

Chapter 20

AGRICULTURE: RELATED AND SEASONAL EXEMPTIONS

Source: FOH Modernization revision 686, published 04/07/2016. Substantive revisions made *after* 04/07/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 04/07/2016 can be found at the link beside this chapter at www.dol.gov/whd/foh.

Table of Contents

20a **EMPLOYEES EMPLOYED IN AGRICULTURE: FLSA SECTIONS 13(a)(6) AND 13(b)(12)**

- 20a00 General.
- 20a01-05 (Reserved.)
- 20a06 Responsibility for compliance by independent contractors on farms.
- 20a07 Application of section 3(m) and 29 CFR 531 on farms.
- 20a08 Sharecroppers and tenant farmers.
- 20a09 (Reserved.)
- 20a10 Effect on section 13(a)(6) of section 13(g): conglomerates.

20b **EMPLOYED IN AGRICULTURE**

- 20b00 (Reserved.)
- 20b01 Off-farm driving.
- 20b02 Field packers not employed by the farmer.
- 20b03 Stripping of tobacco in an independent warehouse.
- 20b04 Fish farming.
- 20b05 Employees of nurseries or florists engaged in caring for plants obtained from other growers.
- 20b06 Christmas trees.
- 20b07 Pine straw.

20c **OUTSIDE BUYER OF POULTRY, EGGS, CREAM, OR MILK: FLSA SECTION 13(b)(5)**

- 20c00 General provisions of the section 13(b)(5) exemption.
- 20c01 Meaning of term “outside buyer.”
- 20c02 Performance of work not within the exemption.
- 20c03 Promotional work by an outside buyer of poultry, eggs, cream, or milk.
- 20c04 Outside buyer who also tests milk at plant.
- 20c05 Employees of hatchery who cull poultry on farms.
- 20c06 Outside buyer may qualify as an administrative employee.

20d **EMPLOYMENT IN AGRICULTURE OR IRRIGATION: SECTION 13(b)(12)**

- 20d00 General considerations.

20e **LIVESTOCK AUCTION OPERATIONS: SECTION 13(b)(13)**

- 20e00 General considerations.

CHAPTER 20 TABLE OF CONTENTS

- 20f EMPLOYMENT BY SMALL COUNTRY ELEVATORS WITHIN AREA OF PRODUCTION: FLSA SECTION 13(b)(14)**
- 20f00 General provisions of the exemption.
 - 20f01 Applying tests: area of production.
 - 20f02 Area of production chart.
 - 20f03 Measuring distances: area of production.
- 20g MAPLE SAP PROCESSING: SECTION 13(b)(15)**
- 20g00 Statutory provisions.
- 20h EMPLOYMENT IN TRANSPORTATION OF FRUITS OR VEGETABLES AND OF PERSONS EMPLOYED IN HARVESTING FRUITS OR VEGETABLES: SECTION 13(b)(16)**
- 20h00 Statutory provisions.
 - 20h01 Sugar cane and sugar beets.
- 20i EMPLOYEES ENGAGED IN PROCESSING SHADE-GROWN TOBACCO: SECTION 13(b)(22)**
- 20i00 Statutory provisions.
- 20j SECTIONS 7(m), 13(h), 13(i), AND 13(j): GENERAL CONSIDERATIONS**
- 20j00 Enforcement policy for computing back wages when the employer is subjects to section 7(m), 13(h), 13(i), and 13(j) exemptions.
 - 20j01 Selection of weeks.
 - 20j02 Application of exemption when same employer operates more than one establishment.
 - 20j03 Exempt workweek overlapping end of old and beginning of new year.
 - 20j04 Overtime standard.
- 20k-s (RESERVED)**
- 20t EMPLOYEES PROVIDING SERVICES FOR TOBACCO AUCTIONS: SECTION 7(m)**
- 20t00 Statutory provisions.
 - 20t01 Application of section 7(m).
- 20u EMPLOYEES ENGAGED IN PROVIDING SERVICES IN COTTON AND SUGAR PROCESSING: SECTION 13(h)**
- 20u00 Statutory provisions.
 - 20u01 Cottonseed processing.
 - [20u02 Cotton storing and compressing within the meaning of section 13\(h\).](#)
- 20v EMPLOYEES ENGAGED IN COTTON GINNING: SECTION 13(i)**
- 20v00 Statutory provisions.

- 20v01 Cotton ginning.
- 20v02 Active versus dead season.
- 20v03 Principles in 29 CFR 780.

20w EMPLOYEES ENGAGED IN SUGAR PROCESSING: SECTION 13(j)

- 20w00 Statutory provisions.
- 20w01 Exempt operations.

