

## Chapter 25

## OTHER EXEMPTIONS

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## Chapter 25

## OTHER EXEMPTIONS

## 25a LAUNDRY AND CLEANING ESTABLISHMENTS - 1961 SEC 13(a)(3)

25a00 General provisions and IB 781. (a) For periods prior to 2/1/67, Sec 13(a)(3) provided an exemption from the MW and OT provisions of the FLSA for "any employee employed by any establishment engaged in laundering, cleaning, or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: Provided, that 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business".

(b) IB 781 (WH Publication 1043) contains the interpretations by the Adm of the scope and terms of this exemption.

25a01 Classification of business as manufacturing, mining, transportation, communications, or other. (a) WH publication 1043 - IB 781.12(a), (b), (c), and (d) contain examples of customers who are considered to be engaged in the "mining, manufacturing, transportation, or communications business", for purposes of old Sec 13(a)(3). The following are further examples of customers who are considered to be so engaged: newspapers, tire recappers, and retail ice cream stands which process dairy products into ice cream.

(b) Among those sales which are considered to be sales made to a customer who is not engaged in the "mining, manufacturing, transportation, or communications business" are sales to the following (see also WH Publication 1043 - IB 781.14): wholesale and warehouse businesses which do not manufacture but merely serve as wholesale distributors, gasoline stations (regardless of ownership), grain commission offices, and military bases such as Air Force bases, naval stations, and the like.

25a02 MW rate. The MW standard to be applied on and after 5/1/74, is determined by testing the employment by the requirements of the Act as it read before the 1966 Amendments. If a particular laundry or cleaning establishment would have been exempt under old Sec 13(a)(3) the MW standard of Sec 6(b) applies. On the other hand if the establishment would not have been exempt under old Sec 13(a)(3), the MW rate of Sec 6(a)(1) applies to individually covered employment.

## 25c LOCAL BULK PETROLEUM DISTRIBUTION ENTERPRISES - SEC 7(b)(3)

25c00 Statutory provisions and IB 794. (a) Sec 7(b)(3) provides a partial OT exemption 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 \$1,000,000 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 forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six 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".

(b) IB 794 contains the basic interpretations of the scope and terms of the Sec 7(b)(3) exemption.

~~25c01 Failure to meet standards for "excess" hours. The compensation requirements for an employee who otherwise qualifies for exemption under Sec 7(b)(3) are stated in the conjunctive; consequently failure to compensate an employee under either of the requirements (1) at a rate not less than one and one-half times the applicable M for hours in excess of 40 in a w and (2) time and one half his regular rate for hours in excess of 12 in a day or 56 in a week) makes the exemption inapplicable to the employee during that w/w and OT then becomes due for hours in excess of the applicable OT standard in the normal manner.~~

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25c02 Independently owned and controlled - leasing of real property. Notwithstanding the provisions of IB 794.114 and 794.115 Wage-Hour will not deny the Sec 7(b)(3) exemption if the tests are otherwise met in cases where a bulk petroleum distributor leases and does not own real property used in his business provided the lease is bona fide. A lease of valuable property owned by the oil company which the distributor represents for only a nominal or token rent will not be deemed bona fide.

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The following SUPERSEDES FOH 25c01 (see also related Inserts 1389, 1390 and 1392):

25c01 Failure to meet standards for "excess" hours. The compensation requirements for an employee who otherwise qualifies for exemption under Sec 7(b)(3) are stated in the conjunctive; consequently an employee must be paid both (1) at a rate not less than one and one-half times the applicable MW for hours in excess of 40 and up to 56 in a w/w and (2) time and one-half his/her regular rate for hours in excess of 12 in a day or 56 in a week. If OT has not been paid in accordance with either or both of these standards, BW are owed for hours worked in excess of these standards.

## 25d SEAFOOD AND FISHING - SECS 13(a)(5) AND 13(b)(4)

25d00 General provisions of Secs 13(a)(5) and 13(b)(4) and IB 784.

(a) Sec 13(a)(5) provides an exemption from the MW and OT provisions of FLSA for "any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee". This exemption was not changed by the 1974 Amendments.

(b) Effective 5/1/74 Sec 13(b)(4) provides an exemption from the OT provisions of FLSA for "any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproducts thereof and who receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed."

(c) The phrase "and who receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed" was added to the Act by the 1974 Amendments effective 5/1/74. Consequently, prior to 5/1/74 employment within the terms of this exemption was completely exempt from OT.

(d) Effective 5/1/75 Sec 13(b)(4) is amended by changing "48 hours" to "44 hours"; consequently, effective on this date OT is due after 44 hours per week. Effective 5/1/76 Sec 13(b)(4) is repealed and OT is due after 40 hours per week.

(e) IB 784 contains the interpretations by the Adm on the scope and terms of the FLSA Secs 13(a)(5) and 13(b)(4) exemptions for periods prior to and after 5/1/74.

