and third opinions.

### § 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or

treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* appendix B to this part 825.) Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH–380E and WH–380F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures

for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

### § 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, ''authentication'' means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. ''Clarification'' means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (''HIPAA'') Privacy Rule (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second opinion.* (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion*. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions*. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses*. If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad*. In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

### § 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule*. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days*. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical

condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employer within the timeframe requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* § 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

### § 825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to active duty status of a covered military member (as defined in § 825.126(b)(2)), an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of

the same or a different covered military member;

(b) *Required information.* An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting.

(c) DOL has developed an optional form (Form WH–384) for employees' use in obtaining a certification that meets FMLA's certification requirements. (*See* appendix G to this part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required.

### § 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider; or

(4) A DOD non-network TRICARE authorized private health care provider.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined

below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator). An employer may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider; or

(iv) A DOD non-network TRICARE authorized private health care provider.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in §825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (*e.g.*, episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under §825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) DOL has developed an optional form (WH–385) for employees' use in obtaining certification that meets

FMLA's certification requirements. (*See* appendix H to this part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. WH–385, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employer may seek authentication and/or clarification of the certification under § 825.307. However, second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember. Additionally, recertifications under § 825.308 are not permitted for leave to care for a covered servicemember. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Department's optional certification form (WH–385) or an employer's own certification form, ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

### § 825.311 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

**§ 825.312 Fitness-for-duty certification.**

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* § 825.305(d).

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability

to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

### § 825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA

leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.312(a)) if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

## Subpart D—Enforcement Mechanisms

### § 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: Wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

### § 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's Web site.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

### § 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a

notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

### § 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

### § 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

## Subpart E—Recordkeeping Requirements

### § 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund, or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of FMLA exists or the Department is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay

and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations (*see* § 825.300(b) through (c)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

## Subpart F—Special Rules Applicable to Employees of Schools

### § 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be ''eligible''

do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

### § 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

### § 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the

end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

### § 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

### § 825.604 Special rules for school employees, restoration to "an equivalent position."

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

## Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

### § 825.700 Interaction with employer's policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

### § 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee needing leave due to his or her own serious health condition would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(4) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (*See* subpart F of this part.)

(b) [Reserved]

### § 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of

the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health

plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the

employer (and, therefore, not an ''eligible'' employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301–4333 (USERRA), veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of employment. *See* § 825.110(b)(2)(i) and (c)(2).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

## Subpart H—Definitions

### § 825.800 Definitions.

For purposes of this part:

*Act* or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq., as amended*).

*Active duty or call to active duty status* means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See also* § 825.126(b)(2).

*ADA* means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended).

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

*COBRA* means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended (Pub. L. 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

*Commerce* and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

*Contingency operation* means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* § 825.126(b)(3).

*Continuing treatment by a health care provider* means any one of the following:

(1) *Incapacity and treatment*. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (1)(i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (1)(i) of this definition means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* § 825.115(a)(5).

(2) *Pregnancy or prenatal care*. Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(3) *Chronic conditions*. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) *Permanent or long-term conditions*. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments*. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider

during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

*Covered military member* means the employee's spouse, son, daughter, or parent on active duty or call to active duty status. *See also* § 825.126(b).

*Covered servicemember* means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty. *See also* § 825.127(a).

*Eligible employee* means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless*:

(i) The break in service is occasioned by the fulfillment of the employee's National Guard or Reserve military service obligation (the time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA)); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250-hours of service with such employer during the previous 12-month period, *except that*:

(i) An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service (accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250-hour requirement);

(ii) To determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

*Employ* means to suffer or permit to work.

*Employee* has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

*Employee employed in an instructional capacity*. *See* the definition of *Teacher* in this section.

*Employer* means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

*Employment benefits* means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a).)

*FLSA* means the Fair Labor Standards Act (29 U.S.C. 201 *et seq*.).

*Group health plan* means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation,

excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

*Health care provider* means:

(1) The Act defines ''health care provider'' as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

*Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

*Instructional employee: See* the definition of *Teacher* in this section.

*Intermittent leave* means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

*Mental disability: See* the definition of *Physical or mental disability* in this section.

*Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members

with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* § 825.127(b)(3).

*Outpatient status* means, with respect to a covered servicemember, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* § 825.127(a)(2).

*Parent* means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

*Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* § 825.127(b)(2).

*Person* means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

*Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, as amended, define these terms.

*Public agency* means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

*Reduced leave schedule* means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

*Secretary* means the Secretary of Labor or authorized representative.

*Serious health condition* means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

*Serious injury or illness* means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating. *See also* § 825.127(a)(1).

*Son or daughter* means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

*Son or daughter of a covered servicemember* means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* § 825.127(b)(1).

*Son or daughter on active duty or call to active duty status* means the employee's biological, adopted, or foster child,

stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See also* § 825.126(b)(1).

*Spouse* means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

*State* means any State of the United States or the District of Columbia or any Territory or possession of the United States.

*Teacher* (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

APPENDIX A TO PART 825—INDEX
[RESERVED]

APPENDIX B TO PART 825—CERTIFICATION OF HEALTH CARE PROVIDER (FORMS WH–380E & WH–380F)

**Appendix B**
Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached: _____

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

**SECTION III: For Completion by the HEALTH CARE PROVIDER**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

 CONTINUED ON NEXT PAGE 

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   **Mark below as applicable:**
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

 CONTINUED ON NEXT PAGE 

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____.

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____ Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

 CONTINUED ON NEXT PAGE 

**Signature of Health Care Provider** **Date**

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

**Appendix B**

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

_____

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

 CONTINUED ON NEXT PAGE 

**SECTION III: For Completion by the HEALTH CARE PROVIDER**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

 CONTINUED ON NEXT PAGE 

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care.

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

 CONTINUED ON NEXT PAGE 

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

**Signature of Health Care Provider** **Date**

**PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.

**DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

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## APPENDIX C TO PART 825—NOTICE TO EMPLOYEES OF RIGHTS UNDER FMLA (WH PUBLICATION 1420)

Appendix C to Part 825–Notice to Employees Of Rights Under FMLA (WH Publication 1420)

**EMPLOYEE RIGHTS AND RESPONSIBILITIES**

UNDER THE FAMILY AND MEDICAL LEAVE ACT

**Basic Leave Entitlement**

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

**Military Family Leave Entitlements**

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

**Benefits and Protections**

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

**Eligibility Requirements**

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

**Definition of Serious Health Condition**

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

**Use of Leave**

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

**Substitution of Paid Leave for Unpaid Leave**

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

**Employee Responsibilities**

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

**Employer Responsibilities**

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

**Unlawful Acts by Employers**

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

**Enforcement**

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

**FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.**

**For additional information:**
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
**WWW.WAGEHOUR.DOL.GOV**

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXX

## APPENDIX D TO PART 825—NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES (FORM WH-381)

**Appendix D**

Notice of Eligibility and Rights & Responsibilities
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

**[Part A – NOTICE OF ELIGIBILITY]**

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

_____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

- _____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
- _____ You have not met the FMLA's 1,250-hours-worked requirement.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

**[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]**

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

____ No additional information requested

 CONTINUED ON NEXT PAGE 

**If your leave does qualify** as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick,** _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

**If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.**

**If your leave does qualify** as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  _____ a fixed leave year based on _____.

  _____ the 12-month period measured forward from the date of your first FMLA leave usage.

  _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have ____ **sick,** ____**vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

**Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:**

_____at _____.

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

## APPENDIX E TO PART 825—DESIGNATION NOTICE TO EMPLOYEE OF FMLA LEAVE (FORM WH-382)

**Appendix E**

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

**Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).**

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided.
We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

**The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:**

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

**Please be advised (check if applicable):**

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

_____ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-382 November 2008

## APPENDIX F TO PART 825 [RESERVED]

APPENDIX G TO PART 825—CERTIFICATION OF QUALIFYING EXIGENCY FOR MILITARY FAMILY LEAVE (FORM WH-384)

**Appendix G**

Certification of Qualifying Exigency
For Military Family Leave
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: _____

Contact Information: _____

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

___ A copy of the covered military member's active duty orders is attached.
___ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
___ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

 CONTINUED ON NEXT PAGE 

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. __ Yes __ No __ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ___No ___Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments:_____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

 CONTINUED ON NEXT PAGE 

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

APPENDIX H TO PART 825—CERTIFICATION FOR SERIOUS INJURY OR ILLNESS OF COVERED SERVICEMENBER FOR MILITARY FAMILY LEAVE (FORM WH-385)

**Appendix H**

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

**Notice to the EMPLOYER** **INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

**SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave** **INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

**SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider** **INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

 CONTINUED ON NEXT PAGE 

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

**SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave:** (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

_____
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
☐ Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ___Yes ____No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ___Yes ___No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ____Yes ____No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

 CONTINUED ON NEXT PAGE 

**SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).** (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ____ Yes ____ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ____Yes ___No. If yes, please describe medical treatment, recuperation or therapy:

 CONTINUED ON NEXT PAGE 

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ___ Yes ___ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
___ Yes ___ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ____Yes _____No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ____Yes ____No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

**Signature of Health Care Provider:** _____ **Date:** _____

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

# SUBCHAPTER D—GARNISHMENT OF EARNINGS

## PART 870—RESTRICTION ON GARNISHMENT

### Subpart A—General

Sec.
870.1 Purpose and scope.
870.2 Amendments to this part.

### Subpart B—Determinations and Interpretations

870.10 Maximum part of aggregate disposable earnings subject to garnishment under section 303(a).
870.11 Exceptions to the restrictions provided by section 303(a) of the CCPA and priorities among garnishments.

### Subpart C—Exemption for State-Regulated Garnishments

870.50 General provision.
870.51 Exemption policy.
870.52 Application for exemption of State-regulated garnishments.
870.53 Action upon an application for exemption.
870.54 Standards governing the granting of an application for exemption.
870.55 Terms and conditions of every exemption.
870.56 Termination of exemption.
870.57 Exemptions.

AUTHORITY: Secs. 303, 305, 306, 82 Stat. 163, 164; 15 U.S.C. 1673, 1675, 1676, unless otherwise noted.

SOURCE: 35 FR 8226, May 26, 1970, unless otherwise noted.

## Subpart A—General

### § 870.1 Purpose and scope.

(a) This part sets forth the procedures and any policies, determinations, and interpretations of general application whereby the Secretary of Labor carries out his duties under section 303 of the CCPA dealing with restrictions on garnishment of earnings, and section 305 permitting exemptions for State-regulated garnishments in certain situations. While the Secretary's duties under section 303 include insuring that certain amounts of earnings are protected, such duties do not include establishing priorities among multiple garnishments, as such priorities are determined by other Federal statutes or by State law.

(b) Functions of the Secretary under the CCPA to be performed as provided in this part are assigned to the Administrator of the Wage and Hour Division (hereinafter referred to as the Administrator), who, under the general direction and control of the Assistant Secretary, Wage and Labor Standards Administration, shall be empowered to take final and binding actions in administering the provisions of this part. The Administrator is empowered to subdelegate any of his duties under this part. Any legal advice and assistance required for administration of this part shall be provided by the Solicitor of Labor.

[35 FR 8226, May 26, 1970, as amended at 44 FR 30684, May 29, 1979]

### § 870.2 Amendments to this part.

The Administrator may, at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor, amend any rules in this part.

## Subpart B—Determinations and Interpretations

### § 870.10 Maximum part of aggregate disposable earnings subject to garnishment under section 303(a).

(a) *Statutory provision.* Section 303 (a) of the CCPA provides that, with some exceptions,

> the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938, in effect at the time the earnings are payable.
>
> whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) *Weekly pay period.* The statutory exemption formula applies directly to the aggregate disposable earnings paid or payable for a pay period of 1 workweek, or a lesser period. Its intent is to protect from garnishment and save to an individual earner the specified amount of compensation for his personal services rendered in the workweek, or a lesser period. Thus:

(1) The amount of an individual's disposable earnings for a workweek or lesser period which may not be garnished is 30 times the Fair Labor Standards Act minimum wage. If an individual's disposable earnings for such a period are equal to or less than 30 times the minimum wage, the individual's earnings may not be garnished in any amount. (When the minimum wage increases, the proportionate amount of earnings which may not be garnished also increases.) On April 1, 1991, the minimum wage increased to $4.25. Accordingly, the amount of disposable weekly earnings which may not be garnished is $127.50 effective April 1, 1991. (For the period April 1, 1990 through March 31, 1991, the amount that may not be garnished is $114 (30×$3.80).)

