

Wage and Hour Division, Labor

§ 780.717

sporadically, occasionally, or casually in the course of their duties for other employers are not employed in the operations of the establishment commonly recognized as a country elevator and would not be counted in determining whether the five-employee limitation is exceeded in any workweek. Examples of such employees are employees of a restaurant who bring food and beverages to the elevator employees, and employees of other employers who make deliveries to the establishment.

§ 780.715 Counting employees “employed in the establishment.”

(a) Employees employed “in the establishment,” if employed “in such operations” as previously explained, are to be counted in determining whether the five-employee limitation on the exemption is exceeded.

(b) Employees employed “in” the establishment clearly include all employees engaged, other than casually or sporadically, in performing any duties of their employment there, regardless of whether they are direct employees of the country elevator establishment or are employees of a farmer, independent contractor, or other person who are suffered or permitted to work (see Act, section 3(g)) in the establishment. However, tradesmen, such as dealers and their salesmen, for example, are not employed in the elevator simply because they visit the establishment to do business there. Neither are workers who deliver, on behalf of their employers, goods used in the sideline business of the establishment to be considered employed in the elevator.

(c) The use of the language “employed in” rather than “engaged in” makes it plain also that the employees to be counted include all those employed by the establishment in its operations without regard to whether they are engaged in the establishment or away from it in performing their duties. This has been the consistent interpretation of similar language in other sections of the Act.

EMPLOYEES “EMPLOYED * * * BY” THE COUNTRY ELEVATOR ESTABLISHMENT

§ 780.716 Exemption of employees “employed * * * by” the establishment.

If the establishment is a country elevator establishment qualified for exemption as previously explained, and if the “area of production” requirement is met (see § 780.720), any employee “employed * * * by” such establishment will come within the section 13(b)(14) exemption. This will bring within the exemption employees who are engaged in duties performed away from the establishment as well as those whose duties are performed in the establishment itself, so long as such employees are “employed * * * by” the country elevator establishment within the meaning of the Act. The employees employed “by” the establishment, who may come within the exemption if the other requirements are met, are not necessarily identical with the employees employed “in the establishment in such operations” who must be counted for purposes of the five-employee limitation since some of the latter employees may be employed by another employer. (See §§ 780.712 through 780.715.)

§ 780.717 Determining whether there is employment “by” the establishment.

(a) No single test will determine whether a worker is in fact employed “by” a country elevator establishment. This question must be decided on the basis of the total situation (*Rutherford Food Corp. v. McComb*, 331 U.S. 722; *U.S. v. Silk*, 331 U.S. 704). Clearly, an employee is so employed where he is hired by the elevator, engages in its work, is paid by the elevator and is under its supervision and control.

(b) “Employed by” requires that there be an employer-employee relationship between the worker and the employer engaged in operating the elevator. The fact, however, that the employer carries an employee on the payroll of the country elevator establishment which qualifies for exemption does not automatically extend the exemption to that employee. In order to be exempt an employee must actually be “employed by” the exempt establishment. This means that whether the

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employee is performing his duties inside or outside the establishment, he must be employed in the work of the exempt establishment itself in activities within the scope of its exempt business in order to meet the requirement of actual employment “by” the establishment (see *Walling v. Connecticut Co.*, 154 F. 2d 552).

(c) In the case of employers who operate multiunit enterprises and conduct business operations in more than one establishment (see *Tobin v. Flour Mills*, 185 F. 2d 596; *Remington v. Shaw* (W.D. Mich.) 2 WH Cases 262), there will be employees of the employer who perform central office or central warehousing activities for the enterprise or for more than one establishment, and there may be other employees who spend time in the various establishments of the enterprise performing duties for the enterprise rather than for the particular establishment in which they are working at the time. Such employees are employed by the enterprise and not by any particular establishment of the employer (*Mitchell v. Miller Drugs*, 255 F. 2d 574; *Mitchell v. Kroger Co.*, 248 F. 2d 935). Accordingly, so long as they perform such functions for the enterprise they would not be exempt as employees employed by a country elevator establishment operated as part of such an enterprise, even while stationed in it or placed on its payroll.

§ 780.718 Employees who may be exempt.

Employees employed “by” a country elevator establishment which qualifies for exemption will be exempt, if the “area of production” requirement is met, while they are engaged in any of the customary operations of the establishment which is commonly recognized as a country elevator. Included among such employees are those who are engaged in selling the elevator’s goods or services, keeping its books, receiving, handling, and loading out grain, grinding and mixing feed or treating seed for farmers, performing ordinary maintenance and repair of the premises and equipment or engaging in any other work of the establishment which is commonly recognized as part of its operations as a country elevator.

An employee employed by such an elevator is not restricted to performing his work inside the establishment. He may also engage in his exempt duties away from the elevator. For example, a salesman who visits farmers on their farms to discuss the storage of their grain in the elevator is performing exempt work while on such visits. It is sufficient that an employee employed by an elevator is, while working away from the establishment, doing the exempt work of the elevator. If the establishment is engaged only in activities commonly recognized as those of a country elevator and none of its employees engaged in any other activities, all the employees employed by the country elevator will come within the exemption if no more than five employees are employed in the establishment in such operations and if the “area of production” requirement is met.

§ 780.719 Employees not employed “by” the elevator establishment.

Since the exemption depends on employment “by” an establishment qualified for exemption rather than simply the work of the employee, employees who are not employed by the country elevator are not exempt. This is so even though they work in the establishment and engage in duties which are part of the services which are commonly recognized as those of a country elevator. Since they are not employed by the elevator, employees of independent contractors, farmers and others who work in or for the elevator are not exempt under section 13(b)(14) simply because they work in or for the elevator (see *Walling v. Friend*, 156 F. 2d 429; *Mitchell v. Kroger*, 248 F. 2d 935; *Durkin v. Joyce Agency*, 110 F. Supp. 918, affirmed sub. nom. *Mitchell v. Joyce Agency*, 348 U.S. 945). Thus an employee of an independent contractor who works inside the elevator in drying grain for the elevator is not exempt under this section.

EMPLOYMENT “WITHIN THE AREA OF PRODUCTION”

§ 780.720 “Area of production” requirement of exemption.

(a) In addition to the requirements for exemption previously discussed,