25d02 Fish farming. (a) Fish farming is included in the term "farming in all its branches" and an employee performing such activities is engaged in agriculture within the meaning of Sec 3(f) (see FOH 20b04 and IB 780.109). It may also be necessary in some situations to consider the application of Secs 13(a)(5) and 13(b)(4), or a combination of exemptions.

(b) In applying Sec 13(a)(5), the activities named in the exemption and such other activities as are so functionally related to the named operations that they are, as a practical matter, necessarily and directly a part of the named operations are considered to be exempt activities. Thus, the repairing and cleaning of fish ponds, the fertilization and breeding of fish, and the sorting of fish are exempt

activities. Also exempt, when performed as an integral part of the above operations (see IB 784.113), would be the maintenance and repair of the tools and equipment used in the above operations. The construction of new ponds or buildings is not an exempt activity under Sec 13(a)(5).

(c) The principles set out in IB 784.106, 784.127, and 784.153 shall be followed in applying the Secs 13(a)(5) and 13(b)(4) exemptions to clerical employees of "fish farms". In this connection, the maintenance of records which are an integral part of the Sec 13(a)(5) exempt fish farming activities, such as the maintenance of breeding records, records of feed consumption related to fish production and the like, would be considered as exempt activities under Sec 13(a)(5).

(d) A 20% tolerance for nonexempt work is permitted under both Secs 13(a)(5) and 13(b)(4). (See IB 784.116.)



## 25e FORESTRY AND LOGGING OPERATIONS

25e00 General provisions. (a) Effective 5/1/74, Sec 13(b)(28) exempts from the OT provisions of the FLSA: "any employee employed in planting or tending trees, cruising, surveying or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight". (Emphasis added by underscoring.)

(b) For the period 2/1/67 - 4/30/74, the wording of old Sec 13(a)(13) was identical to current Sec 13(b)(28); however, Sec 13(a)(13) was both a MW and OT exemption.

(c) Prior to 2/1/67 the wording of Sec 13(a)(15) was identical to Sec 13(a)(13) except that the number of employees read "does not exceed twelve" instead of "does not exceed eight". (Emphasis added.)

(d) Under the Act as amended, the exemption continues to be inapplicable in any w/w where the number of employees employed by the employer in the named operations exceeds twelve. The MW standard of Sec 6(a)(1) and OT after 40 hours applies to such employment. Beginning 5/1/74, in any w/w where all the tests of Sec 13(b)(28) are met except that the number of employees exceeds eight but does not exceed twelve, the exemption does not apply and the MW standard of Sec 6(b) and OT after 40 hours apply. In any w/w where all the tests of the exemption are met, the MW rate of Sec 6(b) applies and the employment is exempt from OT.

(e) The principles in IB 788 shall be followed in applying Sec 13(b)(28) effective 5/1/74 and old Secs 13(a)(13) and 13(a)(15) prior to 5/1/74, and for rate purposes; the number twelve shall be substituted for the number eight as appropriate. In the same manner the principles stated in FOH 25e01 through 25e08 are applicable for purposes of Secs 13(a)(13), 13(a)(15), and 13(b)(28).

25e01 Joint individual and corporate employment of logging employees. Where an employer operates a logging enterprise as an individual and another logging enterprise through a corporation managed and substantially owned by him, because of their affiliation, the individual operations and the corporate operation, although separate legal entities, are in economic reality an integrated business enterprise managed and substantially owned by the same individual person who may equally control and receive the benefit of the services of the employees of both operations. Consequently, if the total number of employees employed in a particular w/w in both the individual and corporate logging operations named in the exemption exceeds 8, ( or 12 under old Sec 13(a)(15) prior to 2/1/67) the exemptions are inapplicable to any of the employees for that w/w. This is so regardless of whether the two operations are conducted independently in that there is no interchange of employees or equipment.

25e02 Effect of number of employees of employer on forestry and logging exemptions. The exemptions apply to the employees engaged in the logging operations named in the exemptions even though their employer has 9 (or 13 under old Sec 13(a)(15)) or more employees, so long as only 8 (or 12 under old Sec 13(a)(15)) or fewer of the employees are employed in the named logging operations for the particular w/w. Thus, if an employer employs only 8 (or 12 under old Sec 13(a)(15)) employees in the named logging operations, and employs other employees in operations not named in the exemption, such as sawmill operations, the exemptions are not defeated because of the fact that he employs more than 8 (or 12 under old Sec 13(a)(15)) employees altogether. The exemptions will not apply, however, to those employees employed in operations not named in the exemption. (See IB 788.14.)

25e03 Employees to be counted in applying the forestry and logging exemptions. The forestry and logging exemptions are limited to those employees employed in the operations named in the exemptions, which operations include "the incidental activities normally performed by persons employed in them" (IB 788.6). Crew supervisors (even though exempt under Reg 541), cooks, kitchen helpers, bullcooks, timekeepers, and repair shop mechanics of a logging camp are engaged in such incidental activities and are the usual members of crews which go into the woods for the purpose of felling timber and preparing and transporting logs. Therefore, these employees must be counted in determining the number of employees the employer has engaged in forestry and logging operations. If the total number of employees so engaged exceeds eight (12 under old Sec 13(a)(15)) when crew supervisors, cooks, kitchen helpers, bullcooks, timekeepers, and repair shop mechanics are counted, the exemptions do not apply.