20a EMPLOYEES EMPLOYED IN AGRICULTURE: FLSA SECTIONS 13(a)(6) AND 13(b)(12)

20a00 General.

29 CFR 526 and 29 CFR 780 contain the basic interpretations regarding the agriculture and related exemptions. FOH 20 supplements these interpretations.

20a01-05 (Reserved.)

20a06 Responsibility for compliance by independent contractors on farms.

Where it is clear that certain agricultural operations performed on a farm are performed for the farmer by a bona fide independent contractor, the independent contractor will be tested for coverage in his own right and considered responsible for minimum wage compliance with respect to his own employees. However, *see* 29 CFR 780.305(c) and 29 CFR 780.331(d).

20a07 Application of section 3(m) and 29 CFR 531 on farms.

In many instances, farm workers are furnished their meals, lodging, and other facilities. In the ordinary case, for purposes of applying section 3(m) (*see* 29 CFR 531), the employer may treat as wages the reasonable cost or fair value of board, housing, fuel, and a garden plot furnished the employee. Where such facilities as a house and garden plot are furnished to a family that has several members working on the employer's farm during the year, no more than the amount representing the reasonable cost to the employer, or the fair value, can be charged to the entire family occupying the house.

20a08 Sharecroppers and tenant farmers.

Numerous questions have arisen as to the employee-employer relationship in agriculture where sharecropping arrangements or landlord-tenant agreement provide for shares of crops as rental payments in farm operations. Sample situations and comments thereon have been prepared for guidance in resolving such question. These are included, with an explanation, in WH Publication 1187, which is filed in FOH Vol. I. *See* 29 CFR 780.330.

20a09 (Reserved.)

20a10 Effect on section 13(a)(6) of section 13(g): conglomerates.

- (a) The minimum wage exemption component of section 13(a)(6) does not apply with respect to any employee employed by an establishment which is part of a "conglomerate" as defined in

section 13(g). *See* FOH 25o. This exception applies to employment under all subparts (*i.e.*, A, B, C, D, E, of section 13(a)(6)).

- (b) A small experimental farm operated or controlled by an agribusiness conglomerate or a ranch controlled by a conglomerate are illustrative of the types of situations which may be within the section 13(g) exception.
- (c) Employment in agriculture outside of section 13(a)(6) because of section 13(g) is subject to the minimum wage rate provided by section 6(a)(5) (*i.e.*, \$2.20 per hour in calendar year 1977 and the section 6(a)(1) rate thereafter). Section 13(g) has no effect on the section 13(b)(12) overtime exemption.

20b EMPLOYED IN AGRICULTURE

20b00 (Reserved.)

20b01 Off-farm driving.

Workers not employed by the farmer, such as the harvesting crew of a canner, processor, packer, or independent contractor, or employees of a chicken factory or hatchery, are employed in agriculture if they are employed on a farm in duties which constitute “primary” or “secondary” agriculture as defined in 29 CFR 780, subpart B. The fact that a minor or incidental part of the work of such employees occurs off the farm will not change the situation. This is true, for example, where a small amount of time within the workweek is spent by an employee in transporting equipment or other employees to and from the farm or between farms, or where the off-farm driving is isolated or sporadic.

20b02 Field packers not employed by the farmer.

- (a) Employees not employed by the farmer (such as employees of a shipper, packer, or independent harvesting contractor) are employed in agriculture if they are engaged in field packing lettuce, celery, asparagus, cabbage, or other vegetables involving closely comparable packing operations.
- (b) Field packing by such employees must be performed either in the field or on the edge of the field where the vegetables are grown, and without a substantial lapse of time between harvesting and packing. Included in this term are such operations as: setting up or distributing packing containers; sorting, trimming, and washing the vegetables; placing the vegetables in containers; closing or fastening the containers; cooling (but not freezing) the vegetables; and loading. Operations performed away from the field or its edge, including transportation to market or to shipping points, unloading, cooling, or reloading are not within the meaning of “field packing” and are not considered agriculture.
- (c) Where such employees are engaged in field packing vegetables in situations not closely comparable to packing lettuce, celery, asparagus, or cabbage, or in field packing fresh fruits, the question shall be referred to the Administrator of the Wage and Hour Division (WHD).

20b03 Stripping of tobacco in an independent warehouse.

