

§ 779.15

or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The interpretative bulletin on general coverage of the Act, part 776 of this chapter, contains a detailed discussion of the application of this definition and what is included in it.

§ 779.15 Sale and resale.

(a) Section 3(k) of the Act provides that "Sale" or "sell", as used in the Act, "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Since "goods", as defined, includes any part or ingredient of goods (see § 779.14), a "resale" of goods includes their sale in a different form than when first purchased or sold, such as the sale of goods of which they have become a component part (*Arnold v. Kanowsky*, 361 U.S. 388). The Act, in section 3(n), provides one exception to this rule by declaring that "resale", as used in the Act, "shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." A resale of goods is not confined to resale of the goods as such, but under section 3(k) may include an "other disposition" of the goods in which they are disposed of in a transaction of a different kind; thus the sale by a restaurant to an airline of prepared meals to be served in flight to passengers whose tickets entitle them to a "complimentary" meal is a sale of goods "for resale". (*Mitchell v. Sherry Corine Corp.*, 264 F 2d 831 (C.A. 4), cert. denied 360 U.S. 934.)

(b) In construing section 3(s)(1) of the Act as it was prior to the 1966 amendments it should be noted that section 3(n) of the prior Act defined "resale" by declaring that this term, "except as used in subsection (s)(1), shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." Thus, although section 3(n) of the prior Act

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also provided the one exception to the meaning of "resale", it made clear that the exception was inapplicable in determining under section 3(s)(1) of the prior Act, "if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total volume to \$250,000 or more". The application of the inflow test under section 3(s) (1) of the prior Act is discussed fully in subpart C of this part.

§ 779.16 State.

As used in the Act, *State* means "any State of the United States or the District of Columbia or any Territory or possession of the United States" (Act, section 3(c)). The application of this definition in determining questions of coverage under the Act's definition of "commerce" and "produced" (see §§ 779.12, 779.13) is discussed in the interpretative bulletin on general coverage, part 776 of this chapter. This definition is also important in determining whether goods "for resale" purchased or received by an enterprise move or have moved across State lines within the meaning of former section 3(s)(1) of the Act (prior to the 1966 amendments) and whether sales of goods or services are "made within the State" within the meaning of the retail or service establishment exemption in section 13(a)(2), as discussed in subpart D of this part.

§ 779.17 Wage and wage payments to tipped employees.

Section 3(m) of the Act provides that as used in the Act, "wage" paid to any employee:

includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined

areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

As explained in part 531 of this chapter, section 3(m) of the Act governs the payment of wages required by the Act, including payment in other than cash and in tips. Part 531 of this chapter contains the regulations under which the reasonable cost or fair value of such facilities furnished may be computed for inclusion as part of wages required by the Act. Section 3(m) provides a method for determining the wage of a "tipped employee" and this term as defined in section 3(t) of the Act "means any employee engaged in an occupation in which he customarily and regularly receives more than \$20 a month in tips". Regulations under which wage credits are permitted on account of tips paid to "tipped employees" are also contained in part 531 of this chapter.

§ 779.18 Regular rate.

As explained in the interpretative bulletin on overtime compensation, part 778 of this chapter, employees subject to the overtime pay provisions of the Act must generally receive for their overtime work in any workweek as provided in the Act not less than one and one-half times their regular rates of pay. Section 7(e) of the Act defines "regular rate" in the following language:

(e) As used in this section the *regular rate* at which an employee is employed shall be deemed to include all remuneration for em-

ployment paid to, or on behalf of, the employee, but shall not be deemed to include:

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or