25e04 Employees in planing and sawmill operations not exempt. (a) Employees in a planing mill or in a sawmill, including such portable mills in the woods, are performing operations connected with the processing of logs and, therefore, are not exempt.

(b) Employees of a mill or a contract carrier who truck logs from the woods to the mill are engaged in a named operation (transporting logs to the mill) and are within the exemptions if the other tests are met. Transporting lumber from the mill is not an exempt operation.

25e05 Construction of access logging roads and trails. (a) Employees engaged in building minor access roads, such as "plank" roads, "corduroy" roads, and similar relatively simple roads for the transportation of logs from the felling site to a central collection point, may be exempt. Another example is the cutting of a trail, known as a "skid road", through the woods for the removal of logs dragged by a tractor or snaked out by a cable attached to a donkey engine. Such a road may require minor clearing operations, including the removal of underbrush, stumps, and trees to give the necessary access.

(b) Exempt road building is that sort normally done by the members of a logging crew. Employees who are employed in constructing major logging roads, and employees building roads normally built by persons who specialize in building roads, are not engaged in forestry or logging operations within the meaning of the exemptions. Major logging roads are those from the central collecting points to the mill.

25e06 Forest nurseries. Forest nurseries grow seedlings specifically for forest or woodland planting, and are distinguished from ordinary landscape nurseries by the fact that they usually make large-quantity sales of low-priced young seedlings, rather than small-quantity sales of more expensive and older trees. Generally, employees engaged in seeding new beds and transplanting seedlings in a forest tree nursery for eventual forest planting come within the forestry and logging exemptions, provided the limitation on the number of employees is met by the employer. Such employees are not engaged in "agriculture".

25e07 Logging incidental to land clearing or sawmilling. The exemptions apply to employees who felled timber or transport logs to the mill, regardless of the fact that the logging or transporting may be incidental to land clearing or sawmilling operations. However, the trees felled must be timber, that is, material for construction or processing. The exemptions do not apply, in a land clearing project, where the felled trees are burned or hauled away for dumping, nor does it apply to tree trimming along power line rights-of-way.

25e08 Nonexempt work enforcement policy. The exemption for an employee employed in exempt work is defeated in any week in which he performs a substantial amount (more than 20%) of nonexempt work. (See IB 788.17.)

25f HOMEWORKERS MAKING WREATHS - SEC 13(d), SECOND PART

25f00 General provisions and IB 780, Subpart K. (a) Sec 13(d), second part, exempts from the provisions of Secs 6, 7, and 12 "any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths)".

(b) IB 780, Subpart K contains the interpretations by the Adm of the scope and terms of the Sec 13(d), second part, exemption.

25f01 "Wreaths". The term "wreaths", as used in Sec 13(d), includes not only the typical circular patterns but also other patterns, such as sprays and ropes.

## 25h EMPLOYEES OF HOSPITALS - FLSA SEC 7(j)

25h00 General provisions. (a) The exemption from OT provided by FLSA Sec 7(j) for employers engaged in the operation of a hospital is explained in Sec 778.601 of IB, Part 778. This section supplements IB 778.601.

(b) The exemption in Sec 7(j) applies to employees of employers engaged in the activities comprising the operation of a hospital.

(1) Employees of the hospital entity. Employees employed by the hospital entity may be subject to Sec 7(j). This includes not only the typical hospital employees who work in the hospital but may also include, for example, employees of an employer who owns and operates or operates pursuant to a contract more than one hospital, who are engaged in performing the following services for the hospitals: public relations, payroll, accounting, administrative services, engineering, architecture and planning, community relations, and personnel and labor relations and remodeling.

(2) Employees employed in hospital operations. Employees in the various medical laboratories and therapy services located in the hospital and operated by the employer exclusively as an integral and essential part of the hospital may be subject to Sec 7(j). Such employees must be employed in medically related activities connected with the operation of the hospital. On the other hand where the laboratory or therapy services are only providing a service to the hospital and operate as an independent business which is not part of the hospital enterprise, Sec 7(j) will not apply to their employees because they are not deemed "employed by" an employer engaged in the operation of a hospital". Similarly, an independent contractor providing nonmedically related services, such as a contractor who provides janitorial or maintenance services to a hospital may not use Sec 7(j) since the contractor is not engaged in the medically related operations of a hospital.

Further, an employer engaged in the operation of a hospital may not utilize the provision to relieve himself of his obligations under Sec 7(a) of the Act with respect to any of his employees who devote a substantial part of their worktime in the w/w to activities other than those in connection with the operation of the hospital, such as custodial work for other tenants who occupy leased space in the building. Such nonexempt work will be considered substantial if it occupies more than 20% of the time worked by the employee in the w/w.

