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.