

**§ 779.386**

RESTAURANTS AND ESTABLISHMENTS  
PROVIDING FOOD AND BEVERAGE  
SERVICE

**§ 779.386 Restaurants may qualify as  
exempt 13(a)(2) establishments.**

(a) A restaurant may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). It should be noted that a separate exemption from the overtime pay provisions of the Act only is provided in section 13(b)(18) for certain food service employees employed by establishments other than restaurants if the establishment meets the definition of a retail or service establishment as defined in the last sentence of section 13(a)(2). Privately owned and operated restaurants conducted as separate and independent business establishments in industrial plants, office buildings, government installations, hospitals, or colleges, such as were involved in *McComb v. Factory Stores*, 81 F. Supp. 403 (N.D. Ohio) continue to be exempt under section 13(a)(2) where the tests of the exemption are met (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., first session, p. 10). However, they would not be met if the food service is carried on as an activity of the larger, nonretail establishment in which the facility is located and there is no independent, separate and distinct place of business offering the restaurant service to individual customers from the general public, who purchase the meals selected by them directly from the establishment which serves them. An establishment serving meals to individuals, pursuant to a contract with an organization or person paying for such meals because the latter has assumed a contractual obligation to furnish them to the individuals concerned, is selling to such organization or firm, and the sales are for resale within the meaning of section 13(a)(2). See also § 779.387.

**§ 779.387 "Restaurant" exemption  
under section 13(b) (8).**

(a) As amended in 1966, the Act, in section 13(b) (8), exempts from its overtime pay provisions "any employee employed by an establishment which is

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a \* \* \* restaurant". The term *restaurant* as used in section 13(b)(8) of the Act means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for immediate consumption on the premises. This includes such establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term "restaurant" does not include drinking establishments, such as bars or cocktail lounges, whose sales of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages. Certain food or beverage service employees of establishments such as bars and cocktail lounges, however, may be exempt under section 13(b)(18).

(b) Not all places where food is served for immediate consumption on the premises are "restaurant" establishments within the meaning of section 13(b)(8). Such service is sometimes provided as an incidental activity of an establishment of another kind, rather than by an establishment possessing the physical and functional characteristics of a separate place of business engaged in restaurant operations. In such event, the establishment providing the meal service is not an establishment "which is" a restaurant as section 13(b)(8) requires for exemption. Further, not every place which serves meals, even if it should qualify as a separate food service establishment, possesses the characteristics of a "restaurant." The meals served by restaurants are characteristically priced, offered, ordered, and served for consumption by and paid for by the customer on an individual meal basis. A restaurant functions principally, and not merely incidentally, to meet the immediate needs and desires of the individual customer for refreshment at the particular time that he visits the establishment for the purpose. A separate transaction to accommodate these needs and desires takes place on the occasion of each such visit. A "restaurant", therefore, is to be distinguished from an establishment offering meal service on a boarding or term basis or providing such service only as

an incident to the operation of an enterprise of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for such operation. Accordingly, a boarding house is not a "restaurant" within the meaning of section 13(b)(8), nor are the dining facilities of a boarding school, college or university which serve its students and faculty, nor are the luncheon facilities provided for private and public day school students, nor are other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

**§ 779.388 Exemption provided for food or beverage service employees.**

(a) A special exemption is provided in section 13(b)(18) of the Act for certain food or beverage service employees of retail or service establishments. This section excludes from the overtime pay provisions in section 7 of the Act, "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs." This is an employee exemption, intended to apply to employees engaged in the named activities for such establishments as "drug stores, department stores, bowling alleys, and the like." (S. Rept. No. 1487, 89th Cong., second session, p. 32.)

(b) The 13(b)(18) exemption will apply only if the following two tests are met:

(1) The employee must be an employee of a retail or service establishment (as defined in section 13(a)(2) of the Act); and

(2) The employee must be employed primarily in connection with the specified food or beverage service activities. If both of the above criteria are met, the employee is exempt from the overtime pay provisions of the Act.

(c) The establishment by which the employee is employed must be a "re-

tail or service establishment." This term is defined in section 13(a)(2) of the Act and the definition is quoted in § 779.24; the application of the definition is considered at length earlier in this subpart. In accordance with this definition, the establishment will be a "retail or service establishment" for purposes of section 13(b)(18) if 75 percent or more of the establishment's 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.

(d) If the establishment comes within the above definition it is immaterial that the establishment is in an enterprise or part of an enterprise described in section 3(s). Thus section 13(b)(18) will be applicable regardless of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part. It should also be noted that it is not required that the establishment make more than 50 percent of its annual dollar volume of sales within the State in which it is located. The establishment by which the employee is employed, provided it qualifies as a "retail or service establishment," may be a drug store, department store, cocktail lounge, night club, and the like.

(e) This exemption does not apply to employees of the ordinary bakery or grocery store who handle, prepare or sell food or beverages for human consumption since such food or beverages are not prepared or offered for consumption "on the premises, or by such services as catering, banquet, box lunch, or curb or counter service \* \* \*."

(f) If the establishment by which the employee is employed is a "retail or service establishment," as explained above, he will be exempt under section 13(b)(18) provided he is employed primarily in connection with the preparation or offering of food or beverages for human consumption either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. An employee employed in the actual preparation or serving of the food or beverages or in activities closely related and directly