(c) Employees of a temporary help company working on assignments in hospitals are considered to be jointly employed by both the temporary help company and the hospital in which they are employed. For enforcement purposes, Wage-Hour will not take exception to a claim by a hospital that Sec 7(j) applies during any 14-day period where the employees work exclusively for a single hospital provided that before performance of the work an agreement is made between the hospital and the employees to use the 14-day period in lieu of the normal w/w. This position is taken without prejudice to the rights of individual employees under Sec 16(b). On the other hand, Sec 7(i) will not apply to any employee who during a 14-day work period is employed in more than one hospital even though all such hospitals may be operating under Sec 7(j) with respect to their regular employees.

25h01 Use of Sec 7(j). A hospital has the option of complying with the OT provisions of Sec 7(a) or of utilizing Sec 7(j) with respect to any or all of its employees. Thus, a hospital may elect to pay certain employees OT compensation as provided by Sec 7(a) and with respect to other employees, may elect to utilize Sec 7(j) of the Act.

25h02 Agreement or understanding. An agreement or understanding may be presumed to exist for the purposes of Sec 7(j) with respect to any employee who accepts payment of wages pursuant to notice by the hospital that compensation will be made according to Sec 7(j). Posting a notice on a bulletin board or advising employees by means of payroll inserts constitutes sufficient notification for this purpose.

25h03 Application of the exemption. (a) The regular rate of pay for salaried employees under Sec 7(j) is determined in the normal manner (see FOH 32b04) except that the "14-day period" is used rather than the w/w. Thus, for example an employee may be paid a salary intended to compensate for up to 80 hours in a 14-day period in which case his regular rate would be obtained by dividing his bi-weekly salary by 80 and he would be due  $1\frac{1}{2}$  times this rate for each OT hour in the 14-day period.

(b) Where a swing shift rotation results in an employee working two 8-hour shifts within a 24-hour period, as defined in IB 778.601(d), the employee would be entitled to receive OT compensation at a rate not less than one and one-half times his regular rate of pay for the hours worked on the second 8-hour shift. This is true irrespective of the fact that the second 8-hour work period in the workday is a regular part of the 80 hours scheduled biweekly by the hospital or the fact that the second 8-hour shift starts the second 40-hour work period in the 14-day period. It should be noted that such premium for daily OT may be credited towards OT compensation due for hours in excess of 80 for that period.

25h04 Use of Sec 7(g)(2). An employer who uses Sec 7(j) may pay OT in accordance with the principle of Sec 7(g)(2). (See FOH 32h)

25h05 Use of fluctuating w/w. (a) If an employee under Sec 7(j) is paid a salary with the understanding that it constitutes ST pay for all hours worked in a 14-day period, his regular rate (not less than the applicable MW rate) would be obtained by dividing his bi-weekly salary by the number of hours worked in the 14-day period and he would be due additional half time for each OT hour worked.

(b) An employee employed on a fluctuating w/w basis must receive his full bi-weekly salary regardless of how few hours are worked in the 14-day period. The usual rules regarding deductions apply. (See FOH 32b04b(b).)

251 NURSING HOMES AND RELATED INSTITUTIONS - OLD 1966 SEC 13 (b) (8), SECOND PART - PRESENT 1974 Sec 7(j)

25100 General provisions of the exemption. (a) Effective 5/1/74, Sec 7(j) is amended by the addition of the phrase "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises . . .". Consequently, effective 5/1/74 employment in such establishments may be subject to the special OT provisions of Sec 7(j) in the same manner as hospital employment. The interpretations in IB 778.601 and FOH 25h00-25h05 are applicable to such employment beginning 5/1/74.

(b) Prior to 5/1/74 Sec 13(b)(8), second part, exempted from the OT provisions of the FLSA: "Any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". This part of Sec 13(b)(8) second part was repealed effective 5/1/74.

25101 Institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises defined. FOH 12f02 contains the definition of such institutions. This definition shall be used for purposes of Sec 13(b)(8), 2nd part, prior to 5/1/74 and Sec 7(j) beginning 5/1/74.

25102 Sec 13(a)(2) not applicable to nursing homes. Nursing homes are specifically excluded from exemption under Sec 13(a)(2).

25103 Laundry operations by employees of residential care institutions. Sec 7(j) (see FOH 25100) provides a partial OT exemption for "an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises". Laundry workers of an establishment which is considered such an institution, employed by and engaged in performing the work of that establishment, may therefore qualify for the exemption.



**25j AMUSEMENT OR RECREATIONAL ESTABLISHMENT, ORGANIZED CAMP, OR RELIGIOUS OR NONPROFIT EDUCATIONAL CONFERENCE CENTER - SEC 13(a)(3)**

**25j00 General provisions.**

- (a) Sec 13(a)(3) provides an exemption from the MW and OT provisions of the FLSA for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year".
- (b) An "organized camp" characteristically provides room and board in a rustic setting over a sustained period of time. An "organized camp" is one with a program of activities and sustained supervision, provided for a set fee. The American Camping Association defines a "camp" as "a sustained experience which provides a creative recreational and educational opportunity in group living in the out of doors. It utilizes trained leadership and the resources of natural surroundings to contribute to each camper's mental, physical, social, and spiritual growth."
- (c) A "religious or nonprofit educational conference center" is a meeting center providing for religious, educational and leadership growth experiences for both youth and adults. They are usually built in secluded and scenic areas and often provide residence accommodations, meal service and recreational facilities. Most are under the sponsorship of religious denominations and are operated on a nonprofit and tax-exempt basis.

