

§ 794.140

to the activities thus customarily performed, engagement in them by the employee for a substantial portion of his workweek will render section 7(b)(3) inapplicable to him for that workweek. On the other hand, where an employee, who is otherwise engaged in the exempt activities (the wholesale or bulk distribution of petroleum products, including activities which are a necessary part thereof, and in activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), devotes an insubstantial amount of time (for administrative purposes, not more than 20 percent in a workweek) to these foreign activities, the section 7(b)(3) exemption will not for that reason be considered inapplicable to him.

§ 794.140 Compensation requirements for a workweek under section 7(b)(3).

(a) Exemption of an employee in any workweek under section 7(b)(3) is expressly conditioned on and limited by the special compensation provisions which it contains. These are set forth in full text in § 794.100. They require payment to the employee of compensation at specified rates for certain periods within the workweek when such periods are included in his hours of work. Their application requires an increase of at least 50 percent in the minimum wage rate otherwise applicable to the employee in such workweek "for employment in excess of forty hours" and, in addition, if such employment is "in excess of twelve hours in any workday, or * * * in excess of fifty-six hours in any workweek, as the case may be," the employee must be paid overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in the workweek in excess of the specified daily standard or in excess of the specified weekly standard, whichever is the greater number of overtime hours. The sections following discuss separately the application of these provisions to workweeks when the employee's hours of work do not exceed the daily or weekly standard specified in section 7(b)(3), and to workweeks when hours in excess of the

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daily or the weekly standard are worked.

(b) The special compensation requirements of section 7(b)(3) apply to an employee otherwise eligible for the exemption whenever he works more than 40 hours in a workweek for an enterprise described in and operating under this subsection. In any workweek in which the employee does not work more than 40 hours for his employer only the minimum wage requirements of section 6 are applicable. This is because section 7(b)(3) operates only as an exemption from the requirement of section 7(a) that compensation at a rate not less than one and one-half times the employee's regular rate must be paid for all hours worked by him in excess of 40 in the workweek. (This general 40-hour workweek standard has been applicable since Feb. 1, 1969, to all employment within the general coverage of the Act, regardless of whether any overtime pay requirements were previously applicable to such employment before the provisions added by the Fair Labor Standards Amendments of 1966 became effective.)

§ 794.141 Workweeks when hours worked do not exceed 12 in any day or 56 in the week; compensation requirements.

(a) The overtime pay exemption provided by section 7(b)(3) is "limited to 12 hours a day and 56 hours a week" in any workweek; the exemption is provided "for employment up to 12 hours in any workday and up to 56 hours in any workweek" without any payment for overtime hours at one and one-half times the regular rate being required. However, the exemption from any such time-and-one-half payment is limited to workweeks when "no more" than the specified hours are worked and is contingent on payment to the employee in such a workweek of "compensation for hours between 40 and 56" at a rate "not less than one and one-half times the applicable minimum wage." (H. Rept. No. 1366, pp. 12-13, 43, and S. Rept. No. 1487, p. 32, 89th Cong., second sess.) Thus, the exemption will be applicable to an employee otherwise eligible under the principles previously discussed in this part in any workweek when his hours of work do not exceed

12 in any day or 56 in the week if, and only if, his "compensation for employment in excess of forty hours" is "at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6", as provided in section 7(b)(3). This means that in addition to the requirement of section 6, under which the first 40 hours of work must be paid for at a rate not less than the minimum hourly wage rate therein specified, the compensation requirements applicable to such an employee for whom the 7(b)(3) exemption is claimed include any increase in his regular straight-time pay rate for the hours worked in excess of 40 which may be necessary in order to raise the wage rate for such hours to a level of 50 percent above the rate required under section 6. Of course, if the employee is employed at a regular straight-time rate for all his hours of work which is as great or greater than one and one-half times the minimum wage applicable to him under section 6, no increase for the hours in excess of 40 will be required under the provisions of section 7(b)(3).

(b) The general minimum wage rate applicable to employees in employment that was subject to the minimum wage provisions of the Act prior to the effective date of the Fair Labor Standards Amendments of 1966 is \$1.60 an hour. Under section 7(b)(3) an employee of a wholesale or bulk petroleum products distributor to whom this rate is applicable must be paid at least \$2.40 an hour for hours worked in excess of 40 in the workweek in order for the exemption to apply. Many employees of such distributors are subject to the \$1.60 minimum wage rate under section 6 either because they are traditionally covered as employees individually engaged in commerce or in the production of goods for commerce as defined in the Act or because the enterprise coverage provisions in effect prior to the 1966 amendments (applicable to enterprises with an annual gross volume of \$1 million or more including excise taxes) would subject their employment to the minimum wage provisions if the 1966 amendments had not been enacted. In the case, however, of an employee of such a distributor whose employment comes within the minimum wage pro-

visions only because of the 1966 amendments (which reduced the annual gross volume for covered enterprises to \$500,000 on Feb. 1, 1967, and to \$250,000 on Feb. 1, 1969, exclusive of specified separately stated excise taxes at the retail level), the minimum wage rate applicable under section 6 was \$1.30 an hour until February 1, 1970, when it increased to \$1.45 an hour. Beginning February 1, 1971, the minimum wage rate applicable to such an employee will be the same (\$1.60 an hour) as that presently applicable to employment covered by the provisions of the prior Act. For employees subject to the \$1.30 minimum wage rate the rate required for work over 40 hours under section 7(b)(3) was accordingly \$1.95 an hour; for those subject to the \$1.45 rate beginning February 1, 1970, such rate is \$2.175. A discussion of the present and prior coverage of the Act will be found in part 776 of this chapter, when a revision of such part discussing enterprise coverage is published.

§ 794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.

(a) As noted in § 794.141, the partial exemption provided by section 7(b)(3) from the requirement that overtime hours be paid for at not less than one and one-half times the employee's regular rate applies only to "employment up to 12 hours in any workday and up to 56 hours in any workweek." The statute makes it plain that in any workweek when an employee otherwise eligible for the exemption works more than the specified daily or weekly hours the exemption applies only "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." Failure of the employer to pay overtime compensation under these special standards defeat the exemption. (See *Wirtz v. Osceola Farms Co.*, 372 F. 2d 584 (C.A. 5); *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 298 (C.A. 9).)

(b) Under this provision, the number of hours worked in the workweek