

## § 779.308

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

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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