**25j01 Tests for the exemption.**

- (a) An "amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center" will be exempt under Sec 13(a)(3) of the amended Act, if it meets either test (A) or test (B) as explained in (b) and (c) below.
- (b) **"(A) Does not operate for more than seven months in any calendar year."**

An amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center will be exempt if "it does not operate for more than seven months in any calendar year". Whether an establishment "operates" during a particular month is a question of fact, and depends on whether it operates as an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center. If an establishment engages only in activities such as maintenance operations or ordering supplies during the "dead season", it is not considered to be operating for purposes of the exemption.

- (c) **(B) 33 1/3% test.**

(1) An amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center will be exempt if "during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year". Since the language of the statute refers to receipts for any six months (not necessarily consecutive months), the monthly average based on total receipts for the six individual months in which the receipts were smallest should be tested against the monthly average for six individual months when the receipts were largest to determine whether this test is met.

- (2) To illustrate the principles in (1) above, consider an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center that is in a covered Sec 3(s)(1) enterprise as defined by the amended Act. The establishment operated for nine months in the preceding calendar year. The establishment was closed during Dec., Jan., and Feb. The total receipts for May, June, July, Aug., Sept., and Oct. (the six months in which the receipts were largest) totaled \$260,000, a monthly average of \$43,333; the total receipts for the other six months totaled \$75,000, a monthly average of \$12,500. Since the average receipts of the latter six months were not more than 33 1/3% of the average receipts for the other six months of the year, the Sec 13(a)(3) exemption will apply.

**25j02 Establishments in national parks, national forests, or on lands in the National Wildlife Refuge System.**

- (a) Establishments such as those selling groceries, curios, and dry goods, as well as gas stations, hotels, motels, restaurants and the like, are generally not within the categories of establishments which are commonly recognized as inherently of an amusement or recreational character within the meaning of Sec 13(a)(3) of the Act. However, certain such establishments in national parks, forests, or the Wildlife Refuge System, are limited by policy of the Interior or Agriculture Departments to merchandising only those items and providing only those services appropriate for the public use and enjoyment of the areas administered by them. These establishments operate under an exclusive contract with these Departments and only during the season when these areas are open to the public. Under these circumstances, the activities of these establishments are considered to have a sufficiently intimate relation to the operation of these recreational areas to warrant their characterization as "amusement or recreational" establishments.
- (b) As provided in Sec 13(a)(3), this exemption from MW (Sec 6) and OT (Sec 7) "does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from Sec 6, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture;"
- (c) However, such employees, although subject to the MW, may qualify for a partial exemption from OT as provided in Sec 13(b)(29):

"any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed."

- (d) In order to qualify for exemption under Sec 13(b)(29), one of the seasonality tests contained in Sec 13(a)(3) must be met by the establishment. Moreover, the possible application of CWHSSA to mechanics and laborers employed by such an establishment should not be overlooked.

**25j03 Resort hotels.**

- (a) Resort hotels are generally not considered amusement or recreational establishments for purposes of Sec 13(a)(3). However, if a resort hotel operates a particular facility (such as a golf course or swimming pool) as a separate establishment, employees of such an establishment might qualify for exemption under Sec 13(a)(3) from MW and OT if all the tests are met.
- (b) Where a resort hotel is located in a national park, national forest, or on lands in the National Wildlife Refuge System, such establishment is characterized as an "amusement or recreational" establishment (see FOH 25j02(a) above), and its employees would be subject to MW and to OT after 56 hours in the w/w under Sec 13(b)(29) (see FOH 25j02(c) above).

**25j04 "Employed by" an exempt establishment.**

- (a) For purposes of applying Sec 13(a)(3), the general principles set forth in IB 779.308 - 779.311 apply. Thus an employee, to be exempt, must be "employed by" the exempt establishment. In some situations, such as an amusement park, baseball park, or racetrack, food and souvenir vendors are employed by a concessionaire on the premises. If the operations of the concessionaire constitute a separate establishment, the tests of Sec 13(a)(3) are applied to the concessionaire's establishment separately without regard to the operations of the host establishment. On the other hand, if the concessionaire and host constitute a single establishment, as is usually the case, the tests apply on the basis of all the operations of the establishment, including those of the concessionaire. (See IB 779.302 - 779.306.)
- (b) Employment in central functions of an organization operating more than one such establishment, as in the case of employees of a central office, warehouse, garage, or commissary which serves a chain of exempt "amusement or recreational" establishments would not be within the exemption under Sec 13(a)(3).
- (c) The word "establishment" has the same meaning under Sec 13(a)(3) as under old Sec 13(a)(2) (see IB 779.303).