- (a) The stripping of tobacco in an independent warehouse that prepares the crop for market is not a practice performed by a farmer if performed by employees of the warehouse, even though

the warehouse employs as strippers, the farmers who grew the tobacco. In a situation where tobacco farmers and their tenants exchange services in stripping tobacco grown by them, careful examination of the arrangement is necessary to determine whether the strippers:

- (1) are individually employed in turn by each farmer (in which event they would be considered as employed in agriculture, if the stripping performed for each farmer is a subordinate part of his activities), or
- (2) are employed by the warehouse (in which event the stripping is not performed by a farmer), or
- (3) are jointly employed by the several farmers (in which event it cannot be said that the stripping is incidental to any particular farmer's farming operations, and they would not be considered as employed in agriculture).
- (4) However, *see* section 7(m), FOH 20i00, FOH 20t00, and FOH 20t01.

20b04 Fish farming.

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 section 3(f) (*see* 29 CFR 780.109 and 29 CFR 780.120). The possibility of exemption under section 13(a)(5) or a combination of exemptions should not be overlooked (*see* FOH 25d02 and 29 CFR 784).

20b05 Employees of nurseries or florists engaged in caring for plants obtained from other growers.

- (a) In some cases nursery operators and florists purchase or secure agricultural or horticultural commodities, such as rooted cuttings or young plants, from others and it becomes necessary to determine whether the activities of particular employees in connection with these commodities constitute primary agriculture (*i.e.*, "cultivation, growing...") within the meaning of section 3(f). In making such a determination it is necessary to consider all the facts and circumstances including whether the operations performed on the plants are calculated to produce growth to maturity or substantial maturity or whether the operations are merely designed to care for and preserve the plants while they are on the employer's premises. Among the factors to be considered are:
 - (1) the stage of development of the plant at the time it is obtained (*i.e.*, whether it is immature, substantially mature, or fully matured), and
 - (2) the nature and purpose of operations performed on the plant, and
 - (3) the length of time the plant is retained from the time it is obtained to the time of sale or other disposition and its stage of development at the time.
- (b) The principles set forth in FOH 20b05(a) above are not hard and fast rules but must be applied in the total fact situation to aid in determining the actual purpose and result of the activities engaged in by the employees. The following examples will serve to illustrate the application of these principles. Where plants are received in a state of substantial maturity and are merely potted and preserved for a short period of time prior to sale or other disposition, the activities of employees engaged in caring for such plants would not be

considered cultivation or growing within the primary definition of agriculture. This would be the case where substantially mature trees and shrubs from other nurseries are planted or healed in for later use in landscaping operations. On the other hand, where rooted cuttings or young plants are received and require substantial growth to reach maturity and where a root system must be developed and regular and intensive care such as spraying, watering, and fertilizing must be performed, the activities of employees performing such operations will be considered as “cultivation” or “growing” within the definition. *See* 29 CFR 780.205-.209.

20b06 **Christmas trees.**

Christmas trees, whether wild or planted, are not “agricultural or horticultural commodities” as these terms are used in section 3(f) (*see* 29 CFR 780.115). Consequently the planting, tending, cutting, and trimming of Christmas trees does not constitute primary agriculture (*see* 29 CFR 780.208). Activities in connection with Christmas trees may be considered secondary agriculture, however. *See* 29 CFR 780.203. The possibility of exemption under section 13(b)(28) should not be overlooked (*see* 29 CFR 788 and FOH 25e).

20b07 **Pine straw.**

- (a) Pine straw is the fresh, undecomposed pine needles that have fallen from pine trees. It is produced commercially and collected for use as a mulch and groundcover. The raking, gathering, baling and loading of pine straw for commercial purposes is usually performed in pine stands or plantations, from pine trees being grown for forestry and lumbering operations.
- (b) Based on the plain language of the statute, forestry and lumbering operations are not considered primary agriculture.
- (c) Pine straw activities generally will not qualify as secondary agriculture, unless all the activities are performed by a farmer or on a farm in conjunction with the other farming operations.
- (d) Since pine straw activities typically do not qualify as primary or secondary agriculture, the minimum wage and overtime pay protections of the Fair Labor Standards Act (FLSA) will apply to most pine straw workers.
- (e) Section 13(b)(28) exempts from overtime pay “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.” Pine straw workers are typically employed in the forestry or lumbering operations described in this exemption because pine straw is a natural substance of trees and therefore a “forestry product.” *See* 29 USC 213(b)(28). Pine straw workers will therefore qualify for the section 13(b)(28) exemption when the employer employs eight or fewer pine straw workers.
- (f) The FLSA agricultural child labor standards, allowing pine straw workers under the age of 16 to perform all pine straw activities except operating and assisting in operation of a forklift, would generally only apply to pine straw activities if they qualified as secondary agriculture. The FLSA child labor provisions for nonagricultural work prohibit pine straw workers under the age of 16 from employment in pine straw activities and prohibit those who are 16 and 17

years old from operating or assisting in the operation of power-driven hoisting devices, such as forklifts, backhoes, and skid steer loaders.