(2) For earnings payable on or after April 1, 1991, if an individual's disposable earnings for a workweek or lesser period are more than $127.50, but less than $170.00, only the amount above $127.50 is subject to garnishment. (For earnings payable during the period April 1, 1990, through March 31, 1991, when the Fair Labor Standards Act minimum wage was $3.80, this range computes to more than $114.00, but less than $152.00.)

(3) For earnings payable on or after April 1, 1991, if an individual's disposable earnings for a workweek or lesser period are $170.00 or more, 25 percent of his/her disposable earnings is subject to garnishment. (The weekly figure was $152.00 (40×$3.80) for the period April 1, 1990 through March 31, 1991.)

(c) *Pay for a period longer than 1 week.* In the case of disposable earnings which compensate for personal services rendered in a pay period longer than 1 workweek, the weekly statutory exemption formula must be transformed to a formula applicable to such earnings providing equivalent restrictions on wage garnishment.

(1) The 25 percent part of the formula would apply to the aggregate disposable earnings for all the workweeks or fractions thereof compensated by the pay for such pay period.

(2) The following formula should be used to calculate the dollar amount of disposable earnings which would not be subject to garnishment: The number of workweeks, or fractions thereof, should be multiplied times the applicable Federal minimum wage and that amount should be multiplied by 30. For example, for the period April 1, 1990 through March 31, 1991 when the Federal minimum wage was $3.80 per hour, the formula should be calculated based on a minimum wage of $3.80 ($3.80 multiplied by 30 equals $114; $114 multiplied by the number of workweeks (or fractions thereof) equals the amount that cannot be garnished). As of April 1, 1991, the $4.25 Federal minimum wage replaces $3.80 in the formula (and the amount which cannot be garnished would then be $127.50 multiplied by the number of workweeks (or fractions thereof)). For purposes of this formula, a calendar month is considered to consist of 4⅓ workweeks. Thus, during the period April 1, 1990 through March 31, 1991 when the Federal minimum hourly wage was $3.80 an hour, the amount of disposable earnings for a 2-week period is $228.00 (2×30×$3.80); for a monthly period, $494.00 (4⅓×30×$3.80). Effective April 1, 1991, such amounts increased as follows: for a two-week period, $255.00 (2×30×$4.25); for a monthly period, $552.50 (4⅓×30×$4.25). The amount of disposable earnings for any other pay period longer than 1 week shall be computed in a manner consistent with section 303(a) of the act and with this paragraph.

(3) Absent any changes to the rate set forth in section 6(a)(1) of the Fair Labor Standards Act, disposable earnings for individuals paid weekly, biweekly, semimonthly, and monthly may not be garnished unless they are in excess of the following amounts:

| Date | Minimum amount | Weekly amount | Biweekly amount | Semi-monthly amount | Monthly rate |
|---|---|---|---|---|---|
| Jan. 1, 1981 | $3.35 | $100.50 | $201.00 | $217.75 | $435.50 |
| Apr. 1, 1990 | 3.80 | 114.00 | 228.00 | 247.00 | 494.00 |
| Apr. 1, 1991 | 4.25 | 127.50 | 255.00 | 276.25 | 552.50 |

(4) Absent any changes to the rate set forth in section 6(a)(1) of the Fair Labor Standards Act, if the disposable earnings are less than the following figures, only the difference between the appropriate figures set forth in paragraph (c)(3) of this section and the individual's disposable earnings may be garnished.

| Date | Minimum amount | Weekly amount | Biweekly amount | Semi-monthly amount | Monthly rate |
|---|---|---|---|---|---|
| Jan. 1, 1981 | $3.35 | $134.00 | $268.00 | $290.33 | $580.67 |
| Apr. 1, 1990 | 3.80 | 152.00 | 304.00 | 329.33 | 658.67 |
| Apr. 1, 1991 | 4.25 | 170.00 | 340.00 | 368.33 | 736.67 |

For example, in April of 1990, if an individual's disposable earnings for a biweekly pay period are $274.00, the difference between $228.00 and $274.00 (i.e., $46.00) may be garnished.

(5) If disposable earnings are in excess of the figures stated in paragraph (c)(4) of this section, 25% of the disposable earnings may be garnished.

(d) *Date wages paid or payable controlling.* The date that disposable earnings are paid or payable, and not the date the Court issues the garnishment order, is controlling in determining the amount of disposable earnings that may be garnished. Thus, a garnishment order in November 1990, providing for withholding from wages over a period of time, based on exemptions computed at the $3.80 per hour minimum wage then in effect, would be modified by operation of the change in the law so that wages paid after April 1, 1991, are subject to garnishment to the extent described in paragraphs (b) and (c) of this section on the basis of a minimum rate of $4.25 per hour. This principle is applicable at the time of the enactment of any further increase in the minimum wage.

(Sec. 2, Pub. L. 93–259, 84 Stat 55)

[35 FR 8226, May 26, 1970, as amended at 40 FR 52610, Nov. 11, 1975; 43 FR 28471, June 30, 1978; 43 FR 30276, July 14, 1978; 44 FR 30685, May 29, 1979; 56 FR 32254, July 15, 1991; 56 FR 40660, Aug. 15, 1991]

## § 870.11 Exceptions to the restrictions provided by section 303(a) of the CCPA and priorities among garnishments.

(a)(1) Section 303(b) of the Consumer Credit Protection Act provides that the restrictions in section 303(a) do not apply to:

(i) Any debt due for any State or Federal tax, or

(ii) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(2) Accordingly the Consumer Credit Protection Act does not restrict in any way the amount which may be withheld for State or Federal taxes or in Chapter XIII Bankruptcy Act proceedings.

(b)(1) Section 303(b) provides the following restrictions on the amount that may be withheld for the support of any person (e.g. alimony or child support):

(A) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is issued), 50 per centum of such individual's disposable earnings for that week; and

(B) Where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week; except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be

deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve week period which ends with the beginning of such workweek.

(2) Compliance with the provisions of section 303(a) and (b) may offer problems when there is more than one garnishment. In that event the priority is determined by State law or other Federal laws as the CCPA contains no provisions controlling the priorities of garnishments. However, in no event may the amount of any individual's disposable earnings which may be garnished exceed the percentages specified in section 303. To illustrate:

(i) If 45% of an individual's disposable earnings were garnished for taxes, and this garnishment has priority, the Consumer Credit Protection Act permits garnishment for the support of any person of only the difference between 45% and the applicable percentage (50 to 65%) in the above quoted section 303(b).

(ii) If 70% of an individual's disposable earnings were garnished for taxes and/or a Title XIII Bankruptcy debt, and these garnishments have priority, the Consumer Credit Protection Act does not permit garnishment either for the support of any person or for other debts.

(iii) If 25% of an individual's disposable earnings were withheld pursuant to an ordinary garnishment which is subject to the restrictions of section 303(a), and the garnishment has priority in accordance with State law, the Consumer Credit Protection Act permits the additional garnishment for the support of any person of only the difference between 25% and the applicable percentage (50–65%) in the above quoted section 303(b).

(iv) If 25% or more of an individual's disposable earnings were withheld pursuant to a garnishment for support, and the support garnishment has priority in accordance with State law, the Consumer Credit Protection Act does not permit the withholding of any additional amounts pursuant to an ordinary garnishment which is subject to the restrictions of section 303(a).

[44 FR 30685, May 29, 1979]

## Subpart C—Exemption for State-Regulated Garnishments

### § 870.50 General provision.

Section 305 of the CCPA authorizes that Secretary to ''exempt from the provisions of section 303(a) garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 303(a).''

### § 870.51 Exemption policy.

(a) It is the policy of the Secretary of Labor to permit exemption from section 303(a) of the CCPA garnishments issued under the laws of a State if those laws considered together cover every case of garnishment covered by the Act, and if those laws provide the same or greater protection to individuals. Differences in text between the restrictions of State laws and those in section 303(a) of the Act are not material so long as the State laws provide the same or greater restrictions on the garnishment of individuals' earnings.

(b) In determining whether State-regulated garnishments should be exempted from section 303(a) of the CCPA, or whether such an exemption should be terminated, the laws of the State shall be examined with particular regard to the classes of persons and of transactions to which they may apply; the formulas provided for determining the maximum part of an individual's earnings which may be subject to garnishment; restrictions on the application of the formulas; and with regard to procedural burdens placed on the individual whose earnings are subject to garnishment.

(c) Particular attention is directed to the fact that subsection (a) of section 303, when considered with subsection (c) of that section, is read as not requiring the raising of the subsection (a) restrictions as affirmative defenses in garnishment proceedings.

### § 870.52 Application for exemption of State-regulated garnishments.

(a) An application for the exemption of garnishments issued under the laws of a State may be made in duplicate by a duly authorized representative of the State. The application shall be filed

with the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210.

(b) Any application for exemption must be accompanied by two copies of all the provisions of the State laws relating to the garnishment of earnings, certified to be true and complete copies by the Attorney General of the State. In addition, the application must be accompanied by a statement, in duplicate, signed by the Attorney General of the State, showing how the laws of the State satisfy the policy expressed in § 870.51(a) and setting forth any other matters which the Attorney General may wish to state concerning the application.

(c) Notice of the filing of an application for exemption shall be published in the FEDERAL REGISTER. Copies of the application shall be available for public inspection and copying during business hours at the national office of the Wage and Hour Division and in the regional office of the Wage and Hour Divison in which the particular State is located. Interested persons shall be afforded an opportunity to submit written comments concerning the application of the State within a period of time to be specified in the notice.

[35 FR 8226, May 26, 1970, as amended at 35 FR 14315, Sept. 11, 1970]

### § 870.53 Action upon an application for exemption.

(a) The Administrator shall grant or deny within a reasonable time any application for the exemption of State-regulated garnishments. The State representative shall be notified in writing of the decision. In the event of denial, a statement of the grounds for the denial shall be made. To the extent feasible and appropriate, the Administrator may afford to the State representative and to any other interested persons an opportunity to submit orally or in writing data, views, and arguments on the issue of whether or not an exemption should be granted and on any subsidiary issues.

(b) If an application is denied, the State representative shall have an opportunity to request reconsideration by the Administrator. The request shall be made in writing. The Administrator shall permit argument whenever the opportunity to do so has not been afforded under paragraph (a) of this section, and may permit argument in any other case.

(c) General notice of every exemption of State-regulated garnishments and of its terms and conditions shall be given by publication in the FEDERAL REGISTER.

### § 870.54 Standards governing the granting of an application for exemption.

The Administrator may grant any application for the exemption of State-regulated garnishments whenever he finds that the laws of the State satisfy the policy expressed in § 870.51(a).

### § 870.55 Terms and conditions of every exemption.

(a) It shall be a condition of every exemption of State-regulated garnishments that the State representative have the powers and duties

(1) To represent, and act on behalf of, the State in relation to the Administrator and his representatives, with regard to any matter relating to, or arising out of, the application, interpretation, and enforcement of State laws regulating garnishment of earnings;

(2) To submit to the Administrator in duplicate and on a current basis, a certified copy of every enactment by the State legislature affecting any of those laws, and a certified copy of any decision in any case involving any of those laws, made by the highest court of the State which has jurisdiction to decide or review cases of its kind, if properly presented to the court; and

(3) To submit to the Administrator any information relating to the enforcement of those laws, which the Administrator may request.

(b) The Administrator may make any exemption subject to additional terms and conditions which he may find appropriate to carry out the purposes of section 303(a) of the Act.

### § 870.56 Termination of exemption.

(a) After notice and opportunity to be heard, the Administrator shall terminate any exemption of State-regulated garnishments when he finds that the laws of the State no longer satisfy the purpose of section 303(a) of the Act

or the policy expressed in § 870.51(a). Also, after notice and opportunity to be heard, the Administrator may terminate any exemption if he finds that any of its terms or conditions have been violated.

