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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.