

## § 779.351

ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

### § 779.351 Exemption provided.

Section 13(a)(11) (See § 779.301) exempts from sections 6 and 7 of the Act any employee or proprietor who is engaged in handling telegraphic messages for the public in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), if the conditions specified in section 13(a)(11) are met and the provisions of section 6 and 7 of the Act would not otherwise apply.

### § 779.352 Requirements for exemption.

The requirements of the exemption are: (a) The establishment in which the employee or proprietor works must qualify as an exempt retail or service establishment under section 13(a)(2) of the Act; (b) the employee or proprietor must be engaged in handling telegraphic messages for the public pursuant to an agency or contract arrangement with a telegraph company; (c) such employee or proprietor must be one to whom the minimum wage and overtime pay provisions of the Act would not apply in the absence of such handling of telegraphic messages (See *Western Union Tel. Co. v. McComb* 165 F. 2d. 65 (CA-6), certiorari denied, 333 U.S. 362); and (d) the exemption applies only where the telegraphic message revenue does not exceed \$500 a month. For purposes of this exemption only, in determining whether a retail or service establishment meets the percentage tests contained in section 13(a)(2) of the Act, the receipts from the telegraphic message agency will not be included.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

### § 779.353 Basis for classification.

The general principles governing the application of the 13(a)(2) and 13(a)(4) exemptions are explained in detail earlier in the subpart. It is the purpose of the following sections to show how these principles apply to establishments in certain specific industries. In these industries the Divisions have made special studies, held hearings or consulted with representatives of industry and labor, to ascertain the

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facts. Based upon these facts the following determinations have been made as to which sales or establishments are, and which are not, recognized as retail in the particular industry.

LUMBER AND BUILDING MATERIALS DEALERS

### § 779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) *Section 13(a)(2)*. An establishment engaged in selling lumber and building materials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. It must appear that:

(1) The establishment is not in an enterprise described in section 3(s) of the Act or, if it is, its annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) is less than \$250,000; and

(2) More than 50 percent of the establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located; and

(3) 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is made from sales which are not for resale and are recognized as retail sales of goods or services in the industry.

These requirements are further explained in §§ 779.301 through 779.343.

(b) *Section 13(a)(4)*. An establishment which makes or processes lumber and building materials which it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements (see *Arnold v. Kanowsky*, 361 U.S. 388) of that exemption. It must appear that:

(1) The establishment qualifies as an exempt retail establishment under section 13(a)(2) (see paragraph (a) of this section and § 779.350); and

(2) The establishment is recognized as a retail establishment in the industry (see § 779.347 and paragraph (c) of this section); and

(3) The goods which such establishment makes or processes for sale are made or processed at the retail establishment which sells them (see § 779.348); and

(4) More than 85 percent of the annual dollar volume derived by the retail establishment from sales of goods so made or processed therein is made within the State in which the establishment is located (see §§779.349, 779.339 through 779.341).

(c) *Establishments recognized as retail in the industry.* An establishment which meets the requirements for exemption under section 13(a)(4) which are stated in paragraphs (b)(1), (3), and (4) of this section is recognized as retail establishment in the industry within the meaning of paragraph (b)(2) of this section if its annual dollar volume of sales of goods made or processed at the establishment does not exceed 50 percent of the annual dollar volume which it derives from sales that are recognized as retail and are not made for resale.

(d) *Establishments lacking a "retail concept."* The exemptions provided by sections 13(a)(2) and 13(a)(4) of the Act do not apply to establishments in an industry in which there is no traditional concept of retail selling or servicing (see §779.316), such as the establishment of a building contractor (see §779.317; *Goldberg v. Dakota Flooring Co.*, 15 WH Cases 305), or a factory (see §779.347).

**§ 779.355 Classification of lumber and building materials sales.**

(a) *General.* In determining, for purposes of the section 13(a)(2) and (4) exemptions, whether 75 percent of the annual dollar volume of the establishment's sales which are not for resale and are recognized as retail in the industry, such sales will be considered to include all sales of lumber and building materials by the establishment which meet all the requirements for such classification as previously explained in this subpart, but will not be considered to include the transactions noted in paragraphs (b) and (c) of this section, which do not meet the statutory tests:

(b) *Transactions not recognized as retail sales.* (See §§779.314 through 779.329.) Dollar volume derived from the following is not made from sales or services which are recognized as retail in the industry:

(1) Contracts to build, maintain, or repair buildings or other structures, or

sales of services involving performance of typical construction activity or any other work recognized as an activity of a contracting business rather than a function of a retail merchant;

(2) Sales of lumber and building materials in which the seller agrees to install them for the purchaser, where the installation is not limited to services that are merely incidental to the sale and delivery of such materials but includes a substantial amount of activity such as construction work which is not recognized as retail (for example, sale and installation of roofing, siding, or insulation). A sale of such materials which would otherwise be recognized as retail (contracts described in paragraph (b)(1) of this section are outside this category) may be so recognized notwithstanding the installation agreement, however, to the extent that the sales value of the materials is segregated and separately identified in the transaction;

(3) Sales in direct carload shipments; that is, where the materials are shipped direct in carload lots from the dealer's supplier to the dealer's customer;

(4) Sales of specialized goods (some examples are logs, ties, pulpwood, telephone poles, and pilings). Such specialized items are of the type which the general consuming public does not ordinarily have occasion to use (cf. §779.318 and *Mitchell v. Raines*, 238 F. 2d 186), and the sales of such items are not recognized as retail in the industry;

(5) Sales made pursuant to formal bid procedures, such as those utilized by the Federal, State, and local governments and their agencies, involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications.

(c) *Sales for resale.* (See §§779.330-779.336.) Examples of sales which cannot be counted toward the required 75 percent because they are for resale include:

(1) Sales of lumber and building materials sold to other dealers for resale in the same form;

(2) Sales to industrial concerns for resale in any altered form or as a part or ingredient of other goods;