(b) General notice of the termination of every exemption of State-regulated garnishments shall be given by publication in the FEDERAL REGISTER.

### § 870.57 Exemptions.

Pursuant to section 305 of the CCPA (82 Stat. 164) and in accordance with the provisions of this part, it has been determined that the laws of the following States provide restrictions on garnishment which are substantially similar to those provided in section 303(a) of the CCPA (82 Stat. 163); and that, therefore, garnishments issued under those laws should be, and they hereby are, exempted from the provisions of section 303(a) subject to the terms and conditions of §§ 870.55(a) and 870.56:

(a) *State of Virginia*. Effective June 30, 1978, garnishments issued under the laws of the State of Virginia are exempt from the provisions of sections 303(a) and 303(b) of the CCPA under the following additional conditions: (1) Whenever garnishments are ordered in the State of Virginia which are not deemed to be governed by section 34–29 of the Code of Virginia, as amended, and the laws of another State are applied, sections 303(a) and 303(b) of the CCPA shall apply to such garnishments according to the provisions thereof; and (2) whenever the earnings of any individual subject to garnishment are withheld and a suspending or supersedeas bond is undertaken in the course of an appeal from a lower court decision, sections 303(a) and 303(b) of the CCPA shall apply to the withholding of such earnings under this procedure according to the provisions thereof.

[35 FR 18527, Dec. 5, 1970, as amended at 43 FR 28472, June 30, 1978]

## PARTS 871–899 [RESERVED]

# FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Table of CFR Titles and Chapters
Alphabetical List of Agencies Appearing in the CFR
List of CFR Sections Affected

# Table of CFR Titles and Chapters

**(Revised as of July 1, 2009)**

## Title 1—General Provisions


I Administrative Committee of the Federal Register (Parts 1—49)

II Office of the Federal Register (Parts 50—299)

IV Miscellaneous Agencies (Parts 400—500)


## Title 2—Grants and Agreements


SUBTITLE A—OFFICE OF MANAGEMENT AND BUDGET GUIDANCE FOR GRANTS AND AGREEMENTS

I Office of Management and Budget Governmentwide Guidance for Grants and Agreements (Parts 100—199)

II Office of Management and Budget Circulars and Guidance (200—299)

SUBTITLE B—FEDERAL AGENCY REGULATIONS FOR GRANTS AND AGREEMENTS

III Department of Health and Human Services (Parts 300— 399)

VI Department of State (Parts 600—699)

VIII Department of Veterans Affairs (Parts 800—899)

IX Department of Energy (Parts 900—999)

XI Department of Defense (Parts 1100—1199)

XII Department of Transportation (Parts 1200—1299)

XIII Department of Commerce (Parts 1300—1399)

XIV Department of the Interior (Parts 1400—1499)

XV Environmental Protection Agency (Parts 1500—1599)

XVIII National Aeronautics and Space Administration (Parts 1880—1899)

XXII Corporation for National and Community Service (Parts 2200—2299)

XXIII Social Security Administration (Parts 2300—2399)

XXIV Housing and Urban Development (Parts 2400—2499)

XXV National Science Foundation (Parts 2500—2599)

XXVI National Archives and Records Administration (Parts 2600—2699)

XXVII Small Business Administration (Parts 2700—2799)

XXVIII Department of Justice (Parts 2800—2899)

XXXI Institute of Museum and Library Services (Parts 3100—3199)

XXXII National Endowment for the Arts (Parts 3200—3299)

XXXIII National Endowment for the Humanities (Parts 3300—3399)

## Title 2—Grants and Agreements—Continued


Chap.

XXXV Export-Import Bank of the United States (Parts 3500—3599)

XXXVII Peace Corps (Parts 3700—3799)


## Title 3—The PresidentCHAPNO≤


Presidential Documents

I Executive Office of the President (Parts 100—199)


## Title 4—Accounts


I Government Accountability Office (Parts 1—99)


## Title 5—Administrative Personnel


I Office of Personnel Management (Parts 1—1199)

II Merit Systems Protection Board (Parts 1200—1299)

III Office of Management and Budget (Parts 1300—1399)

V The International Organizations Employees Loyalty Board (Parts 1500—1599)

VI Federal Retirement Thrift Investment Board (Parts 1600—1699)

VIII Office of Special Counsel (Parts 1800—1899)

IX Appalachian Regional Commission (Parts 1900—1999)

XI Armed Forces Retirement Home (Parts 2100—2199)

XIV Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel (Parts 2400—2499)

XV Office of Administration, Executive Office of the President (Parts 2500—2599)

XVI Office of Government Ethics (Parts 2600—2699)

XXI Department of the Treasury (Parts 3100—3199)

XXII Federal Deposit Insurance Corporation (Parts 3200—3299)

XXIII Department of Energy (Parts 3300—3399)

XXIV Federal Energy Regulatory Commission (Parts 3400—3499)

XXV Department of the Interior (Parts 3500—3599)

XXVI Department of Defense (Parts 3600— 3699)

XXVIII Department of Justice (Parts 3800—3899)

XXIX Federal Communications Commission (Parts 3900—3999)

XXX Farm Credit System Insurance Corporation (Parts 4000—4099)

XXXI Farm Credit Administration (Parts 4100—4199)

XXXIII Overseas Private Investment Corporation (Parts 4300—4399)

XXXV Office of Personnel Management (Parts 4500—4599)

XL Interstate Commerce Commission (Parts 5000—5099)

XLI Commodity Futures Trading Commission (Parts 5100—5199)

XLII Department of Labor (Parts 5200—5299)

XLIII National Science Foundation (Parts 5300—5399)

XLV Department of Health and Human Services (Parts 5500—5599)

## Title 5—Administrative Personnel—Continued


| Chap. | |
|---|---|
| XLVI | Postal Rate Commission (Parts 5600—5699) |
| XLVII | Federal Trade Commission (Parts 5700—5799) |
| XLVIII | Nuclear Regulatory Commission (Parts 5800—5899) |
| L | Department of Transportation (Parts 6000—6099) |
| LII | Export-Import Bank of the United States (Parts 6200—6299) |
| LIII | Department of Education (Parts 6300—6399) |
| LIV | Environmental Protection Agency (Parts 6400—6499) |
| LV | National Endowment for the Arts (Parts 6500—6599) |
| LVI | National Endowment for the Humanities (Parts 6600—6699) |
| LVII | General Services Administration (Parts 6700—6799) |
| LVIII | Board of Governors of the Federal Reserve System (Parts 6800—6899) |
| LIX | National Aeronautics and Space Administration (Parts 6900—6999) |
| LX | United States Postal Service (Parts 7000—7099) |
| LXI | National Labor Relations Board (Parts 7100—7199) |
| LXII | Equal Employment Opportunity Commission (Parts 7200—7299) |
| LXIII | Inter-American Foundation (Parts 7300—7399) |
| LXIV | Merit Systems Protection Board (Parts 7400—7499) |
| LXV | Department of Housing and Urban Development (Parts 7500—7599) |
| LXVI | National Archives and Records Administration (Parts 7600—7699) |
| LXVII | Institute of Museum and Library Services (Parts 7700—7799) |
| LXVIII | Commission on Civil Rights (Parts 7800—7899) |
| LXIX | Tennessee Valley Authority (Parts 7900—7999) |
| LXXI | Consumer Product Safety Commission (Parts 8100—8199) |
| LXXIII | Department of Agriculture (Parts 8300—8399) |
| LXXIV | Federal Mine Safety and Health Review Commission (Parts 8400—8499) |
| LXXVI | Federal Retirement Thrift Investment Board (Parts 8600—8699) |
| LXXVII | Office of Management and Budget (Parts 8700—8799) |
| XCVII | Department of Homeland Security Human Resources Management System (Department of Homeland Security—Office of Personnel Management) (Parts 9700—9799) |
| XCIX | Department of Defense Human Resources Management and Labor Relations Systems (Department of Defense—Office of Personnel Management) (Parts 9900—9999) |


## Title 6—Domestic Security


I Department of Homeland Security, Office of the Secretary (Parts 0—99)


## Title 7—Agriculture


SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE (PARTS 0—26)

## Title 7—Agriculture—Continued


Chap.

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

I Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture (Parts 27—209)

II Food and Nutrition Service, Department of Agriculture (Parts 210—299)

III Animal and Plant Health Inspection Service, Department of Agriculture (Parts 300—399)

IV Federal Crop Insurance Corporation, Department of Agriculture (Parts 400—499)

V Agricultural Research Service, Department of Agriculture (Parts 500—599)

VI Natural Resources Conservation Service, Department of Agriculture (Parts 600—699)

VII Farm Service Agency, Department of Agriculture (Parts 700—799)

VIII Grain Inspection, Packers and Stockyards Administration (Federal Grain Inspection Service), Department of Agriculture (Parts 800—899)

IX Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture (Parts 900—999)

X Agricultural Marketing Service (Marketing Agreements and Orders; Milk), Department of Agriculture (Parts 1000—1199)

XI Agricultural Marketing Service (Marketing Agreements and Orders; Miscellaneous Commodities), Department of Agriculture (Parts 1200—1299)

XIV Commodity Credit Corporation, Department of Agriculture (Parts 1400—1499)

XV Foreign Agricultural Service, Department of Agriculture (Parts 1500—1599)

XVI Rural Telephone Bank, Department of Agriculture (Parts 1600—1699)

XVII Rural Utilities Service, Department of Agriculture (Parts 1700—1799)

XVIII Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, Department of Agriculture (Parts 1800—2099)

XX Local Television Loan Guarantee Board (Parts 2200—2299)

XXVI Office of Inspector General, Department of Agriculture (Parts 2600—2699)

XXVII Office of Information Resources Management, Department of Agriculture (Parts 2700—2799)

XXVIII Office of Operations, Department of Agriculture (Parts 2800—2899)

XXIX Office of Energy Policy and New Uses, Department of Agriculture (Parts 2900—2999)

XXX Office of the Chief Financial Officer, Department of Agriculture (Parts 3000—3099)

XXXI Office of Environmental Quality, Department of Agriculture (Parts 3100—3199)

## Title 7—Agriculture—Continued


| Chap. | |
|---|---|
| XXXII | Office of Procurement and Property Management, Department of Agriculture (Parts 3200—3299) |
| XXXIII | Office of Transportation, Department of Agriculture (Parts 3300—3399) |
| XXXIV | Cooperative State Research, Education, and Extension Service, Department of Agriculture (Parts 3400—3499) |
| XXXV | Rural Housing Service, Department of Agriculture (Parts 3500—3599) |
| XXXVI | National Agricultural Statistics Service, Department of Agriculture (Parts 3600—3699) |
| XXXVII | Economic Research Service, Department of Agriculture (Parts 3700—3799) |
| XXXVIII | World Agricultural Outlook Board, Department of Agriculture (Parts 3800—3899) |
| XLI | [Reserved] |
| XLII | Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture (Parts 4200—4299) |
| L | Rural Business-Cooperative Service, Rurual Housing Service, and Rural Utilities Service, Department of Agriculture (Parts 5000—5099) |


## Title 8—Aliens and Nationality


| | |
|---|---|
| I | Department of Homeland Security (Immigration and Naturalization) (Parts 1—499) |
| V | Executive Office for Immigration Review, Department of Justice (Parts 1000—1399) |


## Title 9—Animals and Animal Products


| | |
|---|---|
| I | Animal and Plant Health Inspection Service, Department of Agriculture (Parts 1—199) |
| II | Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), Department of Agriculture (Parts 200—299) |
| III | Food Safety and Inspection Service, Department of Agriculture (Parts 300—599) |


## Title 10—Energy


| | |
|---|---|
| I | Nuclear Regulatory Commission (Parts 0—199) |
| II | Department of Energy (Parts 200—699) |
| III | Department of Energy (Parts 700—999) |
| X | Department of Energy (General Provisions) (Parts 1000—1099) |
| XIII | Nuclear Waste Technical Review Board (Parts 1303—1399) |
| XVII | Defense Nuclear Facilities Safety Board (Parts 1700—1799) |
| XVIII | Northeast Interstate Low-Level Radioactive Waste Commission (Parts 1800—1899) |

## Title 11—Federal Elections


Chap.