**25j05 Employees at a convention.**

Employees at a convention (including those employed by a concessionaire) are not within the scope of the Sec 13(a)(3) exemption as a convention is not considered an exempt establishment.

**25j06 Country and town clubs.**

- (a) A country or town club whose membership fees are nominal (for example, \$100 per year) would be considered to be open to the general public and may qualify for the Sec 13(a)(3) exemption if either test described in (A) or (B) is met.
- (b) However, a country or town club which is not open to the general public, but is available only to a select group of persons (or their guests) who have been specifically selected to club membership or whose membership fees are so high as to exclude the general public, is not considered an amusement or recreational establishment for purposes of the Sec 13(a)(3) exemption.

**25j07 Marinas.**

A marina is an establishment which is typically engaged in providing boat storage for rent, in selling boating supplies, fishing tackle, oil, fuel, grocery items, new and used boats, as well as providing refinishing and repair service for boats. Such an establishment is not considered an amusement or recreational establishment within the meaning of Sec 13(a)(3). Such an establishment is used by persons engaged in recreation but does not itself provide the recreation.

**25j08 "New business" - application of Tests A and B.**

- (a) Tests A and B refer to a calendar year throughout which the operations of the establishment can be tested to determine its character as a seasonally operated place of business. In the case of a new business, Tests A and B are to be applied as follows:

(1) Test A.

Generally, Test A is not met by a new business establishment which has operated for no more than 7 months in a calendar year for the reason that its business operations did not start until a considerable portion of the year had elapsed. If, however, the character of the establishment is that of an "amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center" whose operations are shown by acceptable evidence to be subject to seasonal factors which would require the establishment to cease operations for five months or more in the calendar year even if it had been in business for the entire calendar year, the new business establishment may meet the requirements of Test A so that its employees will be exempt. For example, an employer may open a new ski slope establishment in November under circumstances where it is clear that the establishment would have operated less than seven months in the year regardless of the date it began operations. In such a case the establishment could claim the exemption under Test A.

(2) Test B.

Test B is based on the establishment's experience "during the preceding calendar year." Generally this requires an entire year's experience to apply Test B in order to make the necessary calculation. However, in the case of a new business where there is no "preceding calendar year" on which to apply Test B, WH will apply the following criteria in determining the applicability of Sec 13(a)(3)(B):

- a. If the enterprise of which the new establishment is a part operates other seasonal amusement or recreational establishments, organized camps, or religious or nonprofit educational conference centers of the same type in the same general area under substantially the same conditions and all such establishments conclusively and clearly meet the condition of Test B;  
or
  - b. If such employer does not have other such establishments but other employers operating the same type of establishment in the same general area under substantially the same conditions and manner of operation clearly are entitled to exemption under Test B.
- (b) Wage-Hour will consider the exemption applicable in the year the new establishment begins operation if either of these tests are met provided, however, that in the event after a year's operation the establishment does not qualify under Test B, proper MW and OT is paid retroactively.

**25j09 Summer programs of schools.**

Some elementary or secondary schools or institutions of higher education which are academically accredited during the fall through spring semesters operate establishments that provide summer recreation or summer camp programs. Where such programs meet the requirements of Sec 13(a)(3)(A) or (B) and are not a part, continuation, or extension of the accredited academic program of the school, such an establishment may qualify as "an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center" pursuant to the exemption, even though some credit courses may be offered on a voluntary basis along with the recreational activities. The applicability of Sec 13(a)(3) to employees of such an establishment is not defeated by the fact that the same distinct physical place of business is for part of the year a "school" and for part of the year "an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center."

**25j10 Application of exemption to State and local government facilities.**

Golf courses, swimming pools, summer camps, ice skating rinks, and similar establishments are the type which may qualify for exemption under Sec 13(a)(3). Activities conducted during the summer months in a city's parks such as playground activities, arts and crafts, sports programs, and related activities which are in operation for not more than 7 months of the year may also come within this exemption. Playground counselors, arts and crafts instructors, and games leaders are the type of employees who may be exempt as long as they work solely in a park or parks in such exempt activities. Of course, as provided in FOH 25j04(b), the exemption is not applicable to central office employees of the parks or recreation department or to maintenance crews who operate out of a central facility responsible for the maintenance and cleaning of all the city's parks.

**25j11 Beach and boardwalk facilities.**

If the tests are met, the Sec 13(a)(3) exemption for amusement parks and recreational areas is applicable in the case of either private or public amusement and recreational activities directly related to the operation of a beach and boardwalk. Lifeguards on a beach, drivers of a motorized train along a boardwalk, and comfort station attendants at those stations operated solely for the convenience of the persons patronizing the beach come within this exemption. In the case of a public agency, those employees solely employed in the cleaning of the beach may also come within the exemption as long as they are not engaged in any work related to the cleaning of the city's streets or other parks (see FOH 25j04(b)).

