

(3) Sales to contractors or builders for use in the construction, repair, or maintenance of commercial or industrial structures or any other structures not specifically included in section 3(n) of the Act (*Sucrs. de Mayal v. Mitchell*, 280 F. 2d 477, certiorari denied 364 U.S. 902; and see *Arnold v. Kanowsky*, 361 U.S. 388, 394, footnote 10, and §§ 779.335-779.336);

(4) Transfers of goods by an employer, who is a dealer in lumber and building materials and who also acts in the capacity of a building contractor or speculative builder, from or through his building materials establishment to his building business for the construction maintenance, or repair of commercial property or any other property not excepted in section 3(n) of the Act. (See § 779.336.)

**§ 779.356 Application of exemptions to employees.**

(a) *Employees who may be exempt under sections 13(a)(2) and 13(a)(4).* These exemptions apply on an establishment basis (see §§ 779.302-779.306). Accordingly, where an establishment of a dealer in lumber and building materials qualifies as an exempt retail or service establishment under section 13(a)(2) or as an exempt establishment under section 13(a)(4), as explained in § 779.354, the exemption from the minimum wage and overtime pay requirements of the Act provided by such section will apply, subject to the limitations hereafter noted in this section, to all employees who are employed "by" such establishment (see §§ 779.307-779.311) in activities within the scope of its business (§ 779.308) and who are not employed by the employer in performing central office or warehouse work of an organization operating several such establishments (§ 779.310; *McComb v. W. E. Wright Co.*, 168 F. 2d 40, cert. denied 335 U.S. 854). Neither exemption extends to employees employed in performing the work of a nonexempt establishment (§ 779.311) or such activities as construction work. Employees employed in making and processing of lumber and building materials for sale do not come within the section 13(a)(2) exemption; they are exempt only if employed by an establishment which qualifies as an exempt es-

tablishment under section 13(a)(4) as explained in § 779.354 and if their work in the making or processing of such materials is done at such establishment. How duties relating to the processing or manufacturing of such materials affect the application of these exemptions is discussed in further detail in paragraphs (b) and (c) of this section.

(b) *Processing and manufacturing activities.* The performance, in an establishment which sells lumber and building materials at retail, of activities such as cutting lumber to a smaller size or dressing lumber in accordance with a customer's request or assembling window and door frames received in "knocked-down" condition, constitutes processing incidental to the sales of such materials. Such activities are not considered manufacturing and will not affect the applicability of the section 13(a)(2) exemption to the establishment or to the employees who perform them. However, whenever lumber is cut or dressed for sale, or fabricated products are manufactured for sale (for example, windows, door frames, benches, pig troughs, pallets, molding, sashes, cabinets, boxes), there is no exemption under section 13(a)(2). Employees performing such manufacturing activities at the establishment are exempt only if all the tests set forth in section 13(a)(4) are met (see pars. (b), (c), and (d) of § 779.354). Employees engaged in such activities at a manufacturing plant, central yard, or other place not qualifying as an exempt establishment under section 13(a)(2) and (4) are not exempt.

(c) *Employees serving exempt and non-exempt operations.* In lumber and building materials establishments which qualify for exemption under section 13(a)(2) but engage in some activities in which their employees are not exempt, such as construction or the making or processing of materials for sale where no exemption under section 13(a)(4) is applicable, there may be auxiliary employees of the establishment whose duties relate to both the exempt sales portion of the business and the non-exempt operations. For example, office workers may keep records of both the retail sales and construction or manufacturing activities; custodial workers

may clean the entire premises, including portions devoted to nonexempt manufacturing; and warehousemen, messengers, and stock clerks may handle material for all departments, including material used in the nonexempt operations. These employees do not qualify for the exemption except when they are primarily engaged in the sales portion of the business and only incidentally perform clerical, custodial, or messenger service for the other operations. As an enforcement policy, such an employee will not be considered to be engaged in nonexempt activities which render him ineligible for exemption under section 13(a)(2) if, in the particular workweek, an insubstantial amount of his time (20 percent or less) is allocable to the clerical, custodial, or messenger services performed by him which relate to such nonexempt operations of the employer.

## COAL DEALERS

**§ 779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.**

(a) *General.* A coal dealer's establishment 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. In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are recognized as retail in the particular industry, sales of coal to the consumer from a dealer's yard storage, where bulk is broken, are recognized as retail if they meet the requirements for such classification as previously explained in this subpart. It has been determined that the following sales do not meet such requirements and are not so recognized even if made from a dealer's yard storage:

(1) Sales where the delivery is made by railroad car or cargo vessel.

(2) Sales in a carload quantity or more for continuous delivery by truck from a dock, mine or public railroad facility.

(3) *Sales of coal at a wholesale price.* A wholesale price is a price comparable to or lower than the establishment's price in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale. If the establishment makes no such

sales, the wholesale price is the price comparable to or lower than the price prevailing in the immediate area in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale.

(4) Sales of coal for use in the production of a specific product to be sold in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity.

(b) *"Sales for resale."* In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are not made for resale, "sales for resale" will include sales of coal to other dealers, to peddlers, and sales of coal for use in the production of a specific product to be sold, in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity. This is distinguished from sales of coal for use in the general manufacturing or industrial process such as the use in laundries, bakeries, nurseries, canneries, etc., or for space heating, which are not sales made for resale.

## ICE MANUFACTURERS AND ICE DEALERS

**§ 779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.**

(a) An establishment engaged in selling ice 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. Similarly, an establishment making the ice it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) In determining whether the requirements of the 13(a)(2) exemption that 75 percent of the establishment's sales must not be made for resale and must be recognized as retail sales in the industry are met, sales of ice which meet all the requirements for such classification as previously explained in this subpart will be regarded as retail. The following sales have been determined not to qualify under the applicable tests for recognition as retail:

(1) Sales for resale.