I Federal Election Commission (Parts 1—9099)

II Election Assistance Commission (Parts9400—9499)


## Title 12—Banks and Banking


I Comptroller of the Currency, Department of the Treasury (Parts 1—199)

II Federal Reserve System (Parts 200—299)

III Federal Deposit Insurance Corporation (Parts 300—399)

IV Export-Import Bank of the United States (Parts 400—499)

V Office of Thrift Supervision, Department of the Treasury (Parts 500—599)

VI Farm Credit Administration (Parts 600—699)

VII National Credit Union Administration (Parts 700—799)

VIII Federal Financing Bank (Parts 800—899)

IX Federal Housing Finance Board (Parts 900—999)

XI Federal Financial Institutions Examination Council (Parts 1100—1199)

XII Federal Housing Finance Agency (Parts 1200—1299)

XIV Farm Credit System Insurance Corporation (Parts 1400—1499)

XV Department of the Treasury (Parts 1500—1599)

XVII Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development (Parts 1700—1799)

XVIII Community Development Financial Institutions Fund, Department of the Treasury (Parts 1800—1899)


## Title 13—Business Credit and Assistance


I Small Business Administration (Parts 1—199)

III Economic Development Administration, Department of Commerce (Parts 300—399)

IV Emergency Steel Guarantee Loan Board (Parts 400—499)

V Emergency Oil and Gas Guaranteed Loan Board (Parts 500—599)


## Title 14—Aeronautics and Space


I Federal Aviation Administration, Department of Transportation (Parts 1—199)

II Office of the Secretary, Department of Transportation (Aviation Proceedings) (Parts 200—399)

III Commercial Space Transportation, Federal Aviation Administration, Department of Transportation (Parts 400—499)

V National Aeronautics and Space Administration (Parts 1200—1299)

VI Air Transportation System Stabilization (Parts 1300—1399)

## Title 15—Commerce and Foreign Trade

Chap.


SUBTITLE A—OFFICE OF THE SECRETARY OF COMMERCE (PARTS 0—29)

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

I Bureau of the Census, Department of Commerce (Parts 30—199)

II National Institute of Standards and Technology, Department of Commerce (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Foreign-Trade Zones Board, Department of Commerce (Parts 400—499)

VII Bureau of Industry and Security, Department of Commerce (Parts 700—799)

VIII Bureau of Economic Analysis, Department of Commerce (Parts 800—899)

IX National Oceanic and Atmospheric Administration, Department of Commerce (Parts 900—999)

XI Technology Administration, Department of Commerce (Parts 1100—1199)

XIII East-West Foreign Trade Board (Parts 1300—1399)

XIV Minority Business Development Agency (Parts 1400—1499)

SUBTITLE C—REGULATIONS RELATING TO FOREIGN TRADE AGREEMENTS

XX Office of the United States Trade Representative (Parts 2000—2099)

SUBTITLE D—REGULATIONS RELATING TO TELECOMMUNICATIONS AND INFORMATION

XXIII National Telecommunications and Information Administration, Department of Commerce (Parts 2300—2399)


## Title 16—Commercial Practices


I Federal Trade Commission (Parts 0—999)

II Consumer Product Safety Commission (Parts 1000—1799)


## Title 17—Commodity and Securities Exchanges


I Commodity Futures Trading Commission (Parts 1—199)

II Securities and Exchange Commission (Parts 200—399)

IV Department of the Treasury (Parts 400—499)


## Title 18—Conservation of Power and Water Resources


I Federal Energy Regulatory Commission, Department of Energy (Parts 1—399)

III Delaware River Basin Commission (Parts 400—499)

VI Water Resources Council (Parts 700—799)

## Title 18—Conservation of Power and Water Resources—Continued


Chap.

VIII Susquehanna River Basin Commission (Parts 800—899)

XIII Tennessee Valley Authority (Parts 1300—1399)


## Title 19—Customs Duties


I Bureau of Customs and Border Protection, Department of Homeland Security; Department of the Treasury (Parts 0—199)

II United States International Trade Commission (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Bureau of Immigration and Customs Enforcement, Department of Homeland Security (Parts 400—599)


## Title 20—Employees' Benefits


I Office of Workers' Compensation Programs, Department of Labor (Parts 1—199)

II Railroad Retirement Board (Parts 200—399)

III Social Security Administration (Parts 400—499)

IV Employees Compensation Appeals Board, Department of Labor (Parts 500—599)

V Employment and Training Administration, Department of Labor (Parts 600—699)

VI Employment Standards Administration, Department of Labor (Parts 700—799)

VII Benefits Review Board, Department of Labor (Parts 800—899)

VIII Joint Board for the Enrollment of Actuaries (Parts 900—999)

IX Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 1000—1099)


## Title 21—Food and Drugs


I Food and Drug Administration, Department of Health and Human Services (Parts 1—1299)

II Drug Enforcement Administration, Department of Justice (Parts 1300—1399)

III Office of National Drug Control Policy (Parts 1400—1499)


## Title 22—Foreign Relations


I Department of State (Parts 1—199)

II Agency for International Development (Parts 200—299)

III Peace Corps (Parts 300—399)

IV International Joint Commission, United States and Canada (Parts 400—499)

V Broadcasting Board of Governors (Parts 500—599)

VII Overseas Private Investment Corporation (Parts 700—799)

IX Foreign Service Grievance Board (Parts 900—999)

## Title 22—Foreign Relations—Continued


Chap.

X Inter-American Foundation (Parts 1000—1099)

XI International Boundary and Water Commission, United States and Mexico, United States Section (Parts 1100—1199)

XII United States International Development Cooperation Agency (Parts 1200—1299)

XIII Millenium Challenge Corporation (Parts 1300—1399)

XIV Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel (Parts 1400—1499)

XV African Development Foundation (Parts 1500—1599)

XVI Japan-United States Friendship Commission (Parts 1600—1699)

XVII United States Institute of Peace (Parts 1700—1799)


## Title 23—Highways


I Federal Highway Administration, Department of Transportation (Parts 1—999)

II National Highway Traffic Safety Administration and Federal Highway Administration, Department of Transportation (Parts 1200—1299)

III National Highway Traffic Safety Administration, Department of Transportation (Parts 1300—1399)


## Title 24—Housing and Urban Development


SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT

I Office of Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development (Parts 100—199)

II Office of Assistant Secretary for Housing-Federal HousingCommissioner, Department of Housing and Urban Development (Parts 200—299)

III Government National Mortgage Association, Department of Housing and Urban Development (Parts 300—399)

IV Office of Housing and Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development (Parts 400—499)

V Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 500—599)

VI Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 600—699) [Reserved]

VII Office of the Secretary, Department of Housing and Urban Development (Housing Assistance Programs and Public and Indian Housing Programs) (Parts 700—799)

## Title 24—Housing and Urban Development—Continued

Chap.

VIII Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Section 8 Housing Assistance Programs, Section 202 Direct Loan Program, Section 202 Supportive Housing for the Elderly Program and Section 811 Supportive Housing for Persons With Disabilities Program) (Parts 800—899)

IX Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Parts 900—1699)

X Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Interstate Land Sales Registration Program) (Parts 1700—1799)

XII Office of Inspector General, Department of Housing and Urban Development (Parts 2000—2099)

XX Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 3200—3899)

XXV Neighborhood Reinvestment Corporation (Parts 4100—4199)

## Title 25—Indians

I Bureau of Indian Affairs, Department of the Interior (Parts 1—299)

II Indian Arts and Crafts Board, Department of the Interior (Parts 300—399)

III National Indian Gaming Commission, Department of the Interior (Parts 500—599)

IV Office of Navajo and Hopi Indian Relocation (Parts 700—799)

V Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Part 900)

VI Office of the Assistant Secretary-Indian Affairs, Department of the Interior (Parts 1000—1199)

VII Office of the Special Trustee for American Indians, Department of the Interior (Parts 1200—1299)

## Title 26—Internal Revenue

I Internal Revenue Service, Department of the Treasury (Parts 1—899)

## Title 27—Alcohol, Tobacco Products and Firearms

I Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Parts 1—399)

II Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice (Parts 400—699)

## Title 28—Judicial Administration

I Department of Justice (Parts 0—299)

## Title 28—Judicial Administration—Continued


Chap.

III Federal Prison Industries, Inc., Department of Justice (Parts 300—399)

V Bureau of Prisons, Department of Justice (Parts 500—599)

VI Offices of Independent Counsel, Department of Justice (Parts 600—699)

VII Office of Independent Counsel (Parts 700—799)

VIII Court Services and Offender Supervision Agency for the District of Columbia (Parts 800—899)

IX National Crime Prevention and Privacy Compact Council (Parts 900—999)

XI Department of Justice and Department of State (Parts 1100—1199)


## Title 29—Labor


SUBTITLE A—OFFICE OF THE SECRETARY OF LABOR (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO LABOR

I National Labor Relations Board (Parts 100—199)

II Office of Labor-Management Standards, Department of Labor (Parts 200—299)

III National Railroad Adjustment Board (Parts 300—399)

IV Office of Labor-Management Standards, Department of Labor (Parts 400—499)

V Wage and Hour Division, Department of Labor (Parts 500—899)

IX Construction Industry Collective Bargaining Commission (Parts 900—999)

X National Mediation Board (Parts 1200—1299)

XII Federal Mediation and Conciliation Service (Parts 1400—1499)

XIV Equal Employment Opportunity Commission (Parts 1600—1699)

XVII Occupational Safety and Health Administration, Department of Labor (Parts 1900—1999)

XX Occupational Safety and Health Review Commission (Parts 2200—2499)

XXV Employee Benefits Security Administration, Department of Labor (Parts 2500—2599)

XXVII Federal Mine Safety and Health Review Commission (Parts 2700—2799)

XL Pension Benefit Guaranty Corporation (Parts 4000—4999)


## Title 30—Mineral Resources


I Mine Safety and Health Administration, Department of Labor (Parts 1—199)

II Minerals Management Service, Department of the Interior (Parts 200—299)

III Board of Surface Mining and Reclamation Appeals, Department of the Interior (Parts 300—399)

IV Geological Survey, Department of the Interior (Parts 400—499)

## Title 30—Mineral Resources—Continued


Chap.

VII Office of Surface Mining Reclamation and Enforcement, Department of the Interior (Parts 700—999)


## Title 31—Money and Finance: Treasury


SUBTITLE A—OFFICE OF THE SECRETARY OF THE TREASURY (PARTS 0—50)

SUBTITLE B—REGULATIONS RELATING TO MONEY AND FINANCE

I Monetary Offices, Department of the Treasury (Parts 51—199)

II Fiscal Service, Department of the Treasury (Parts 200—399)

IV Secret Service, Department of the Treasury (Parts 400—499)

V Office of Foreign Assets Control, Department of the Treasury (Parts 500—599)

VI Bureau of Engraving and Printing, Department of the Treasury (Parts 600—699)

VII Federal Law Enforcement Training Center, Department of the Treasury (Parts 700—799)

VIII Office of International Investment, Department of the Treasury (Parts 800—899)

IX Federal Claims Collection Standards (Department of the Treasury—Department of Justice) (Parts 900—999)


## Title 32—National Defense


SUBTITLE A—DEPARTMENT OF DEFENSE

I Office of the Secretary of Defense (Parts 1—399)

V Department of the Army (Parts 400—699)

VI Department of the Navy (Parts 700—799)

VII Department of the Air Force (Parts 800—1099)

SUBTITLE B—OTHER REGULATIONS RELATING TO NATIONAL DEFENSE

XII Defense Logistics Agency (Parts 1200—1299)

XVI Selective Service System (Parts 1600—1699)

XVII Office of the Director of National Intelligence (Parts 1700—1799)

XVIII National Counterintelligence Center (Parts 1800—1899)

XIX Central Intelligence Agency (Parts 1900—1999)

XX Information Security Oversight Office, National Archives and Records Administration (Parts 2000—2099)

XXI National Security Council (Parts 2100—2199)

XXIV Office of Science and Technology Policy (Parts 2400—2499)

XXVII Office for Micronesian Status Negotiations (Parts 2700—2799)

XXVIII Office of the Vice President of the United States (Parts 2800—2899)


## Title 33—Navigation and Navigable Waters


I Coast Guard, Department of Homeland Security (Parts 1—199)

II Corps of Engineers, Department of the Army (Parts 200—399)

## Title 33—Navigation and Navigable Waters—Continued


Chap.