**25j12 "Receipts" of State or local government-operated amusement or recreational establishments.**

Sec 13(a)(3)(B) contains certain percentage tests for "receipts" of the establishment. As used here, receipts are fees received from admissions. A state or local government-operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to qualify under Sec 13(a)(3)(B). However, such an establishment may qualify under Sec 13(a)(3)(A).

**25j13 Employees of an exempt establishment - construction activities.**

Employees of a Sec 13(a)(3) exempt establishment who engage in construction or reconstruction work do not qualify for the Sec 13(a)(3) exemption in any w/w in which they are so engaged. For example, employees of an amusement park who, in addition to their maintenance and repair work, engage in the erection of new structures, buildings, and places of entertainment designed to continue the public's

interest, are not within the Sec 13(a)(3) exemption in any w/w that some (there is no tolerance for such nonexempt work) construction work is performed. (See also FOH 21k07.)

**25j14 State and county fairs.**

The activities of the usual State or county fair are analogous to those of an amusement park, carnival, or circus, i.e., it has rides, exhibitions, side shows, etc., and its revenues are derived principally from selling admissions to such events. State and county fairs may thus qualify for the Sec 13(a)(3) exemption if the tests are met.

**25j15 Campsites and campgrounds.**

- (a) Campsites and campgrounds provide facilities where the general public may camp in tents, campers, recreational vehicles, travel trailers, or motor homes. They may include paved driveways and furnish water, waste and electrical outlets, picnic benches and tables, restrooms and showers, laundry facilities, ice houses, bottled gas and grocery facilities, and provide for handling mail and various recreational pursuits. The camping season usually runs from the end of May through the Labor Day weekend, but in milder climates some campgrounds have a longer season and others are open year-round.
- (b) An exempt campsite or campground operates and maintains its establishment as a functional amusement or recreational unit, i.e., providing facilities for camping as a recreational activity. It may provide swimming, boating, or fishing facilities as well as facilities for various other amusement or recreational activities such as volleyball, horseshoes, miniature golf, movies, dances, contests, bonfires, and the like. It may be located on either state or local government or private land. Such a campsite or campground may be considered an amusement or recreational establishment for the purpose of Sec 13(a)(3) and tested for exemption under clause (A) or (B) of that section.
- (c) On the other hand, if a campsite or campground merely provides space and parking facilities which the travelling public uses while in transit to a recreational area (as opposed to (b) above), the campsite or campground is not an amusement or recreational establishment for purposes of Sec 13(a)(3). At such a facility the travelling public usually stays for only a short period of time such as one or two nights.

**25j16 Drive-in theaters.**

Drive-in theaters may qualify for the Sec 13(a)(3) exemption if either of the tests is met.

**25j17 Riverboat cruises.**

Businesses engaged in conducting riverboat cruises for sightseeing and entertainment purposes may qualify for the Sec 13(a)(3) exemption where the tests for the exemption are met and the majority of the firm's revenue is derived from ticket sales and entertainment, rather than food, drink, concessions, and gifts. For purposes of applying the exemption, treat riverboats, docking, and ticketing facilities as one establishment.

25k DOMESTIC BABYSITTERS, AND COMPANIONS TO THE AGED OR INFIRM -  
NEW SEC 13(a)(15)

25k00 Statutory provisions. (a) Effective 5/1/74, Sec 13 (a) (15) provides a MW and OT exemption for "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(b) Regulations will be issued to define and delimit these terms.

25k01 Personal health care at home. Trained personnel such as nurses, whether registered or practical, are not exempt under Sec 13(a)(15). See also FOH 10c16. However, registered nurses may be exempt as professional employees under Sec 13(a)(1) depending on the facts.

25k02 Persons attending invalid infants and young children. Individuals other than trained personnel such as nurses (see FOH 25k01) who attend invalid infants and young children are considered companions, rather than babysitters, and the employment thus may be within the Sec 13(a)(15) exemption. (See Reg 552.106.)

## 25L PUBLIC EMPLOYEES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES - SECTION 7(k)

25L00 Statutory provisions. (a) Effective 1/1/75, Sec 7(k) of the amended Act provides a partial OT exemption for any employee of a public agency engaged in fire protection activities or any employee engaged in law enforcement activities (including security personnel in correctional institutions) if --

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days (60 hours in a work period of 7 days), compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Effective 1/1/76, OT compensation must be paid for hours in excess of 232 in a work period of 28 days (58 hours in a work period of 7 days) or in the case of any work period between 7 and 28 days, a proportionate number of hours in such work period.

(c) Effective 1/1/77, OT compensation must be paid for hours in excess of 216 in a work period of 28 days (54 hours in a work period of 7 days) or in the case of a work period between 7 and 28 days, a proportionate number of hours in such work period.

(d) Effective 1/1/78, OT compensation must be paid for hours which exceed the lesser of: (A) 216 hours, or (B) the average number of hours in tours of duty during 1975 (as determined by the Secretary in a study conducted pursuant to Sec 6(c)(3) of the FLS Amendments of 1974) in a work period of 28 days or in the case of a work period between 7 and 28 days, a proportionate number of hours in such work period.

