

same will be true with respect to employment of its employees in those related activities which are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. There is no requirement that engaging in such activities constitute any particular percentage of the enterprises's business. However, in the case of an enterprise engaged in other activities as well as in the wholesale or bulk distribution of petroleum products (including related activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), an employee employed in such other activities of the enterprise is not engaged in employment which the exemption was intended to reach (see § 794.101). Such an employee is not brought within the exemption by virtue of the fact that the enterprise by which he is employed is engaged with other employees in the distribution activities described in section 7(b)(3). This accords with the judicial construction of other exemptions in the Act which are similarly worded. See *Connecticut Co. v. Walling*, 154 F. 2d 522, Certiorari denied, 329 U.S. 667; *Northwest Airlines v. Jackson*, 185 F. 2d 74; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52; *Fleming v. Swift & Co.*, 41 F. Supp. 825, aff'd 131 F. 2d 249.

**§ 794.105 Other requirements for exemption.**

The limited overtime pay exemption provided by section 7(b)(3) applies to any employee compensated in accordance with its terms who is "employed \* \* \* by an \* \* \* enterprise \* \* \* engaged in the wholesale or bulk distribution of petroleum products" as explained in §§ 794.103 through 794.104 if the enterprise which employs him meets all of the following requirements: (a) It is a "local" enterprise; (b) it is "independently owned and controlled"; (c) it has an annual gross volume of sales of less than \$1 million exclusive of excise taxes; (d) it makes more than 75 percent of its annual dollar volume of sales within the State in which it is located; and (e) not more than 25 percent of such annual dollar

volume of sales is to customers who are engaged in the bulk distribution of petroleum products for resale. In order to determine whether all these requirements are met, it is necessary to know what constitutes the "enterprise" to which reference is made, the meaning of "the wholesale or bulk distribution of petroleum products" in which engagement is required as a prerequisite to exemption, what is meant by a "local" enterprise and what characterizes it as "independently owned and controlled", and the criteria for application of the dollar volume tests. These matters will be discussed in some detail in the sections following.

THE "ENTERPRISE"

**§ 794.106 Statutory definition of "enterprise."**

The term "enterprise" is defined in section 3(r) of the Act. That definition (insofar as it affects a wholesale or bulk petroleum distributor) is as follows:

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.