

Wage and Hour Division, Labor

§ 780.721

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 agricultural 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

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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

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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