IV Saint Lawrence Seaway Development Corporation, Department of Transportation (Parts 400—499)


## Title 34—Education


SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION (PARTS 1—99)

SUBTITLE B—REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

I Office for Civil Rights, Department of Education (Parts 100—199)

II Office of Elementary and Secondary Education, Department of Education (Parts 200—299)

III Office of Special Education and Rehabilitative Services, Department of Education (Parts 300—399)

IV Office of Vocational and Adult Education, Department of Education (Parts 400—499)

V Office of Bilingual Education and Minority Languages Affairs, Department of Education (Parts 500—599)

VI Office of Postsecondary Education, Department of Education (Parts 600—699)

VII Office of Educational Research and Improvmeent, Department of Education [Reserved]

XI National Institute for Literacy (Parts 1100—1199)

SUBTITLE C—REGULATIONS RELATING TO EDUCATION

XII National Council on Disability (Parts 1200—1299)


## Title 35 [Reserved]

## Title 36—Parks, Forests, and Public Property


I National Park Service, Department of the Interior (Parts 1—199)

II Forest Service, Department of Agriculture (Parts 200—299)

III Corps of Engineers, Department of the Army (Parts 300—399)

IV American Battle Monuments Commission (Parts 400—499)

V Smithsonian Institution (Parts 500—599)

VI [Reserved]

VII Library of Congress (Parts 700—799)

VIII Advisory Council on Historic Preservation (Parts 800—899)

IX Pennsylvania Avenue Development Corporation (Parts 900—999)

X Presidio Trust (Parts 1000—1099)

XI Architectural and Transportation Barriers Compliance Board (Parts 1100—1199)

XII National Archives and Records Administration (Parts 1200—1299)

XV Oklahoma City National Memorial Trust (Parts 1500—1599)

XVI Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation (Parts 1600—1699)

## Title 37—Patents, Trademarks, and Copyrights


Chap.

I United States Patent and Trademark Office, Department of Commerce (Parts 1—199)

II Copyright Office, Library of Congress (Parts 200—299)

III Copyright Royalty Board, Library of Congress (Parts 301—399)

IV Assistant Secretary for Technology Policy, Department of Commerce (Parts 400—499)

V Under Secretary for Technology, Department of Commerce (Parts 500—599)


## Title 38—Pensions, Bonuses, and Veterans' Relief


I Department of Veterans Affairs (Parts 0—99)


## Title 39—Postal Service


I United States Postal Service (Parts 1—999)

III Postal Regulatory Commission (Parts 3000—3099)


## Title 40—Protection of Environment


I Environmental Protection Agency (Parts 1—1099)

IV Environmental Protection Agency and Department of Justice (Parts 1400—1499)

V Council on Environmental Quality (Parts 1500—1599)

VI Chemical Safety and Hazard Investigation Board (Parts 1600—1699)

VII Environmental Protection Agency and Department of Defense; Uniform National Discharge Standards for Vessels of the Armed Forces (Parts 1700—1799)


## Title 41—Public Contracts and Property Management


SUBTITLE B—OTHER PROVISIONS RELATING TO PUBLIC CONTRACTS

50 Public Contracts, Department of Labor (Parts 50–1—50–999)

51 Committee for Purchase From People Who Are Blind or Severely Disabled (Parts 51–1—51–99)

60 Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Parts 60–1—60–999)

61 Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 61–1—61–999)

Chapters 62—100 [Reserved]

SUBTITLE C—FEDERAL PROPERTY MANAGEMENT REGULATIONS SYSTEM

101 Federal Property Management Regulations (Parts 101–1—101–99)

102 Federal Management Regulation (Parts 102–1—102–299)

Chapters 103—104 [Reserved]

105 General Services Administration (Parts 105–1—105–999)

## Title 41—Public Contracts and Property Management—Continued


Chap.

109 Department of Energy Property Management Regulations (Parts 109–1—109–99)

114 Department of the Interior (Parts 114–1—114–99)

115 Environmental Protection Agency (Parts 115–1—115–99)

128 Department of Justice (Parts 128–1—128–99)

Chapters 129—200 [Reserved]

SUBTITLE D—OTHER PROVISIONS RELATING TO PROPERTY MANAGEMENT [RESERVED]

SUBTITLE E—FEDERAL INFORMATION RESOURCES MANAGEMENT REGULATIONS SYSTEM [RESERVED]

SUBTITLE F—FEDERAL TRAVEL REGULATION SYSTEM

300 General (Parts 300–1—300–99)

301 Temporary Duty (TDY) Travel Allowances (Parts 301–1—301–99)

302 Relocation Allowances (Parts 302–1—302–99)

303 Payment of Expenses Connected with the Death of Certain Employees (Part 303–1—303–99)

304 Payment of Travel Expenses from a Non-Federal Source (Parts 304–1—304–99)


## Title 42—Public Health


I Public Health Service, Department of Health and Human Services (Parts 1—199)

IV Centers for Medicare & Medicaid Services, Department of Health and Human Services (Parts 400—499)

V Office of Inspector General-Health Care, Department of Health and Human Services (Parts 1000—1999)


## Title 43—Public Lands: Interior


SUBTITLE A—OFFICE OF THE SECRETARY OF THE INTERIOR (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC LANDS

I Bureau of Reclamation, Department of the Interior (Parts 200—499)

II Bureau of Land Management, Department of the Interior (Parts 1000—9999)

III Utah Reclamation Mitigation and Conservation Commission (Parts 10000—10010)


## Title 44—Emergency Management and Assistance


I Federal Emergency Management Agency, Department of Homeland Security (Parts 0—399)

IV Department of Commerce and Department of Transportation (Parts 400—499)

## Title 45—Public Welfare

Chap.


SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE

II Office of Family Assistance (Assistance Programs), Administration for Children and Families, Department of Health and Human Services (Parts 200—299)

III Office of Child Support Enforcement (Child Support Enforcement Program), Administration for Children and Families, Department of Health and Human Services (Parts 300—399)

IV Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services (Parts 400—499)

V Foreign Claims Settlement Commission of the United States, Department of Justice (Parts 500—599)

VI National Science Foundation (Parts 600—699)

VII Commission on Civil Rights (Parts 700—799)

VIII Office of Personnel Management (Parts 800—899) [Reserved]

X Office of Community Services, Administration for Children and Families, Department of Health and Human Services (Parts 1000—1099)

XI National Foundation on the Arts and the Humanities (Parts 1100—1199)

XII Corporation for National and Community Service (Parts 1200—1299)

XIII Office of Human Development Services, Department of Health and Human Services (Parts 1300—1399)

XVI Legal Services Corporation (Parts 1600—1699)

XVII National Commission on Libraries and Information Science (Parts 1700—1799)

XVIII Harry S. Truman Scholarship Foundation (Parts 1800—1899)

XXI Commission on Fine Arts (Parts 2100—2199)

XXIII Arctic Research Commission (Part 2301)

XXIV James Madison Memorial Fellowship Foundation (Parts 2400—2499)

XXV Corporation for National and Community Service (Parts 2500—2599)


## Title 46—Shipping


I Coast Guard, Department of Homeland Security (Parts 1—199)

II Maritime Administration, Department of Transportation (Parts 200—399)

III Coast Guard (Great Lakes Pilotage), Department of Homeland Security (Parts 400—499)

IV Federal Maritime Commission (Parts 500—599)


## Title 47—Telecommunication


I Federal Communications Commission (Parts 0—199)

## Title 47—Telecommunication—Continued

Chap.

II Office of Science and Technology Policy and National Security Council (Parts 200—299)

III National Telecommunications and Information Administration, Department of Commerce (Parts 300—399)

## Title 48—Federal Acquisition Regulations System

1 Federal Acquisition Regulation (Parts 1—99)

2 Defense Acquisition Regulations System, Department of Defense (Parts 200—299)

3 Department of Health and Human Services (Parts 300—399)

4 Department of Agriculture (Parts 400—499)

5 General Services Administration (Parts 500—599)

6 Department of State (Parts 600—699)

7 Agency for International Development (Parts 700—799)

8 Department of Veterans Affairs (Parts 800—899)

9 Department of Energy (Parts 900—999)

10 Department of the Treasury (Parts 1000—1099)

12 Department of Transportation (Parts 1200—1299)

13 Department of Commerce (Parts 1300—1399)

14 Department of the Interior (Parts 1400—1499)

15 Environmental Protection Agency (Parts 1500—1599)

16 Office of Personnel Management, Federal Employees Health Benefits Acquisition Regulation (Parts 1600—1699)

17 Office of Personnel Management (Parts 1700—1799)

18 National Aeronautics and Space Administration (Parts 1800—1899)

19 Broadcasting Board of Governors (Parts 1900—1999)

20 Nuclear Regulatory Commission (Parts 2000—2099)

21 Office of Personnel Management, Federal Employees Group Life Insurance Federal Acquisition Regulation (Parts 2100—2199)

23 Social Security Administration (Parts 2300—2399)

24 Department of Housing and Urban Development (Parts 2400—2499)

25 National Science Foundation (Parts 2500—2599)

28 Department of Justice (Parts 2800—2899)

29 Department of Labor (Parts 2900—2999)

30 Department of Homeland Security, Homeland Security Acquisition Regulation (HSAR) (Parts 3000—3099)

34 Department of Education Acquisition Regulation (Parts 3400—3499)

51 Department of the Army Acquisition Regulations (Parts 5100—5199)

52 Department of the Navy Acquisition Regulations (Parts 5200—5299)

53 Department of the Air Force Federal Acquisition Regulation Supplement [Reserved]

## Title 48—Federal Acquisition Regulations System—Continued

Chap.

54 Defense Logistics Agency, Department of Defense (Parts 5400—5499)

57 African Development Foundation (Parts 5700—5799)

61 General Services Administration Board of Contract Appeals (Parts 6100—6199)

63 Department of Transportation Board of Contract Appeals (Parts 6300—6399)

99 Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (Parts 9900—9999)

## Title 49—Transportation

SUBTITLE A—OFFICE OF THE SECRETARY OF TRANSPORTATION (PARTS 1—99)

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

I Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Parts 100—199)

II Federal Railroad Administration, Department of Transportation (Parts 200—299)

III Federal Motor Carrier Safety Administration, Department of Transportation (Parts 300—399)

IV Coast Guard, Department of Homeland Security (Parts 400—499)

V National Highway Traffic Safety Administration, Department of Transportation (Parts 500—599)

VI Federal Transit Administration, Department of Transportation (Parts 600—699)

VII National Railroad Passenger Corporation (AMTRAK) (Parts 700—799)

VIII National Transportation Safety Board (Parts 800—999)

X Surface Transportation Board, Department of Transportation (Parts 1000—1399)

XI Research and Innovative Technology Administration, Department of Transportation [Reserved]

XII Transportation Security Administration, Department of Homeland Security (Parts 1500—1699)

## Title 50—Wildlife and Fisheries

I United States Fish and Wildlife Service, Department of the Interior (Parts 1—199)

II National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 200—299)

III International Fishing and Related Activities (Parts 300—399)

IV Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations (Parts 400—499)

## Title 50—Wildlife and Fisheries—Continued

Chap.