25L01 Weigh station inspectors. Weigh station inspectors, even though given certain "general police powers", are not engaged in an activity within the traditional meaning of the term "law enforcement activities" and therefore do not qualify for the Sec 7(k) exemption.



25L02 Trading time. The criteria for trading time on regularly scheduled tours of duty are contained in Reg 553.18. It is our position that the period within which time traded must be paid back is not confined to a specific calendar or fiscal year. Each increment of traded time must, however, be paid back within 365 days (12 months) from the day the time was actually traded unless the death, severance, or retirement of the employee owed for the time occurs sooner.

25L03 Public agency security personnel handling convicts. Any employee of any public agency who performs the duties described in Reg 553.4(e), i.e., the responsibility of maintaining and controlling the custody of prisoners and guarding them, may qualify for the Sec 7(k) exemption. It is not necessary, for example, that the employees be employed by a department of public safety or similar public agency in order to be exempt. The employee may be employed by a highway department, recreation department, etc. Further, "security personnel in correctional institutions" need not meet the tests specified in Reg 553.4(a)(1), 553.4(a)(2) and 553.4(a)(3) to qualify under Sec 7(k). A "correctional institution" is defined to mean any Government facility maintained as part of the penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. "Security personnel" does not include nurses, janitors, cooks, recreational directors, etc.

25m PUBLIC EMPLOYEES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT  
ACTIVITIES - SECTION 13(b)(20)

25m00 Statutory provisions. (a) Sec 13(b)(20) of the amended Act  
provides --

(1) an exemption from OT during the period of 5/1/74 - 12/31/74,  
for any employee of a public agency who is employed in fire  
protection or law enforcement activities (including security  
personnel in correctional institutions);

(2) effective 1/1/75, an exemption from OT for any employee  
of a public agency who in any w/v is employed in fire  
protection activities or any employee of a public agency who  
in any w/v is employed in law enforcement activities (including  
security personnel in correctional institutions), if the public  
agency employs during the w/v less than 5 employees in fire  
protection or law enforcement as the case may be. These  
provisions are separately tested and separately applied. Thus,  
for example, in a town that employs 5 employees in law  
enforcement activities and 4 employees in fire protection  
activities, only the fire protection employees may qualify for  
exemption under this provision.

25n LIVE-IN DOMESTICS - SEC 13(b)(21)

25n00 Statutory provisions. (a) Effective 5/1/74, Sec 13 (b)(21) provides an OT exemption for "any employee who is employed in domestic service in a household and who resides in such household".

(b) The hours worked by such live-in domestics will be determined under the principles of IB 785.23.

(c) See FOH 30b22.

FIELD OPERATIONS HANDBOOK - 8/14/74 25p-25p02

ADD the following new Secs to text and Table of Contents:

25p HOUSE PARENTS IN NON-PROFIT EDUCATIONAL INSTITUTIONS - SEC 13  
(b)(24)

25p00 Statutory provisions. Effective 5/1/74, Sec 13(b)(24) provides an exemption from OT for any employee who is employed with his spouse by a non-profit educational institution to serve as the parents for children -

(A) who are orphans or one of whose natural parents is deceased, and

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than \$10,000.

25p01 Enforcement policy for period prior to 5/1/74. The Adm will take no position with respect to alleged OT violations in any current investigation during the period prior to 5/1/74 where the employee is entitled to the OT exemption on the basis of new Sec 13(b)(24) but would have been subject to OT previously.

25p02 Hours worked. Any reasonable agreement between the parties which takes into consideration all the pertinent facts, within the meaning of IB 785.23, is permissible in determining hours worked by exempt house-parents for MW compliance purposes.

NOTE: With regard to FOH 25p00, a word of explanation is in order. Sec 13(b)(24)(A) is followed by the word "and" rather than the word "or" which appears in the FLSA as amended. The reason we have done this in the FOH is because extensive and exhaustive research has made clear that the '74 Amendments contained an error in wording. That is, in order to remain logically consistent with all that was stated on the Record concerning this exemption, it is obvious that the word "and" rather than "or" should have been printed between points (A) and (F): see p. 10, Sec 17 of Public Law 93-259 in FOH Vol I. Thus, it has been determined that the word "and" is correct and should be used in construing the exemption. That is why we put "and" in FOH 25p00, and also why there are no quotation marks at the beginning and end of the exemption, since it is not an exact quotation.

250 CONGLOMERATES - SEC 13(g)

25000 General provisions. (a) Effective 5/1/74 Sec 13(g) provides:

"The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support, the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done; when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s)."

(b) The application of this Sec of the Act is more fully explained in Chapter 21 (re Sec 13(a)(2)) and Chapter 20 (re Sec 13(a)(6)).

25001 Common control under Sec 13(g). Sec 13(g) requires common control for an establishment to be considered part of a conglomerate (see FOH 25000). WE will consider common control under Sec 3(r) to be the same for purposes of Sec 13(g).