

Wage and Hour Division, Labor

§ 794.135

considered to come within the 25 percent limitation for purposes of the exemption under section 7(b)(3) if it is made to a “customer who is engaged in the bulk distribution of such products for resale”. The identity of such customers is generally well known in the trade. For example, this would generally include other petroleum jobbers, brokers, wholesalers, and any others who engaged in the bulk distribution of petroleum products for resale. Thus a sale to a petroleum jobber who is engaged in selling petroleum products to gasoline stations would clearly be a sale to a customer described in section 7(b)(3). The essential tests are: first, that the customer must be one who is engaged in the distribution of “such products”, which means petroleum products; second, that he must engage in “the bulk distribution” of such products; and finally, that he must be engaged in such distribution “for resale”. These three requirements are discussed in §§ 794.132 through 794.134.

§ 794.132 “Petroleum products”.

A sale by an enterprise engaged in the wholesale or bulk distribution of petroleum products will be included in the 25 percent limitation under the exemption only if it is made to a customer who engages in the distribution, in bulk and for resale, of “petroleum products”. The term “petroleum products” as used in section 7(b)(3) includes such products as gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquified-petroleum gas. Sales to customers who are not engaged in the distribution of petroleum products will not be included in the 25 percent limitation.

§ 794.133 “Bulk” distribution.

“Bulk” distribution of petroleum products typically connotes those methods of distribution in which large quantities of the product are distributed in a single delivery or delivery trip. Thus, “bulk” distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer (whether or not at “wholesale”). It also includes deliveries made in series on a single trip on a delivery route to the storage tanks or facilities of a number of customers from

a bulk supply of the product transported by tank truck, motor transport, or other motor carrier operated by the enterprise. Such deliveries are to be contrasted with such typical small-quantity individual deliveries as those made into the tank of a motor vehicle for use in its propulsion.

§ 794.134 Distribution “for resale.”

A sale made to a customer engaged in the bulk distribution of petroleum products will be included in the 25 percent limitation only if the customer engages in the bulk distribution of petroleum products “for resale”. Except with respect to a specific exclusion in section 3(n) regarding certain building materials, the word “resale” is not defined in the Act. The common meaning of “resale” is the act of “selling again”. A sale is made for resale when the seller knows or has reasonable cause to believe that what is sold by him will be resold by the purchaser in the same or a different form. Where the sale is thus made for resale, it does not matter what ultimately happens to the subject of the sale. Thus, the fact that goods sold for resale are consumed by fire or no market is found for them and they are therefore never resold does not alter the character of the sale which is made for resale. In considering whether there is a sale of petroleum products for resale in any specific situation, the term “sale” includes, as defined in section 3(k) of the Act, “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”

APPLICATION OF EXEMPTION TO EMPLOYEES

§ 794.135 Employees who are exempt.

If an enterprise engaged in distribution of petroleum products satisfies all the conditions specified in section 7(b)(3) as previously discussed, the partial exemption provided by this section from the Act’s general overtime pay requirements will be applicable to all employees employed by their employer in activities of the enterprise for which the exemption was intended if, but

only if, such employees are compensated in accordance with the compensation requirements of section 7(b)(3) (see § 794.100).

§ 794.136 Employees whose activities may qualify them for exemption.

The activities for which the section 7(b)(3) partial exemption was intended are discussed generally in §§ 794.103 through 794.104. In accordance with the principles there set forth, those employees employed in an enterprise which qualifies for application of the exemption, who are engaged in the storage and delivery of petroleum products for the enterprise, and those employees whose work is required for the performance of the activities in the wholesale or bulk distribution of the petroleum products or the related activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products, are employees for whom the employer may take the exemption provided they are paid in accordance with the special compensation provisions of section 7(b)(3). Thus, so long as these payment requirements are met, the exemption is applicable not only to such employees as drivers, helpers, loaders, dispatchers, and warehousemen engaged in the bulk delivery and storage of petroleum products, but also to such employees as office, management, and sales personnel, maintenance, custodial, protective personnel, and any others, who engage in related functions customarily carried on by such enterprises in the industry in conjunction with the wholesale and bulk distribution of the petroleum products.

§ 794.137 Effect of activities other than “wholesale or bulk distribution of petroleum products.”

As previously noted, in some cases the related activities performed through unified operation or common control for a common business purpose which are included in the enterprise under the definition in section 3(r) of the Act may include activities other than the wholesale or bulk distribution of petroleum products. Examples are tire recapping or gasoline station services, the sale and servicing of oil burn-

ers, or the distribution of coal, ice, feed, building supplies, paint, etc. In some instances, as in the case of oil-burner servicing, these other activities 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. As indicated in § 794.104, employees of the enterprise who engage in such activities are within the general scope of the exemption. However, activities which are not customary practices of enterprises in the industry of wholesale or bulk distribution of petroleum products are not within the scope of the intent of the section 7(b)(3) exemption. For example, construction activities, operation of a sporting goods store, scrap paper and metal activities, the operation of a general repair garage, etc., are not the type of activities for which the section 7(b)(3) exemption was intended. Thus, where an enterprise engaged in the wholesale or bulk distribution of petroleum products operates a general repair garage, a mechanic servicing the automobiles and trucks brought to the garage by customers will not for that reason be within the exemption provided by section 7(b)(3), although the exemption provided by section 13(a)(2) may apply to him if the garage qualifies as an exempt retail or service establishment under the tests provided in that section of the Act. On the other hand, mechanics employed by an enterprise engaged in the wholesale or bulk distribution of petroleum products for the purpose of keeping the distribution equipment of the enterprise in good repair would come within the 7(b)(3) exemption.

§ 794.138 Workweek unit in applying the exemption.

(a) As is true generally with respect to provisions of the Act concerning compensation for overtime hours of work (see §§ 778.100 through 778.105 of this chapter, *Overnight Transportation Co. v. Missel*, 316 U.S. 572), the unit of time to be used in determining the application of all provisions of the section 7(b)(3) exemption to an employee is the workweek. As defined in § 778.105 of this chapter, an employee's workweek is a fixed and regularly recurring