V Marine Mammal Commission (Parts 500—599)

VI Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 600—699)

## CFR Index and Finding Aids

Subject/Agency Index

List of Agency Prepared Indexes

Parallel Tables of Statutory Authorities and Rules

List of CFR Titles, Chapters, Subchapters, and Parts

Alphabetical List of Agencies Appearing in the CFR

# Alphabetical List of Agencies Appearing in the CFR

**(Revised as of July 1, 2009)**

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Administrative Committee of the Federal Register | 1, I |
| Advanced Research Projects Agency | 32, I |
| Advisory Council on Historic Preservation | 36, VIII |
| African Development Foundation | 22, XV |
| Federal Acquisition Regulation | 48, 57 |
| Agency for International Development | 22, II |
| Federal Acquisition Regulation | 48, 7 |
| Agricultural Marketing Service | 7, I, IX, X, XI |
| Agricultural Research Service | 7, V |
| Agriculture Department | 5, LXXIII |
| Agricultural Marketing Service | 7, I, IX, X, XI |
| Agricultural Research Service | 7, V |
| Animal and Plant Health Inspection Service | 7, III; 9, I |
| Chief Financial Officer, Office of | 7, XXX |
| Commodity Credit Corporation | 7, XIV |
| Cooperative State Research, Education, and Extension Service | 7, XXXIV |
| Economic Research Service | 7, XXXVII |
| Energy, Office of | 2, IX; 7, XXIX |
| Environmental Quality, Office of | 7, XXXI |
| Farm Service Agency | 7, VII, XVIII |
| Federal Acquisition Regulation | 48, 4 |
| Federal Crop Insurance Corporation | 7, IV |
| Food and Nutrition Service | 7, II |
| Food Safety and Inspection Service | 9, III |
| Foreign Agricultural Service | 7, XV |
| Forest Service | 36, II |
| Grain Inspection, Packers and Stockyards Administration | 7, VIII; 9, II |
| Information Resources Management, Office of | 7, XXVII |
| Inspector General, Office of | 7, XXVI |
| National Agricultural Library | 7, XLI |
| National Agricultural Statistics Service | 7, XXXVI |
| Natural Resources Conservation Service | 7, VI |
| Operations, Office of | 7, XXVIII |
| Procurement and Property Management, Office of | 7, XXXII |
| Rural Business-Cooperative Service | 7, XVIII, XLII, L |
| Rural Development Administration | 7, XLII |
| Rural Housing Service | 7, XVIII, XXXV, L |
| Rural Telephone Bank | 7, XVI |
| Rural Utilities Service | 7, XVII, XVIII, XLII, L |
| Secretary of Agriculture, Office of | 7, Subtitle A |
| Transportation, Office of | 7, XXXIII |
| World Agricultural Outlook Board | 7, XXXVIII |
| Air Force Department | 32, VII |
| Federal Acquisition Regulation Supplement | 48, 53 |
| Air Transportation Stabilization Board | 14, VI |
| Alcohol and Tobacco Tax and Trade Bureau | 27, I |
| Alcohol, Tobacco, Firearms, and Explosives, Bureau of | 27, II |
| AMTRAK | 49, VII |
| American Battle Monuments Commission | 36, IV |
| American Indians, Office of the Special Trustee | 25, VII |
| Animal and Plant Health Inspection Service | 7, III; 9, I |
| Appalachian Regional Commission | 5, IX |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Architectural and Transportation Barriers Compliance Board | 36, XI |
| Arctic Research Commission | 45, XXIII |
| Armed Forces Retirement Home | 5, XI |
| Army Department | 32, V |
| Engineers, Corps of | 33, II; 36, III |
| Federal Acquisition Regulation | 48, 51 |
| Benefits Review Board | 20, VII |
| Bilingual Education and Minority Languages Affairs, Office of | 34, V |
| Blind or Severely Disabled, Committee for Purchase From People Who Are | 41, 51 |
| Broadcasting Board of Governors | 22, V |
| Federal Acquisition Regulation | 48, 19 |
| Census Bureau | 15, I |
| Centers for Medicare & Medicaid Services | 42, IV |
| Central Intelligence Agency | 32, XIX |
| Chief Financial Officer, Office of | 7, XXX |
| Child Support Enforcement, Office of | 45, III |
| Children and Families, Administration for | 45, II, III, IV, X |
| Civil Rights, Commission on | 5, LXVIII; 45, VII |
| Civil Rights, Office for | 34, I |
| Coast Guard | 33, I; 46, I; 49, IV |
| Coast Guard (Great Lakes Pilotage) | 46, III |
| Commerce Department | 44, IV |
| Census Bureau | 15, I |
| Economic Affairs, Under Secretary | 37, V |
| Economic Analysis, Bureau of | 15, VIII |
| Economic Development Administration | 13, III |
| Emergency Management and Assistance | 44, IV |
| Federal Acquisition Regulation | 48, 13 |
| Fishery Conservation and Management | 50, VI |
| Foreign-Trade Zones Board | 15, IV |
| Industry and Security, Bureau of | 15, VII |
| International Trade Administration | 15, III; 19, III |
| National Institute of Standards and Technology | 15, II |
| National Marine Fisheries Service | 50, II, IV, VI |
| National Oceanic and Atmospheric Administration | 15, IX; 50, II, III, IV, VI |
| National Telecommunications and Information Administration | 15, XXIII; 47, III |
| National Weather Service | 15, IX |
| Patent and Trademark Office, United States | 37, I |
| Productivity, Technology and Innovation, Assistant Secretary for | 37, IV |
| Secretary of Commerce, Office of | 15, Subtitle A |
| Technology, Under Secretary for | 37, V |
| Technology Administration | 15, XI |
| Technology Policy, Assistant Secretary for | 37, IV |
| Commercial Space Transportation | 14, III |
| Commodity Credit Corporation | 7, XIV |
| Commodity Futures Trading Commission | 5, XLI; 17, I |
| Community Planning and Development, Office of Assistant Secretary for | 24, V, VI |
| Community Services, Office of | 45, X |
| Comptroller of the Currency | 12, I |
| Construction Industry Collective Bargaining Commission | 29, IX |
| Consumer Product Safety Commission | 5, LXXI; 16, II |
| Cooperative State Research, Education, and Extension Service | 7, XXXIV |
| Copyright Office | 37, II |
| Copyright Royalty Board | 37, III |
| Corporation for National and Community Service | 2, XXII; 45, XII, XXV |
| Cost Accounting Standards Board | 48, 99 |
| Council on Environmental Quality | 40, V |
| Court Services and Offender Supervision Agency for the District of Columbia | 28, VIII |
| Customs and Border Protection Bureau | 19, I |
| Defense Contract Audit Agency | 32, I |
| Defense Department | 5, XXVI; 32, Subtitle A; 40, VII |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Advanced Research Projects Agency | 32, I |
| Air Force Department | 32, VII |
| Army Department | 32, V; 33, II; 36, III, 48, 51 |
| Defense Acquisition Regulations System | 48, 2 |
| Defense Intelligence Agency | 32, I |
| Defense Logistics Agency | 32, I, XII; 48, 54 |
| Engineers, Corps of | 33, II; 36, III |
| Human Resources Management and Labor Relations Systems | 5, XCIX |
| National Imagery and Mapping Agency | 32, I |
| Navy Department | 32, VI; 48, 52 |
| Secretary of Defense, Office of | 2, XI; 32, I |
| Defense Contract Audit Agency | 32, I |
| Defense Intelligence Agency | 32, I |
| Defense Logistics Agency | 32, XII; 48, 54 |
| Defense Nuclear Facilities Safety Board | 10, XVII |
| Delaware River Basin Commission | 18, III |
| District of Columbia, Court Services and Offender Supervision Agency for the | 28, VIII |
| Drug Enforcement Administration | 21, II |
| East-West Foreign Trade Board | 15, XIII |
| Economic Affairs, Under Secretary | 37, V |
| Economic Analysis, Bureau of | 15, VIII |
| Economic Development Administration | 13, III |
| Economic Research Service | 7, XXXVII |
| Education, Department of | 5, LIII |
| Bilingual Education and Minority Languages Affairs, Office of | 34, V |
| Civil Rights, Office for | 34, I |
| Educational Research and Improvement, Office of | 34, VII |
| Elementary and Secondary Education, Office of | 34, II |
| Federal Acquisition Regulation | 48, 34 |
| Postsecondary Education, Office of | 34, VI |
| Secretary of Education, Office of | 34, Subtitle A |
| Special Education and Rehabilitative Services, Office of | 34, III |
| Vocational and Adult Education, Office of | 34, IV |
| Educational Research and Improvement, Office of | 34, VII |
| Election Assistance Commission | 11, II |
| Elementary and Secondary Education, Office of | 34, II |
| Emergency Oil and Gas Guaranteed Loan Board | 13, V |
| Emergency Steel Guarantee Loan Board | 13, IV |
| Employee Benefits Security Administration | 29, XXV |
| Employees' Compensation Appeals Board | 20, IV |
| Employees Loyalty Board | 5, V |
| Employment and Training Administration | 20, V |
| Employment Standards Administration | 20, VI |
| Endangered Species Committee | 50, IV |
| Energy, Department of | 5, XXIII; 10, II, III, X |
| Federal Acquisition Regulation | 48, 9 |
| Federal Energy Regulatory Commission | 5, XXIV; 18, I |
| Property Management Regulations | 41, 109 |
| Energy, Office of | 7, XXIX |
| Engineers, Corps of | 33, II; 36, III |
| Engraving and Printing, Bureau of | 31, VI |
| Environmental Protection Agency | 2, XV; 5, LIV; 40, I, IV, VII |
| Federal Acquisition Regulation | 48, 15 |
| Property Management Regulations | 41, 115 |
| Environmental Quality, Office of | 7, XXXI |
| Equal Employment Opportunity Commission | 5, LXII; 29, XIV |
| Equal Opportunity, Office of Assistant Secretary for | 24, I |
| Executive Office of the President | 3, I |
| Administration, Office of | 5, XV |
| Environmental Quality, Council on | 40, V |
| Management and Budget, Office of | 5, III, LXXVII; 14, VI; 48, 99 |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| National Drug Control Policy, Office of | 21, III |
| National Security Council | 32, XXI; 47, 2 |
| Presidential Documents | 3 |
| Science and Technology Policy, Office of | 32, XXIV; 47, II |
| Trade Representative, Office of the United States | 15, XX |
| Export-Import Bank of the United States | 2, XXXV; 5, LII; 12, IV |
| Family Assistance, Office of | 45, II |
| Farm Credit Administration | 5, XXXI; 12, VI |
| Farm Credit System Insurance Corporation | 5, XXX; 12, XIV |
| Farm Service Agency | 7, VII, XVIII |
| Federal Acquisition Regulation | 48, 1 |
| Federal Aviation Administration | 14, I |
| Commercial Space Transportation | 14, III |
| Federal Claims Collection Standards | 31, IX |
| Federal Communications Commission | 5, XXIX; 47, I |
| Federal Contract Compliance Programs, Office of | 41, 60 |
| Federal Crop Insurance Corporation | 7, IV |
| Federal Deposit Insurance Corporation | 5, XXII; 12, III |
| Federal Election Commission | 11, I |
| Federal Emergency Management Agency | 44, I |
| Federal Employees Group Life Insurance Federal Acquisition Regulation | 48, 21 |
| Federal Employees Health Benefits Acquisition Regulation | 48, 16 |
| Federal Energy Regulatory Commission | 5, XXIV; 18, I |
| Federal Financial Institutions Examination Council | 12, XI |
| Federal Financing Bank | 12, VIII |
| Federal Highway Administration | 23, I, II |
| Federal Home Loan Mortgage Corporation | 1, IV |
| Federal Housing Enterprise Oversight Office | 12, XVII |
| Federal Housing Finance Agency | 12, XII |
| Federal Housing Finance Board | 12, IX |
| Federal Labor Relations Authority, and General Counsel of the Federal Labor Relations Authority | 5, XIV; 22, XIV |
| Federal Law Enforcement Training Center | 31, VII |
| Federal Management Regulation | 41, 102 |
| Federal Maritime Commission | 46, IV |
| Federal Mediation and Conciliation Service | 29, XII |
| Federal Mine Safety and Health Review Commission | 5, LXXIV; 29, XXVII |
| Federal Motor Carrier Safety Administration | 49, III |
| Federal Prison Industries, Inc. | 28, III |
| Federal Procurement Policy Office | 48, 99 |
| Federal Property Management Regulations | 41, 101 |
| Federal Railroad Administration | 49, II |
| Federal Register, Administrative Committee of | 1, I |
| Federal Register, Office of | 1, II |
| Federal Reserve System | 12, II |
| Board of Governors | 5, LVIII |
| Federal Retirement Thrift Investment Board | 5, VI, LXXVI |
| Federal Service Impasses Panel | 5, XIV |
| Federal Trade Commission | 5, XLVII; 16, I |
| Federal Transit Administration | 49, VI |
| Federal Travel Regulation System | 41, Subtitle F |
| Fine Arts, Commission on | 45, XXI |
| Fiscal Service | 31, II |
| Fish and Wildlife Service, United States | 50, I, IV |
| Fishery Conservation and Management | 50, VI |
| Food and Drug Administration | 21, I |
| Food and Nutrition Service | 7, II |
| Food Safety and Inspection Service | 9, III |
| Foreign Agricultural Service | 7, XV |
| Foreign Assets Control, Office of | 31, V |
| Foreign Claims Settlement Commission of the United States | 45, V |
| Foreign Service Grievance Board | 22, IX |
| Foreign Service Impasse Disputes Panel | 22, XIV |
| Foreign Service Labor Relations Board | 22, XIV |
| Foreign-Trade Zones Board | 15, IV |
| Forest Service | 36, II |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| General Services Administration | 5, LVII; 41, 105 |
| Contract Appeals, Board of | 48, 61 |
| Federal Acquisition Regulation | 48, 5 |
| Federal Management Regulation | 41, 102 |
| Federal Property Management Regulations | 41, 101 |
| Federal Travel Regulation System | 41, Subtitle F |
| General | 41, 300 |
| Payment From a Non-Federal Source for Travel Expenses | 41, 304 |
| Payment of Expenses Connected With the Death of Certain Employees | 41, 303 |
| Relocation Allowances | 41, 302 |
| Temporary Duty (TDY) Travel Allowances | 41, 301 |
| Geological Survey | 30, IV |
| Government Accountability Office | 4, I |
| Government Ethics, Office of | 5, XVI |
| Government National Mortgage Association | 24, III |
| Grain Inspection, Packers and Stockyards Administration | 7, VIII; 9, II |
| Harry S. Truman Scholarship Foundation | 45, XVIII |
| Health and Human Services, Department of | 2, III; 5, XLV; 45, Subtitle A, |
| Centers for Medicare & Medicaid Services | 42, IV |
| Child Support Enforcement, Office of | 45, III |
| Children and Families, Administration for | 45, II, III, IV, X |
| Community Services, Office of | 45, X |
| Family Assistance, Office of | 45, II |
| Federal Acquisition Regulation | 48, 3 |
| Food and Drug Administration | 21, I |
| Human Development Services, Office of | 45, XIII |
| Indian Health Service | 25, V |
| Inspector General (Health Care), Office of | 42, V |
| Public Health Service | 42, I |
| Refugee Resettlement, Office of | 45, IV |
| Homeland Security, Department of | 6, I |
| Coast Guard | 33, I; 46, I; 49, IV |
| Coast Guard (Great Lakes Pilotage) | 46, III |
| Customs and Border Protection Bureau | 19, I |
| Federal Emergency Management Agency | 44, I |
| Human Resources Management and Labor Relations Systems | 5, XCVII |
