

the product and storing it, placing the product into boxes, and loading the boxes on trucks or other transportation facilities for shipment to retailers or other receivers. Transportation to and from the establishment is also included (*Johnson v. Johnson & Company, Inc.*, N.D. Ga., 47 F. Supp. 650). Office and clerical employees of a wholesaler who perform general office work such as posting to ledgers, sending bills and statements, preparing tax returns, and making up payrolls, are not exempt unless these activities can be shown to be functionally necessary, in the particular fact situation, to the actual conduct of the operations named in section 13(b)(4). Such activities as selling, taking, and putting up orders, recording sales, and taking cash are, however, included in employment in “marketing” or “distributing” within the exemption. Employees of a wholesaler engaged in the performance of any of the enumerated operations on fresh fish or fish products will be engaged in exempt work. However, any such operations which they perform on aquatic products which have been canned or otherwise rendered non-perishable are nonexempt in accordance with the principles stated in §§ 784.138 and 784.154.

APPLICATION OF SECTION 13(b)(4) IN  
CERTAIN ESTABLISHMENTS

**§ 784.156 Establishments exclusively devoted to named operations.**

As noted in § 784.106 and elsewhere in the previous discussion, the section 13(b)(4) exemption depends on employment of the employee in the operations named in that section and does not apply on an establishment basis. However, the fact that an establishment is exclusively devoted to operations specified in section 13(b)(4) is, in the absence of evidence to the contrary, an indication that the employees employed there are employed in the named operations either directly or through the performance of functions so necessary to conducting the operations that the employment should, in practical effect, be considered a part of the activity intended to be exempted. Where this is the case, it is consistent with the legislative intent to avoid seg-

mentation and treat all employees of the establishment in the same manner (see Sen. Rep. No. 145, 87th Cong. first session, p. 33). Accordingly, where it can be demonstrated that an establishment is, during a particular workweek, devoted exclusively to the performance of the operations named in section 13(b)(4), on the forms of aquatic life there specified, any employee of the establishment who is employed there during such workweek will be considered to be employed in such operations and to come within the exemption if there are no other facts pertinent to his employment that require a particular examination of the functions which he performs in connection with the conduct of the named operations. If, however, there are any facts (for example, the employment of the same employee at the establishment or the engagement by other employees in like duties there during periods when none of the named operations are being carried on) which raise questions as to whether he is actually engaged in the exempt activities, it will be necessary to scrutinize what he is actually doing during the conduct of the operations named in section 13(b)(4) in order to determine the applicability of the exemption to him. This is necessary because an employee who would not otherwise be within the exemption such as a carpenter doing repair work during the dead season, does not become exempt as “employed in” one of the named activities merely because the establishment begins canning or processing fish.

**PART 785—HOURS WORKED**

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AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

## Subpart A—General Considerations

### § 785.1 Introductory statement.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor,

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Washington, DC 20210, or to any area or Regional Office of the Division.

[35 FR 15289, Oct. 1, 1970]

### § 785.2 Decisions on interpretations; use of interpretations.

The ultimate decisions on interpretations of the act are made by the courts. The Administrator must determine in the first instance the positions he will take in the enforcement of the Act. The regulations in this part seek to inform the public of such positions. It should thus provide a “practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.” (*Skidmore v. Swift*, 323 U.S. 134, 138 (1944).)

### § 785.3 Period of effectiveness of interpretations.

These interpretations will remain in effect until they are rescinded, modified or withdrawn. This will be done when and if the Administrator concludes upon reexamination, or in the light of judicial decision, that a particular interpretation, ruling or enforcement policy is incorrect or unwarranted. All other rulings, interpretations or enforcement policies inconsistent with any portion of this part are superseded by it. The Portal-to-Portal Bulletin (part 790 of this chapter) is still in effect except insofar as it may not be consistent with any portion hereof. The applicable statutory provisions are set forth in § 785.50.

### § 785.4 Application to Walsh-Healey Public Contracts Act.

The principles set forth in this part are also followed by the Administrator of the Wage and Hour Division in determining hours worked by employees performing work subject to the provisions of the Walsh-Healey Public Contracts Act.

[35 FR 15289, Oct. 1, 1970]

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### Subpart B—Principles for Determination of Hours Worked

#### § 785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.

Section 6 requires the payment of a minimum wage by an employer to his employees who are subject to the Act. Section 7 prohibits their employment for more than a specified number of hours per week without proper overtime compensation.

[26 FR 7732, Aug. 18, 1961]

#### § 785.6 Definition of “employ” and partial definition of “hours worked”.

By statutory definition the term “employ” includes (section 3(g)) “to suffer or permit to work.” The act, however, contains no definition of “work”. Section 3(o) of the Fair Labor Standards Act contains a partial definition of “hours worked” in the form of a limited exception for clothes-changing and wash-up time.

#### § 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business.” (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer’s property may be treated by the parties as a benefit to the employer.” (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944)) The workweek ordinarily includes “all