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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 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]

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.

[4] *Walling* v. *Friend, et al.*, 156 F. 2d 429 (C. A. 8).

[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).

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.