| Immigration and Customs Enforcement Bureau | 19, IV |
| Immigration and Naturalization | 8, I |
| Transportation Security Administration | 49, XII |
| HOPE for Homeowners Program, Board of Directors of | 24, XXIV |
| Housing and Urban Development, Department of | 2, XXIV; 5, LXV; 24, Subtitle B |
| Community Planning and Development, Office of Assistant Secretary for | 24, V, VI |
| Equal Opportunity, Office of Assistant Secretary for | 24, I |
| Federal Acquisition Regulation | 48, 24 |
| Federal Housing Enterprise Oversight, Office of | 12, XVII |
| Government National Mortgage Association | 24, III |
| Housing—Federal Housing Commissioner, Office of Assistant Secretary for | 24, II, VIII, X, XX |
| Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of | 24, IV |
| Inspector General, Office of | 24, XII |
| Public and Indian Housing, Office of Assistant Secretary for | 24, IX |
| Secretary, Office of | 24, Subtitle A, VII |
| Housing—Federal Housing Commissioner, Office of Assistant Secretary for | 24, II, VIII, X, XX |
| Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of | 24, IV |
| Human Development Services, Office of | 45, XIII |
| Immigration and Customs Enforcement Bureau | 19, IV |
| Immigration and Naturalization | 8, I |
| Immigration Review, Executive Office for | 8, V |
| Independent Counsel, Office of | 28, VII |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Indian Affairs, Bureau of | 25, I, V |
| Indian Affairs, Office of the Assistant Secretary | 25, VI |
| Indian Arts and Crafts Board | 25, II |
| Indian Health Service | 25, V |
| Industry and Security, Bureau of | 15, VII |
| Information Resources Management, Office of | 7, XXVII |
| Information Security Oversight Office, National Archives and Records Administration | 32, XX |
| Inspector General | |
| Agriculture Department | 7, XXVI |
| Health and Human Services Department | 42, V |
| Housing and Urban Development Department | 24, XII |
| Institute of Peace, United States | 22, XVII |
| Inter-American Foundation | 5, LXIII; 22, X |
| Interior Department | |
| American Indians, Office of the Special Trustee | 25, VII |
| Endangered Species Committee | 50, IV |
| Federal Acquisition Regulation | 48, 14 |
| Federal Property Management Regulations System | 41, 114 |
| Fish and Wildlife Service, United States | 50, I, IV |
| Geological Survey | 30, IV |
| Indian Affairs, Bureau of | 25, I, V |
| Indian Affairs, Office of the Assistant Secretary | 25, VI |
| Indian Arts and Crafts Board | 25, II |
| Land Management, Bureau of | 43, II |
| Minerals Management Service | 30, II |
| National Indian Gaming Commission | 25, III |
| National Park Service | 36, I |
| Reclamation, Bureau of | 43, I |
| Secretary of the Interior, Office of | 2, XIV; 43, Subtitle A |
| Surface Mining and Reclamation Appeals, Board of | 30, III |
| Surface Mining Reclamation and Enforcement, Office of | 30, VII |
| Internal Revenue Service | 26, I |
| International Boundary and Water Commission, United States and Mexico, United States Section | 22, XI |
| International Development, United States Agency for | 22, II |
| Federal Acquisition Regulation | 48, 7 |
| International Development Cooperation Agency, United States | 22, XII |
| International Fishing and Related Activities | 50, III |
| International Joint Commission, United States and Canada | 22, IV |
| International Organizations Employees Loyalty Board | 5, V |
| International Trade Administration | 15, III; 19, III |
| International Trade Commission, United States | 19, II |
| Interstate Commerce Commission | 5, XL |
| Investment Security, Office of | 31, VIII |
| James Madison Memorial Fellowship Foundation | 45, XXIV |
| Japan–United States Friendship Commission | 22, XVI |
| Joint Board for the Enrollment of Actuaries | 20, VIII |
| Justice Department | 2, XXVII; 5, XXVIII; 28, I, XI; 40, IV |
| Alcohol, Tobacco, Firearms, and Explosives, Bureau of | 27, II |
| Drug Enforcement Administration | 21, II |
| Federal Acquisition Regulation | 48, 28 |
| Federal Claims Collection Standards | 31, IX |
| Federal Prison Industries, Inc. | 28, III |
| Foreign Claims Settlement Commission of the United States | 45, V |
| Immigration Review, Executive Office for | 8, V |
| Offices of Independent Counsel | 28, VI |
| Prisons, Bureau of | 28, V |
| Property Management Regulations | 41, 128 |
| Labor Department | 5, XLII |
| Benefits Review Board | 20, VII |
| Employee Benefits Security Administration | 29, XXV |
| Employees' Compensation Appeals Board | 20, IV |
| Employment and Training Administration | 20, V |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Employment Standards Administration | 20, VI |
| Federal Acquisition Regulation | 48, 29 |
| Federal Contract Compliance Programs, Office of | 41, 60 |
| Federal Procurement Regulations System | 41, 50 |
| Labor-Management Standards, Office of | 29, II, IV |
| Mine Safety and Health Administration | 30, I |
| Occupational Safety and Health Administration | 29, XVII |
| Public Contracts | 41, 50 |
| Secretary of Labor, Office of | 29, Subtitle A |
| Veterans' Employment and Training Service, Office of the Assistant Secretary for | 41, 61; 20, IX |
| Wage and Hour Division | 29, V |
| Workers' Compensation Programs, Office of | 20, I |
| Labor-Management Standards, Office of | 29, II, IV |
| Land Management, Bureau of | 43, II |
| Legal Services Corporation | 45, XVI |
| Library of Congress | 36, VII |
| Copyright Office | 37, II |
| Copyright Royalty Board | 37, III |
| Local Television Loan Guarantee Board | 7, XX |
| Management and Budget, Office of | 5, III, LXXVII; 14, VI; 48, 99 |
| Marine Mammal Commission | 50, V |
| Maritime Administration | 46, II |
| Merit Systems Protection Board | 5, II, LXIV |
| Micronesian Status Negotiations, Office for | 32, XXVII |
| Millenium Challenge Corporation | 22, XIII |
| Mine Safety and Health Administration | 30, I |
| Minerals Management Service | 30, II |
| Minority Business Development Agency | 15, XIV |
| Miscellaneous Agencies | 1, IV |
| Monetary Offices | 31, I |
| Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation | 36, XVI |
| Museum and Library Services, Institute of | 2, XXXI |
| National Aeronautics and Space Administration | 2, XVIII; 5, LIX; 14, V |
| Federal Acquisition Regulation | 48, 18 |
| National Agricultural Library | 7, XLI |
| National Agricultural Statistics Service | 7, XXXVI |
| National and Community Service, Corporation for | 45, XII, XXV |
| National Archives and Records Administration | 2, XXVI; 5, LXVI; 36, XII |
| Information Security Oversight Office | 32, XX |
| National Capital Planning Commission | 1, IV |
| National Commission for Employment Policy | 1, IV |
| National Commission on Libraries and Information Science | 45, XVII |
| National Council on Disability | 34, XII |
| National Counterintelligence Center | 32, XVIII |
| National Credit Union Administration | 12, VII |
| National Crime Prevention and Privacy Compact Council | 28, IX |
| National Drug Control Policy, Office of | 21, III |
| National Endowment for the Arts | 2, XXXII |
| National Endowment for the Humanities | 2, XXXIII |
| National Foundation on the Arts and the Humanities | 45, XI |
| National Highway Traffic Safety Administration | 23, II, III; 49, V |
| National Imagery and Mapping Agency | 32, I |
| National Indian Gaming Commission | 25, III |
| National Institute for Literacy | 34, XI |
| National Institute of Standards and Technology | 15, II |
| National Intelligence, Office of Director of | 32, XVII |
| National Labor Relations Board | 5, LXI; 29, I |
| National Marine Fisheries Service | 50, II, IV, VI |
| National Mediation Board | 29, X |
| National Oceanic and Atmospheric Administration | 15, IX; 50, II, III, IV, VI |
| National Park Service | 36, I |
| National Railroad Adjustment Board | 29, III |
| National Railroad Passenger Corporation (AMTRAK) | 49, VII |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| National Science Foundation | 2, XXV; 5, XLIII; 45, VI |
| Federal Acquisition Regulation | 48, 25 |
| National Security Council | 32, XXI |
| National Security Council and Office of Science and Technology Policy | 47, II |
| National Telecommunications and Information Administration | 15, XXIII; 47, III |
| National Transportation Safety Board | 49, VIII |
| Natural Resources Conservation Service | 7, VI |
| Navajo and Hopi Indian Relocation, Office of | 25, IV |
| Navy Department | 32, VI |
| Federal Acquisition Regulation | 48, 52 |
| Neighborhood Reinvestment Corporation | 24, XXV |
| Northeast Interstate Low-Level Radioactive Waste Commission | 10, XVIII |
| Nuclear Regulatory Commission | 5, XLVIII; 10, I |
| Federal Acquisition Regulation | 48, 20 |
| Occupational Safety and Health Administration | 29, XVII |
| Occupational Safety and Health Review Commission | 29, XX |
| Offices of Independent Counsel | 28, VI |
| Oklahoma City National Memorial Trust | 36, XV |
| Operations Office | 7, XXVIII |
| Overseas Private Investment Corporation | 5, XXXIII; 22, VII |
| Patent and Trademark Office, United States | 37, I |
| Payment From a Non-Federal Source for Travel Expenses | 41, 304 |
| Payment of Expenses Connected With the Death of Certain Employees | 41, 303 |
| Peace Corps | 22, III |
| Pennsylvania Avenue Development Corporation | 36, IX |
| Pension Benefit Guaranty Corporation | 29, XL |
| Personnel Management, Office of | 5, I, XXXV; 45, VIII |
| Human Resources Management and Labor Relations Systems, Department of Defense | 5, XCIX |
| Human Resources Management and Labor Relations Systems, Department of Homeland Security | 5, XCVII |
| Federal Acquisition Regulation | 48, 17 |
| Federal Employees Group Life Insurance Federal Acquisition Regulation | 48, 21 |
| Federal Employees Health Benefits Acquisition Regulation | 48, 16 |
| Pipeline and Hazardous Materials Safety Administration | 49, I |
| Postal Regulatory Commission | 5, XLVI; 39, III |
| Postal Service, United States | 5, LX; 39, I |
| Postsecondary Education, Office of | 34, VI |
| President's Commission on White House Fellowships | 1, IV |
| Presidential Documents | 3 |
| Presidio Trust | 36, X |
| Prisons, Bureau of | 28, V |
| Procurement and Property Management, Office of | 7, XXXII |
| Productivity, Technology and Innovation, Assistant Secretary | 37, IV |
| Public Contracts, Department of Labor | 41, 50 |
| Public and Indian Housing, Office of Assistant Secretary for | 24, IX |
| Public Health Service | 42, I |
| Railroad Retirement Board | 20, II |
| Reclamation, Bureau of | 43, I |
| Refugee Resettlement, Office of | 45, IV |
| Relocation Allowances | 41, 302 |
| Research and Innovative Technology Administration | 49, XI |
| Rural Business-Cooperative Service | 7, XVIII, XLII, L |
| Rural Development Administration | 7, XLII |
| Rural Housing Service | 7, XVIII, XXXV, L |
| Rural Telephone Bank | 7, XVI |
| Rural Utilities Service | 7, XVII, XVIII, XLII, L |
| Saint Lawrence Seaway Development Corporation | 33, IV |
| Science and Technology Policy, Office of | 32, XXIV |
| Science and Technology Policy, Office of, and National Security Council | 47, II |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Secret Service | 31, IV |
| Securities and Exchange Commission | 17, II |
| Selective Service System | 32, XVI |
| Small Business Administration | 2, XXVII; 13, I |
| Smithsonian Institution | 36, V |
| Social Security Administration | 2, XXIII; 20, III; 48, 23 |
| Soldiers' and Airmen's Home, United States | 5, XI |
| Special Counsel, Office of | 5, VIII |
| Special Education and Rehabilitative Services, Office of | 34, III |
| State Department | 2, VI; 22, I; 28, XI |
| Federal Acquisition Regulation | 48, 6 |
| Surface Mining and Reclamation Appeals, Board of | 30, III |
| Surface Mining Reclamation and Enforcement, Office of | 30, VII |
| Surface Transportation Board | 49, X |
| Susquehanna River Basin Commission | 18, VIII |
| Technology Administration | 15, XI |
| Technology Policy, Assistant Secretary for | 37, IV |
| Technology, Under Secretary for | 37, V |
| Tennessee Valley Authority | 5, LXIX; 18, XIII |
| Thrift Supervision Office, Department of the Treasury | 12, V |
| Trade Representative, United States, Office of | 15, XX |
| Transportation, Department of | 2, XII; 5, L |
| Commercial Space Transportation | 14, III |
| Contract Appeals, Board of | 48, 63 |
| Emergency Management and Assistance | 44, IV |
| Federal Acquisition Regulation | 48, 12 |
| Federal Aviation Administration | 14, I |
| Federal Highway Administration | 23, I, II |
| Federal Motor Carrier Safety Administration | 49, III |
| Federal Railroad Administration | 49, II |
| Federal Transit Administration | 49, VI |
| Maritime Administration | 46, II |
| National Highway Traffic Safety Administration | 23, II, III; 49, V |
| Pipeline and Hazardous Materials Safety Administration | 49, I |
| Saint Lawrence Seaway Development Corporation | 33, IV |
| Secretary of Transportation, Office of | 14, II; 49, Subtitle A |
| Surface Transportation Board | 49, X |
| Transportation Statistics Bureau | 49, XI |
| Transportation, Office of | 7, XXXIII |
| Transportation Security Administration | 49, XII |
| Transportation Statistics Bureau | 49, XI |
| Travel Allowances, Temporary Duty (TDY) | 41, 301 |
| Treasury Department | 5, XXI; 12, XV; 17, IV; 31, IX |
| Alcohol and Tobacco Tax and Trade Bureau | 27, I |
| Community Development Financial Institutions Fund | 12, XVIII |
| Comptroller of the Currency | 12, I |
| Customs and Border Protection Bureau | 19, I |
| Engraving and Printing, Bureau of | 31, VI |
| Federal Acquisition Regulation | 48, 10 |
| Federal Claims Collection Standards | 31, IX |
| Federal Law Enforcement Training Center | 31, VII |
| Fiscal Service | 31, II |
| Foreign Assets Control, Office of | 31, V |
| Internal Revenue Service | 26, I |
| Investment Security, Office of | 31, VIII |
| Monetary Offices | 31, I |
| Secret Service | 31, IV |
| Secretary of the Treasury, Office of | 31, Subtitle A |
| Thrift Supervision, Office of | 12, V |
| Truman, Harry S. Scholarship Foundation | 45, XVIII |
| United States and Canada, International Joint Commission | 22, IV |
| United States and Mexico, International Boundary and Water Commission, United States Section | 22, XI |
| Utah Reclamation Mitigation and Conservation Commission | 43, III |
| Veterans Affairs Department | 2, VIII; 38, I |
| Federal Acquisition Regulation | 48, 8 |

