

his control to another, or by agreement or other arrangement, he may so restrict his right to exercise control as to abandon the control or to share the control of his business activities with other persons or corporations. In such a case, the activities may be performed under "common control." In other cases, the power to control may be reserved through agreement or arrangement between the parties so as to vest the control of the activities of one business in the hands of another.

(b) Activities are considered to be performed under "common control" even if, because of the particular methods of operation, the power to control is only seldom used, as where the business has been in operation for a long time without change in methods of operation and practically no actual direction is necessary; also common control may exist where the control, although rarely visibly exercised, is evidenced by the fact that mere suggestions are adopted readily by the business being controlled.

(c) In the retail industry, particularly, there are many instances where, for business reasons, related activities performed by separate companies are so unified or controlled as to constitute a single enterprise. A common example, specifically named in the definition, is the leased department. This and other examples are discussed in §§ 779.225 through 779.235.

LEASED DEPARTMENTS, FRANCHISE AND  
OTHER BUSINESS ARRANGEMENTS

**§ 779.225 Leased departments.**

(a) As stated in section 3(r) of the enterprise includes "departments of an establishment operated through leasing arrangements." This statutory provision is based on the fact that ordinarily the activities of such leased departments are related to the activities of the establishment in which they are located, and they are performed for a common business purpose either through "unified operation" or "common control." A general discussion will be found in part 776 of this chapter.

(b) In the ordinary case, a retail or service establishment may control many of the operations of a leased department therein and unify its oper-

ation with its own. Thus, they may operate under a common trade name: The host establishment may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies; advertising, adjustment and credit operations, may be unified, and insurance, taxes, and other matters may be included as a part of the total operations of the establishment. Some or all of these and other functions, which are the normal prerogatives of an independent businessman, may be controlled or unified with the store's other activities in such a way as to constitute a single enterprise under the Act.

(c) Since the definition specifically includes in the "enterprise," for the purpose of this Act, "departments of an establishment operated through leasing arrangements," any such department will be considered a part of the host establishment's enterprise in the absence of special facts and circumstances warranting a different conclusion.

(d) Whether, in a particular case, the relationship is such as to constitute the lessee's operation to be a separate establishment of a different enterprise rather than a "leased department" of the host establishment as described in the definition, will depend upon all the facts including the agreements and arrangements between the parties as well as the manner in which the operations are conducted. If, for example, the facts show that the lessee occupies a physically separate space with (or even without) a separate entrance, and operates under a separate name, with his own separate employees and records, and in other respects conducts his business independently of the lessor's, the lessee may be operating a separate establishment or place of business of his own and the relationship of the parties may be only that of landlord and tenant. In such a case, the lessee's operation will not be regarded as a "leased department" and will not be included in the same enterprise with the lessor.

(e) The employees of a leased department would not be covered on an enterprise basis if such leased department is

## Wage and Hour Division, Labor

## § 779.228

located in an establishment which is not itself a covered enterprise or part of a covered enterprise. Likewise, the applicability of exemptions for certain retail or service establishments from the Act's minimum wage or overtime pay provisions, or both, to employees of a leased department would depend upon the character of the establishment in which the leased department is located. Other sections of this subpart discuss the coverage of leased retail and service departments in more detail while subpart D of this part explains how exemptions for certain retail and service establishments apply to leased department employees.

### § 779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.

While certain franchise and other arrangements may operate to bring the one to whom the franchise is granted into another enterprise (see § 779.232), section 3(r) contains a specific exception for certain arrangements entered into by a retail or service establishment which is under independent ownership. The specific exception in section 3(r) reads as follows:

*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, (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.

### § 779.227 Conditions which must be met for exception.

This exception, in accordance with its specific terms, will apply to exclude an establishment from enterprise coverage only if the following conditions are met:

(a) The establishment must be a "retail or service establishment" as this term is defined in section 13(a)(2) of the Act (see discussion of this term in §§ 779.312 and 779.313); and

(b) The retail or service establishment must not be an "enterprise" which is large enough to come within the scope of section 3(s) of the Act; and

(c) The retail or service establishment must be under independent ownership.

### § 779.228 Types of arrangements contemplated by exception.

If the retail or service establishment meets the requirements in paragraphs (a) through (c) of § 779.227, it may enter into the following arrangements without becoming a part of the larger enterprise, that is, without losing its status as a "separate and distinct enterprise" to which section 3(s) would not otherwise apply:

(a) Any arrangement, whether by agreement, franchise or otherwise, that it will sell, or sell only certain goods specified by a particular manufacturer, distributor, or advertiser.

(b) Any such arrangement 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.

(c) Any such arrangement by which it will join with other similar retail or service establishments in the same industry for the purpose of collective purchasing. Where an agreement for "collective purchasing" is involved, further requirements are imposed, namely, that all of the other establishments joining in the agreement must be retail or service establishments under independent ownership, and that all of the establishments joining in the collective purchasing arrangement must be "in the same industry." This has reference to such arrangements by a group of grocery stores, or by some other trade group in the retail industry.

(d) Any arrangement whereby the establishment's premises are leased from a person who also leases premises to other retail or service establishments. In connection with this rental arrangement, the Senate Report cites as an example the retail establishment which