

## § 794.115

conducts his business as any other independent businessman.

It also means that the jobber is not a subsidiary of nor controlled by any so-called major oil company, although the jobber may sell the branded products of such a company.

Some jobbers own service stations which they lease to independent dealers and a small percentage of jobbers may operate one or more service stations with their own salaried personnel. (Senate Hearings on the Amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 411.)

It appears, therefore, that the purpose of the requirement limiting the exemption to the enterprises which are "independently owned and controlled," is to confine the exemption to those petroleum jobbers who own their own facilities and equipment and who are not subsidiaries nor controlled by any producer, refinery, terminal supplier or so-called major oil company. (See *Wirtz v. Lunsford*, cited above.) The fact that the petroleum jobber sells a branded product of a major oil company will not, of itself, affect the status of his enterprise as one which is "independently owned and controlled". So also the fact that the jobber owns gasoline service stations, which he leases or which he operates himself, will not affect the status of his enterprise as being "independently owned and controlled".

### § 794.115 "Independently owned."

Ownership of the enterprise may be vested in an individual petroleum jobber, or a partnership, or a corporation, so long as such ownership is not shared by a major oil company, or other producer, refiner, distributor or supplier of petroleum products, so as to affect the independent ownership of the enterprise. As noted in § 794.114, an enterprise will not be considered independently owned where it does not own its own office, bulk storage, and delivery facilities. The enterprise may also not be considered "independently owned" where it does not own its stock-in-trade. (See *Wirtz v. Lunsford*, 404 F.2d 693 (C.A. 6).) It is recognized that, in the ordinary course of business dealings, an independently owned enterprise may purchase its goods on credit and this, of course, will not affect its characterization as being "independently owned" within the meaning of

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the exemption. However, there may well be a question as to whether the enterprise is "independently owned" where the enterprise receives its petroleum products on consignment and the supplier lays claim to the ownership of the account receivable. Of possible relevance also is the intent evident in the statutory language to provide exemption only for an enterprise which can meet the specified tests which depend on "the sales of such enterprise." The determination in such cases, as in other cases involving questions of independent ownership, will necessarily depend on all the facts.

### § 794.116 "Independently \* \* \* controlled."

As explained in § 794.114, the enterprise in addition to being independently owned must also be "independently controlled." The test here is whether the individual, partnership, or corporation which owns the enterprise also controls the enterprise as an independent businessman, free of control by any so-called major oil company or other person engaged in the petroleum business. Control by others may be evidenced by ownership; but control may exist in the absence of any ownership. For example where an enterprise engaged in the wholesale or bulk distribution of petroleum products enters into franchise or other arrangements which have the effect of restricting the products it distributes, the prices it may charge, or otherwise controlling the activities of the enterprise in those respects which are the common attributes of an independent businessman, these facts may establish that the enterprise is not "independently controlled" as required by the exemption under section 7(b)(3). (*Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6).)

### § 794.117 Effect of franchises and other arrangements.

Whether a franchise or other contractual arrangement affects the status of the enterprise as "an independently owned and controlled \* \* \* enterprise," depends upon all the facts including the terms of the agreements and arrangements between the parties as well as the other relationships that have been established. The term "franchise"