- (g) Since pine straw activities generally do not qualify as agriculture under the FLSA, employers may continue to utilize the H-2B temporary worker program as opposed to the H-2A temporary worker program.
- (h) *See* FOH 57k for the application of MSPA to pine straw workers and FOH 36b07 for the application of the Occupational Safety and Health Act Field Sanitation Standards to pine straw workers.

20c OUTSIDE BUYER OF POULTRY, EGGS, CREAM, OR MILK: FLSA SECTION 13(b)(5)

20c00 General provisions of the section 13(b)(5) exemption.

Section 13(b)(5) provides that the overtime provisions of the FLSA shall not apply to any individual employed as an outside buyer of poultry, eggs, cream, or milk in their raw or natural state.

20c01 Meaning of term “outside buyer.”

- (a) The term “outside buyer” as used in section 13(b)(5) refers only to employees who are engaged in buying or contracting to buy, and who are regularly performing these functions away from their employer’s place of business. The term does not include buyers who are located and perform their work in fixed establishments, usually known as buying stations, which are located in the country or in small rural communities away from the main plant where the goods are processed. Section 13(b)(5) describes an occupation, rather than specific operations, as the basis of exemption for the employees involved.
- (b) The exemption applies to an employee who has as his or her chief duty or primary function buying, in the sense of obtaining and soliciting commitments from the persons on whom he calls, to sell the named commodities. Such an employee will be exempt even though in the course of his duties he spends substantial portions of his time in such work as driving over fixed routes and calling on established customers to pick up the commodities, delivering them to the company plant, returning the empty containers and delivering payment checks, and other work incidental to his occupation as an outside buyer. On the other hand, a routeman who merely trucks commodities is not within the exemption.

20c02 Performance of work not within the exemption.

For enforcement purpose, an outside buyer will be considered exempt even though he spends 20 percent or less of his time in the workweek in nonexempt activities.

20c03 Promotional work by an outside buyer of poultry, eggs, cream, or milk.

Promotional work with farmers, designed to increase the amount of poultry, eggs, cream, or milk purchased in their raw or natural state by an outside buyer, is work characteristic of the occupation or an individual employed as an outside buyer of such products, and would not serve to defeat the exemption. Such promotional work is different from work foreign to the occupation, as for example the picking up of supplies bought by the employer, or the

performance of productive work on the products purchased (other than their incidental delivery to the employer when purchased). These latter activities are not within the occupation of outside buyer, and will defeat the exemption.

20c04 **Outside buyer who also tests milk at plant.**

The work of testing milk at the plant is not the work of an outside buyer within the meaning of the section 13(b)(5) exemption.

20c05 **Employees of hatchery who cull poultry on farms.**

An employee who is part of a crew employed by a hatchery to test poultry raised by poultry farmers, for the purpose of eliminating diseased fowls, is not an outside buyer within the meaning of section 13(b)(5), even though the hatchery reimburses the poultry farmer for the loss of the culled fowls. These employees are not primarily employed as buyers. Their primary purpose is to dispose of the culled poultry so that the flock will not be adversely affected. This particular activity, however, may be exempt under section 13(a)(6).

20c06 **Outside buyer may qualify as an administrative employee.**

In some instances it may be found that an employee may be properly exempt under section 13(a)(1), if he meets the test provided in 29 CFR 541, particularly with regard to an administrative employee.

20d **EMPLOYMENT IN AGRICULTURE OR IRRIGATION: SECTION 13(b)(12)**

20d00 **General considerations.**

Section 13(b)(12) provides an overtime exemption for the named operations. The principles governing the application of the exemption are contained in 29 CFR 780.400 -.409. The minimum wage rate applicable to such employment is that of section 6(a)(5) (*i.e.*, \$2.20 per hour until 01/01/1978 and section 6(a)(1) thereafter) except for the irrigation activities specifically described in the exemption which are performed off the farm by non-farmers. The latter are due the section 6(a)(1) minimum wage rate. However, if the irrigation work which meets requirement for exemption is employment in agriculture within the meaning of section 3(f), the possible application of section 13(a)(6) should not be overlooked.

20e **LIVESTOCK AUCTION OPERATIONS: SECTION 13(b)(13)**

20e00 **General considerations.**

Section 13(b)(13) is an overtime exemption. The principles in 29 CFR 780.600 -.621 are applicable for purposes of the section 13(b)(13) exemption.

20f **EMPLOYMENT BY SMALL COUNTRY ELEVATORS WITHIN AREA OF PRODUCTION: FLSA SECTION 13(b)(14)**

20f00 **General provisions of the exemption.**

- (a) Section 13(b)(14) exempts from the overtime provisions of the FLSA “any employee employed within the area of production (as defined by the Secretary) by an establishment

commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations.”