| Agency | CFR Title, Subtitle or Chapter |
|---|---|
| Veterans' Employment and Training Service, Office of the Assistant Secretary for | 41, 61; 20, IX |
| Vice President of the United States, Office of | 32, XXVIII |
| Vocational and Adult Education, Office of | 34, IV |
| Wage and Hour Division | 29, V |
| Water Resources Council | 18, VI |
| Workers' Compensation Programs, Office of | 20, I |
| World Agricultural Outlook Board | 7, XXXVIII |

# List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations that were made by documents published in the FEDERAL REGISTER since January 1, 2001, are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to FEDERAL REGISTER pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes.

## 2001

### 29 CFR

66 FR Page

Chapter V

578 Authority citation revised ..... 63502
578.1 Revised ..... 63503
578.3 Heading and (a) revised ..... 63503
579 Authority citation revised ..... 63503
579.1 Heading revised; (b) redesignated as (c); new (b) added ..... 63503
579.5 Heading and (a) revised; (e) amended ..... 63503
580 Authority citation revised ..... 63503
580.5 Amended ..... 63503
697 Authority citation revised ..... 44968
697.1 Revised ..... 44968
697.2 Redesignated as 697.3; new 697.2 added ..... 44969
697.3 Redesignated as 697.4; new 697.3 redesignated from 697.2 ..... 44969
697.4 Redesignated from 697.3 ..... 44969

## 2002

### 29 CFR

67 FR Page

Chapter V

500 Authority citation revised ..... 76986
500.170 Revised ..... 76986

## 2003

### 29 CFR

68 FR Page

Chapter V

697.2 Revised ..... 46950
697.4 Revised ..... 46951

## 2004

### 29 CFR

69 FR Page

Chapter V

541 Revised; eff. 8–23–04 ..... 22260
570.5—570.27 (Subpart B) Authority citation revised ..... 75402
570.5 Heading revised ..... 75402
570.6 Heading, (b)(1) and (2) note revised ..... 75402
570.7 Heading revised ..... 75402
570.8 Heading revised ..... 75402
570.9 Heading revised ..... 75402
570.10 Heading revised ..... 75402
570.11 Heading revised ..... 75402
570.12 Heading revised ..... 75402
570.25 Heading revised ..... 75402
570.27 Heading revised ..... 75402
570.31—570.38 (Subpart C) Authority citation revised ..... 75402
570.31 Heading revised ..... 75402
570.32 Heading revised ..... 75402
570.33 Heading revised ..... 75402
570.34 Heading, (a)(7) and (b)(5) revised ..... 75402
570.35 Heading revised ..... 75403
570.35a Heading revised ..... 75403
570.36 Heading revised ..... 75403
570.37 Heading revised ..... 75403
570.38 Heading revised ..... 75403
570.50—570.68 (Subpart E) Authority citation revised ..... 75403
570.51 (b)(2) revised ..... 75403
570.52 (b) revised; (c)(5) and (6) added ..... 75403
570.63 Heading, (a)(1)(i), (b) and (c) revised ..... 75403
570.67 (a) and (b) revised ..... 75404
579 Authority citation revised ..... 75405

## 29 CFR—Continued

69 FR Page

Chapter V—Continued

579.1 Heading. (a) introductory text, (1), (6) and (c) revised ..... 75405
579.3 Heading and (a)(5) revised ..... 75405
579.5 Heading revised ..... 75405
579.6 Removed ..... 75405
579.7 Removed ..... 75405
579.8 Removed ..... 75405
580 Authority citation revised ..... 75405
580.5 Revised ..... 75405
580.6 (a) revised ..... 75405
580.13 Revised ..... 75405
580.14 Removed ..... 75406
580.16 Revised ..... 75406
580.18 (a) revised ..... 75406

## 2005

## 29 CFR

70 FR Page

Chapter V

697.2 Revised ..... 57723
697.4 Revised ..... 57724

## 2006

(Regulations published from January 1, 2006, through July 1, 2006)

## 29 CFR

71 FR Page

Chapter V

500.212 (a) amended ..... 16665
501.33 (a) and (c) amended ..... 16665
516.0 Table amended (OMB numbers) ..... 16665
519.10 Removed ..... 16665
519.20 Removed ..... 16665
531.8 Removed ..... 16665
536 Authority citation revised ..... 16665
536.1 Removed ..... 16666
536.2 Removed ..... 16666
536.3 Heading and (a) introductory text amended ..... 16666
536.4 Removed ..... 16666
547.1 Amended (OMB numbers) ..... 16666
547.3 Removed ..... 16666
548.5 Removed ..... 16666
549.1 Amended (OMB numbers) ..... 16666
549.4 Removed ..... 16666
550.3 Removed ..... 16666
552.7 Removed ..... 16666
570.27 Removed ..... 16666
570.38 Removed ..... 16666

## 2007

(No regulations published)

## 2008

## 29 CFR

73 FR Page

Chapter V

501 Revised ..... 77229
780 Authority citation revised ..... 77238
780.115 Revised ..... 77238
780.201 Revised ..... 77238
780.205 Revised ..... 77239
780.208 Revised ..... 77239
788.10 Revised ..... 77239
825 Revised ..... 68073

## 2009

(Regulations published from January 1, 2009, through July 1, 2009)

## 29 CFR

74 FR Page

Chapter V

501 Redesignated as Part 502 and suspended; new Part 501 added ..... 26008
502 Redesignated from Part 501 and suspended ..... 26008
780 Authority citation revised ..... 26014
780.115 Redesignated as 780.159 and suspended; new 780.115 added ..... 26014
780.159 Redesignated from 780.115 and suspended ..... 26014
780.201 Redesignated as 780.215 and suspended; new 780.201 added ..... 26014
780.205 Redesignated as 780.216 and suspended; new 780.205 added ..... 26015
780.208 Redesignated as 780.217 and suspended; new 780.208 added ..... 26015
780.215 Redesignated from 780.201 and suspended ..... 26014
780.216 Redesignated from 780.205 and suspended ..... 26015
780.217 Redesignated from 780.208 and suspended ..... 26015
788.10 Redesignated as 788.18 and suspended; new 788.10 added ..... 26015
788.18 Redesignated from 788.10 and suspended ..... 26015
825 Regulation at 73 FR 68073 confirmed ..... 2862