

## § 794.136

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-

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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

period of 168 hours—seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted.

(b) By its terms (§794.100), section 7(b)(3) exempts an employer from any statutory responsibility he might otherwise have for a violation of section 7(a) of the Act “by employing any employee for a workweek in excess of that specified in such subsection” without paying the overtime compensation prescribed therein, “if such employee is so employed \* \* \* by an \* \* \* enterprise” qualifying under section 7(b)(3) for application of its provisions to such employment and if such employee receives the compensation which section 7(b)(3) requires. Accordingly, for section 7(b)(3) to apply to any workweek when an employee is employed for hours in excess of those specified in section 7(a), it must be established that in such workweek he is employed by his employer in the exempt activities of an enterprise described in section 7(b)(3) and that the compensation received by him for his work in such workweek satisfies the special pay requirements of section 7(b)(3).

**§ 794.139 Exempt and nonexempt activities in the workweek.**

The general nature of the activities of a wholesale or bulk petroleum distribution enterprise in which an employee must be engaged in order to come within the intent of the section 7(b)(3) exemption is discussed in §§ 794.136 through 794.137. In each case where an employee of the enterprise is engaged for a substantial portion of his workweek in activities which do not appear to be a part of the wholesale or bulk distribution of petroleum products, it will be necessary to examine such activities and the manner and extent of their performance to determine whether they are included in or are foreign to the activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distrib-

utes such products. If they are foreign to the activities thus customarily performed, engagement in them by the employee for a substantial portion of his workweek will render section 7(b)(3) inapplicable to him for that workweek. On the other hand, where an employee, who is otherwise engaged in the exempt activities (the wholesale or bulk distribution of petroleum products, including activities which are a necessary part thereof, and in activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), devotes an insubstantial amount of time (for administrative purposes, not more than 20 percent in a workweek) to these foreign activities, the section 7(b)(3) exemption will not for that reason be considered inapplicable to him.

**§ 794.140 Compensation requirements for a workweek under section 7(b)(3).**

(a) Exemption of an employee in any workweek under section 7(b)(3) is expressly conditioned on and limited by the special compensation provisions which it contains. These are set forth in full text in §794.100. They require payment to the employee of compensation at specified rates for certain periods within the workweek when such periods are included in his hours of work. Their application requires an increase of at least 50 percent in the minimum wage rate otherwise applicable to the employee in such workweek “for employment in excess of forty hours” and, in addition, if such employment is “in excess of twelve hours in any workday, or \* \* \* in excess of fifty-six hours in any workweek, as the case may be,” the employee must be paid overtime compensation “at a rate not less than one and one-half times the regular rate at which he is employed” for all hours worked in the workweek in excess of the specified daily standard or in excess of the specified weekly standard, whichever is the greater number of overtime hours. The sections following discuss separately the application of these provisions to workweeks when the employee’s hours of work do not exceed the daily or weekly standard specified in section 7(b)(3), and to workweeks when hours in excess of the