- (b) The WHD’s position with regard to this exemption is set forth in 29 CFR 780.700 -.724.
- (c) The term “area of production” is defined in 29 CFR 536.3. This definition applies to section 13(b)(14) of the amended act.

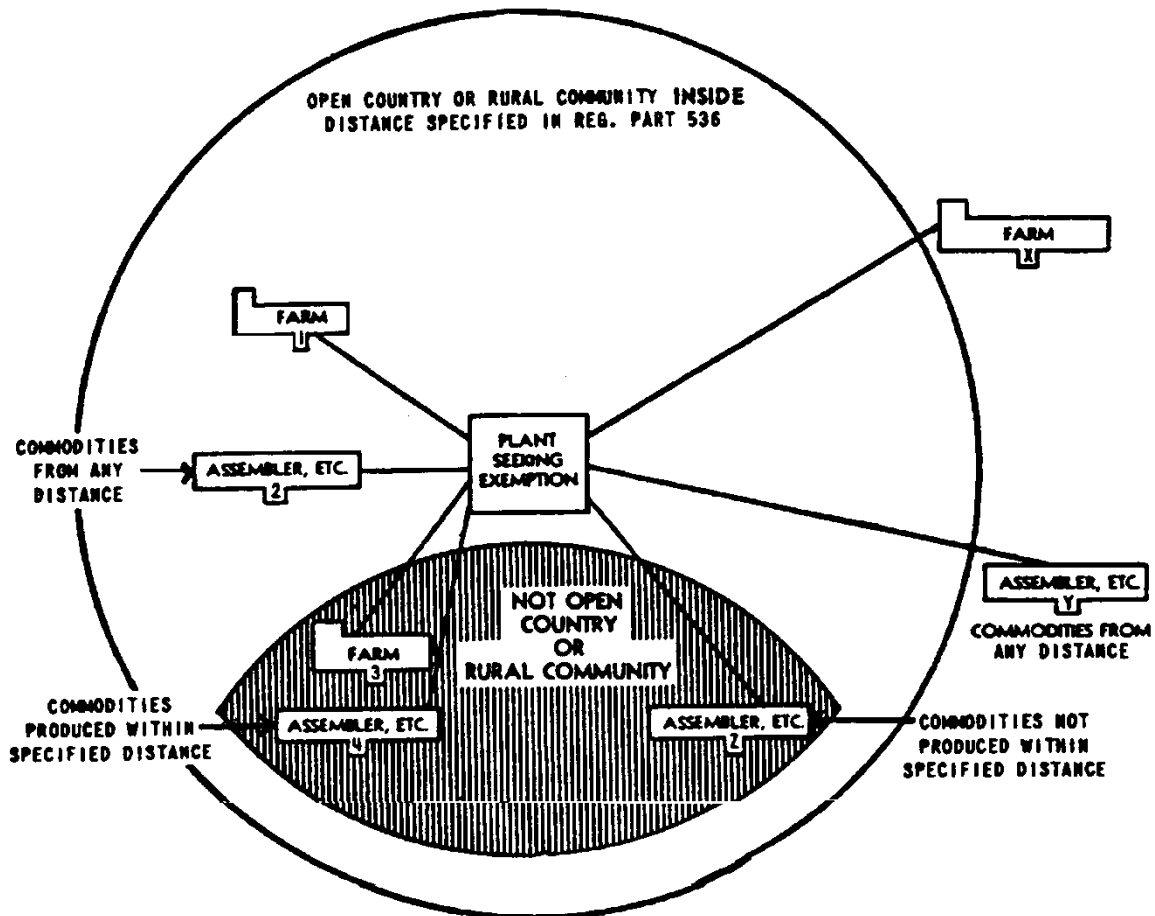
20f01 Applying tests: area of production.

- (a) 29 CFR 536 defines “Area of Production.” The Area of Production chart (*see* FOH 20f02) graphically represents a summary of the requirements in the definition.
- (b) In determining whether 95 percent of the commodities come from the “normal rural source of supply” during a particular month, only the commodities arriving at the establishment that month are considered.
- (c) Irrespective of segregation, employees who work only on commodities received from within the specified distances are not exempt if the establishment itself does not meet the distance-percentage tests for receipt of commodities.
- (d) In applying the population tests of 29 CFR 536, the 1980 United States decennial census of population shall be used for all workweeks.
- (e) Where an establishment is engaged in performing operations on two or more commodities, one for which a 20-mile distance is specified, and soybeans for which the specified distance is 50 miles, the tolerance of 5 percent applies to the combined receipts of the commodities. Thus, if more than 95 percent of the soybeans are received from within the 50 miles, but less than 95 percent of the cream from within 20 miles, the distance test could be met if the dollar value of the receipts of both commodities from disqualifying sources or distances does not exceed 5 percent of the total receipts. *See* 29 CFR 536.3(b)(4).

