

Subpart B—Exemption From Overtime Pay Requirements Under Section 7(b)(3) of the Act

SCOPE AND APPLICATION IN GENERAL

§ 794.100 The statutory provision.

Section 7(b)(3) of the Act provides a partial exemption from the overtime pay requirements of section 7 (but not from the minimum wage, equal pay or child labor requirements) for any employee employed

by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if:

(A) The annual gross volume of sales of such enterprise is less than \$1 million exclusive of excise taxes;

(B) More than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) Not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the minimum wage applicable to him under section 6, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

§ 794.101 Intended scope of exemption.

Under section 7(b)(3) of the Act, the intent of the exemption must be given effect in determining the scope of its application to an enterprise and to the employees of an enterprise. The statutory language must be applied to the facts in a manner consistent with the purpose of the exemption as evidenced by its legislative history. This purpose is to relieve the described enterprises from the application of the Act's general overtime pay requirements (in the limited manner specified in the exemption) to employment in their activities of distributing petroleum products. Such employment was stated to be affected by climatic, seasonal, and other pertinent factors characteristic of business operations in the distribution of

such products. (See, in this connection, the following documents of 87th Cong., first sess.; H. Rept. No. 75, pp. 26, 27, 36; 105 Congressional Record (daily edition) p. 4519; S. Rept. No. 145, pp. 37, 50; H. Rept. No. 327, p. 18; Hearings before Senate Subcommittee on Labor on S. 256, S. 879, and S. 895, at pp. 411-424; Hearings before House Special Subcommittee on Labor on H.R. 2935, at pp. 422-425 and 627-629; and these documents of the 89th Cong., second sess.; H. Rept. No. 1366, pp. 12, 13, and 43; Cong. Record (daily edition) p. 10745; S. Rept. No. 1487, pp. 32 and 51.)

§ 794.102 Guides for construing exemptions.

It is judicially settled that "The details with which the exemptions in this Act have been made preclude their enlargement by implication" and "no matter how broad the exemption, it is meant to apply only to" the employment specified in the statute. Conditions specified in the language of the Act are "explicit prerequisites to exemption." Accordingly, it is the well-established rule that exemptions from the Act "are to be narrowly construed against the employer seeking to assert them" and their application is limited to those who come "plainly and unmistakably within their terms and spirit." An employer who claims such an exemption has the burden of showing that it applies. See *Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6); *Addison v. Holly Hill*, 322 U.S. 607; *Maneja v. Waialua*, 349 U.S. 254; *Phillips v. Walling*, 334 U.S. 490; *Arnold v. Kanowsky*, 361 U.S. 388; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290; *Walling v. General Industries Co.*, 330 U.S. 545.

§ 794.103 Dependence of exemption on engagement in described distribution.

By its terms, section 7(b)(3) provides a partial and contingent exemption from the general overtime pay requirements of the Act applicable to "any employee * * * employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum product * * *." Thus, engagement in the described distribution is an "explicit prerequisite to exemption" (*Arnold v. Kanowsky*, 361 U.S. 388), as

are the other express conditions set forth in the section. A natural reading of the statutory language suggests that the employee as well as the enterprise must be so engaged in order for the exemption to apply (see *Porto Rico Light Co. v. Mor*, 253 U.S. 345). To the extent that its employees are engaged in the described distribution, the enterprise is itself so engaged (see *Kirshbaum v. Walling*, 316 U.S. 517; and see §794.104). Also, whenever an enterprise is so engaged, any of its employees will be considered to be “employed by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products” if the duties of his employment require him to perform any operations or provide any services in carrying on such activities of his employer, and if the employee is not engaged in a substantial portion of his workweek in other activities which do not provide a basis for exemption under section 7(b)(3). Such an interpretation of the quoted language is believed necessary to give effect to the intended scope of the exemption as explained in §794.101. Where an enterprise is exclusively engaged in the wholesale or bulk distribution of petroleum products and meets all the other requirements of section 7(b)(3), all of its employees who are paid for their hours of work in accordance with section 6 of the Act and the special pay provisions of section 7(b)(3) (see §§778.602 of this chapter and §§794.135 through 794.136) will be exempt from the overtime pay requirements of the Act under the principles stated above. What products are included in the term “petroleum products” and what constitutes the “bulk distribution” of such products within the meaning of section 7(b)(3) are discussed in §§794.132 through 794.133.

§ 794.104 Enterprises engaged in described distribution and in other activities.

An enterprise may be engaged in the wholesale or bulk distribution of petroleum products, within the meaning of section 7(b)(3), without being exclusively so engaged. Such engagement may be only one of the several related activities, performed through unified operation or common control for a common business purpose, which con-

stitute the enterprise (see §794.106) under section 3(r) of the Act. If engaging in such distribution is a regular and significant part of its business, an enterprise which meets the other tests for exception under section 7(b)(3) will be relieved of overtime pay obligations with respect to employment of its employees in such distribution activities, in accordance with the intended scope (see §794.101) of the exemption. The same will be true with respect to employment of its employees in those related activities which are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. There is no requirement that engaging in such activities constitute any particular percentage of the enterprises’s business. However, in the case of an enterprise engaged in other activities as well as in the wholesale or bulk distribution of petroleum products (including related activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), an employee employed in such other activities of the enterprise is not engaged in employment which the exemption was intended to reach (see §794.101). Such an employee is not brought within the exemption by virtue of the fact that the enterprise by which he is employed is engaged with other employees in the distribution activities described in section 7(b)(3). This accords with the judicial construction of other exemptions in the Act which are similarly worded. See *Connecticut Co. v. Walling*, 154 F. 2d 522, Certiorari denied, 329 U.S. 667; *Northwest Airlines v. Jackson*, 185 F. 2d 74; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52; *Fleming v. Swift & Co.*, 41 F. Supp. 825, aff’d 131 F. 2d 249.

§ 794.105 Other requirements for exemption.

The limited overtime pay exemption provided by section 7(b)(3) applies to any employee compensated in accordance with its terms who is “employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products” as explained in §§794.103 through 794.104 if