20f02 Area of production chart.

Receipts which *may* be counted towards 95 percent: 1, 2, 3, 4. Receipts which *may not* be counted towards 95 percent: X, Y, Z. If more than 5 percent of the commodities come from X, Y, or Z, the exemption does not apply.

AREA OUTSIDE DISTANCE SPECIFIED IN 29 CFR 536



20f03 Measuring distances: area of production.

- (a) The regulations specify that the distances involved in the area of production definition shall be airline distances. However, the extent to which a Wage and Hour Investigator (WHI) must go in making an actual physical check of required distances will be governed by the needs of the particular investigation. For normal investigation purposes, the distance between required points may be based on a “rule of thumb” measurement; that is, a roughly practical rather than a scientific measurement. On a comparatively straight road the odometer reading on an automobile may be used, or the distance may be determined by the scale of miles on a map.
- (b) Measurements for distances shall be made from the nearest boundaries of the premises on which the establishments in question are located, the nearest boundaries of the farm or farms, and the nearest boundaries of the city, town, or village to be considered. Where some portion of a particular farm lies outside the specified distance, the entire farm shall be counted as if it were within the specified distance.
- (c) If any difficulty is experienced in measuring distances where an unincorporated community is involved, the matter shall be referred to the assistant administrator for the Office of Policy in order that the metes and bounds of the community as used in the 1980 census of population may be secured from the Bureau of Census.

20g MAPLE SAP PROCESSING: SECTION 13(b)(15)

20g00 **Statutory provisions.**

- (a) Section 13(b)(15) provides an overtime exemption for “any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup.”
- (b) The principles in 29 CFR 780.815 -.819 are applicable for purposes of section 13(b)(15). However, the exemption is presently limited to maple sap processing.

20h **EMPLOYMENT IN TRANSPORTATION OF FRUITS OR VEGETABLES AND OF PERSONS EMPLOYED IN HARVESTING FRUITS OR VEGETABLES: SECTION 13(b)(16)**

20h00 **Statutory provisions.**

- (a) Section 13(b)(16) provides an overtime exemption for “any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same [s]tate, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same [s]tate of persons employed or to be employed in the harvesting of fruits or vegetables.”
- (b) The principles contained in 29 CFR 780.900 -.923 explain the application of this exemption.

20h01 **Sugar cane and sugar beets.**

Sugar cane and sugar beets are neither fruits nor vegetables for purposes of the section 13(b)(16) exemption (*see* 29 CFR 780.907). On the other hand, however, sections 13(b)(26) and 13(h)(1)(D) relate specifically to sugar cane and sugar beets.

20i **EMPLOYEES ENGAGED IN PROCESSING SHADE-GROWN TOBACCO: SECTION 13(b)(22)**

20i00 **Statutory provisions.**

- (a) Section 13(b)(22) provided an overtime exemption for “[a]ny agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.”
- (b) Effective 01/01/1978, section 13(b)(22) is repealed.
- (c) The principles in 29 CFR 780.500 -.522 apply.

20j **SECTIONS 7(m), 13(h), 13(i), and 13(j): GENERAL CONSIDERATIONS**

20j00 **Enforcement policy for computing back wages when the employer is subject to sections 7(m), 13(h), 13(i), and 13(j) exemptions.**

- (a) When an employer has failed to pay overtime specifically required by section 7(a) but could have properly applied any of the above exemptions to the period when no overtime was paid, care must be taken in determining the extent of liability to assure that he/she is not given an

advantage in applying the exemption retroactively that would not have been available to an employer who conscientiously applied the exemption each week as he/she went along. For this reason, the WHD will be guided by the following in enforcing the act:

- (1) If the employer has available during a particular investigation period year any of the exemptions, but has failed to post the required notice of exemption and has failed to keep the records as required in 29 CFR 516, subpart B, it will be assumed that he has claimed as exempt weeks the first 14 weeks in the year in which the establishment engaged in operations subject to the exemption and in which the employer did not pay overtime compensation for hours over 40 in a week. If in any of these first 14 weeks of overtime any employee has worked in excess of 10 hours a day or 48 hours in week, without receiving overtime pay, back wages shall be sought in these weeks for the employee for hours in excess of 10 or 48 in those weeks. Such weeks will be counted as weeks of exemption. Of course, when the exempt weeks are used up, overtime is due for hours worked in excess of 40 in all remaining weeks in the calendar year. *See* FOH 32a01.
 - (2) The calendar year (or period of 52 consecutive weeks) is used in determining the weeks of exemption irrespective of the fact that some part of a calendar year (or period) may fall outside a 2-year investigation period. While the statute of limitations may preclude a request for back wages for more than a 2-year period of time, it has no application insofar as the selection of the exempt workweeks is concerned. Thus, if a 2-year investigation period started in the latter part of the calendar year or period, it is possible that all (or some) of the weeks of exemption for that year or period were used up before the investigation period started, and no more weeks (or fewer than the specified number of weeks) are available for the balance of that year or period.
- (b) The policy regarding back wages contained in FOH 32a01(b) is also applicable to sections 7(m), 13(h), (i), and (j).

20j01 **Selection of weeks.**

- (a) The choice of the 14 weeks is a matter that is within the discretion of the employer. Exemption may be taken, however, only for such workweeks during which the operations specified in the act are carried on and only for those employees who worked not more than 10 hours in a day or 48 hours in a week, or were compensated at time and one half their regular rate of pay for hours worked in excess of 10 a day or 48 a week.
- (b) The exempt weeks need not run consecutively. The decision as to each workweek during which the establishment operated under the exemptions may be made at the end of the workweek, the employees being paid accordingly, the nature of the exemption taken being recorded on the payroll, and a notice thereof being posted in accordance with 29 CFR 516.

20j02 **Application of exemption when same employer operates more than one establishment.**

The weeks taken under these exemptions are applicable on an establishment basis, and an employee may be subject to an exemption in each establishment in which he works, even though the establishments are operated by a single employer.

20j03 **Exempt workweek overlapping end of old and beginning of new year.**

If the workweek overlaps the end of the old year and the beginning of the new year, the employer may charge the week against the quota under either year; that is, it may be charged against the old year if he has unused exempt weeks remaining from that year, but it must be charged against the new year's quota if he has exhausted exempt weeks in the old year.

20j04 **Overtime standard.**

Since these are exemptions from section 7(a), neither can be operative with respect to any employee in a workweek when he does not work hours in excess of those specified in section 7(a). If an employer can qualify for one of these exemptions he need not pay daily overtime for hours in excess of 10 in a day when no section 7(a) weekly overtime is worked by the employee. If an employee works two 14-hour days in a particular workweek (28 hours total for the workweek) no overtime compensation is due as he has not exceeded the 40-hour weekly overtime standard. But if an employee engaged in exempt operations worked three 14-hour days in a selected workweek (42 hours total for the workweek), payment of overtime compensation would be due for 12 hours.

20k-20s **(RESERVED)**

20t **EMPLOYEES PROVIDING SERVICES FOR TOBACCO AUCTIONS: SECTION 7(m)**

20t00 **Statutory provisions.**

(a) Section 7(m) provides a partial overtime exemption: “for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime prescribed in such subsection, if such employee—

(1) Is employed by such employer—

- a. To provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,
- b. In auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or
- c. In auction sale, buying, handling, stripping, sorting, grading, sizing, packing or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62, (as such types are defined by the Secretary of Agriculture); and

(2) Receives for—

- a. Such employment by such employer which is in excess of ten hours in any workday, or

- b. Such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.”

20t01 **Application of section 7(m).**

- (a) The weeks taken under the section 7(m) exemption are applicable on an establishment basis, and an employee may be subject to the 14-week exemption in each establishment he works, even though such establishments are operated by a single employer.
- (b) Section 7(m) is available only to the types of employment named in the language of the exemption.
- (c) Section 7(m) is applicable on a workweek basis. See FOH 20j00 and FOH 32a01 regarding computation of back wages where its terms are not met. The employer may use the section 7(m) exemption for any of 14 workweeks ending in the *calendar year* if the tests are met.

Pursuant to the last sentence of section 7(m), where an employer claims exemption for an employee under this exemption he or she may not claim another exemption *from section 7* for such employee, such as under section 13(b)(12).

20u **EMPLOYEES ENGAGED IN PROVIDING SERVICES IN COTTON AND SUGAR PROCESSING: SECTION 13(h)**

20u00 **Statutory provisions.**

- (a) This section provides a partial overtime exemption (up to 10 hours in a workday and up to 48 hours in a workweek for up to 14 workweeks in the aggregate in any *calendar year*) for employees employed “exclusively to provide services necessary and incidental to”:

“(A)...[T]he ginning of cotton in an establishment primarily engaged in the ginning of cotton;” or

“(B)...[T]he receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;” or

“(C)...[T]he receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or”

“(D)...[T]he processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets....”

- (b)
 - (1) An employer’s use of the section 13(h) exemption for a particular group of employees precludes use of any other exemption under sections 7 or 13 for those employees. Such use, however, does not prohibit utilizing sections 13(i) or 13(j) for

certain other employees simply because section 13(h) is used. Thus, for example, if an employer claims section 13(h) for certain employees in the establishment, he or she cannot claim other *section 7 or section 13 exemptions* for them, but can utilize sections 13(a)(1), 13(i), or 13(j) for non-section 13(h) activities by other employees.

- (2) The statutory wording “necessary and incidental” in section 13(h) is not analogous in scope to that of “engaged in” in sections 13(i) and 13(j) and shall not be interpreted to have the same meaning and effect. For example, employers whose employees actually perform the operations described in section 13(i) or 13(j) may claim the exemption for those so engaged. Employers whose employees are engaged in occupations “necessary and incidental” to work performed pursuant to section 13(i) or 13(j), who work exclusively in such operations and who work solely in those portions of the premises devoted by their employer to such operations, may claim exemption(s) provided by section 13(h).
 - (3) Section 13(h) is more narrow in its application than the expired sections 7(c) and 7(d) with respect to the cotton storing and compressing and cottonseed processing industries. Pursuant to 29 CFR 526.10(b)(8) and 29 CFR 526.11(b)(1), old sections 7(c) and 7(d) exempted entire industries, whereas sections 13(h)(1)(B) and 13(h)(1)(C) exempt only individual employees. Section 13(h) requires that employees be exclusively involved in specified activities (thus permitting no tolerances).
- (c) Section 13(h) provides an exemption for employees performing auxiliary services (services that are necessary and incidental to the named operations) which are not exempt under sections 13(i) and 13(j). It also replaces sections 7(c) and/or (d) with respect to the operations named in section 13(h) which were previously exempted under sections 7(c) and/or 7(d). For example employees not actually engaged in ginning cotton (*see* 29 CFR 780.810) or processing sugar beets, sugar beet molasses, or sugar cane into sugar (*see* 29 CFR 780.818) may be eligible for the exemption provided by this section.

20u01 **Cottonseed processing.**

- (a) Pursuant to section 13(h) the term “processing of cottonseed” includes cleaning and removing hulls and linters from cottonseed, extracting oil therefrom, making cottonseed cake, and, when done in a continuous series of operations with the crushing, grinding cake into meal.
- (b) The following processing operations are included during the period when the seed is being received:
 - (1) The grinding of cottonseed cake, even when not part of a continuous series of operations with the crushing, and even though an insubstantial amount of hull bran purchased from other sources is added. Handling and grinding of the purchased bran when only an insubstantial amount is added, are included in the exemption.
 - (2) The processing of hulls into fiber and bran. The exemption is not applicable to the further processing into fiber and bran of hulls which have been received from other cottonseed crushing mills, except where the amount of such hulls is insubstantial.
 - (3) The manufacture of pellets from cottonseed meal and hulls (same exception as noted in FOH 20u01(2)).

- (4) The refining of crude cottonseed oil, which has been produced exclusively at the crushing mill, only when done in a continuous series of operations with the crushing. The exemption extends to laboratory employees testing crude or refined oil during the crushing season.
- (c) Processing cottonseed includes preparation of cottonseed for planting by means of drying, screening, delinting, redrying, or poisoning.
- (d) As a practical matter, WHIs are not expected to check for trivial amounts of time spent by an otherwise exempt employee in nonexempt work such as selling bagging and ties as an accommodation.

20u02 Cotton storing and compressing within the meaning of section 13(h).

Includes the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility other than one operated in conjunction with a cotton mill. Also included are any operations incident to the foregoing such as loading, unloading, weighing, sampling, assembling, and preparing for shipment, when performed at the storing establishment.

20v EMPLOYEES ENGAGED IN COTTON GINNING: SECTION 13(i)

20v00 Statutory provisions.

- (a) Section 13(i) provides a partial overtime exemption “for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—
 - (1) Is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities, and
 - (2) Receives for any such employment during such workweeks—
 - a. In excess of ten hours in any workday, and
 - b. In excess of forty-eight hours in any workweek, and compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.”
- (b) Unlike section 7(c) (repealed effective 12/31/1976) that applied on a calendar-year basis, section 13(i), like former section 13(b)(25), is applicable during the active season within a period of 52 consecutive weeks. This means an employer may start his or her exemption year in any workweek during the active season and can select the section 13(i) exemption weeks available from the rest of the subsequent 51 workweeks.
- (c) Prior to the 1977 amendments (effective 01/01/1978), section 13(i) replaced section 13(b)(25) and the latter provided a partial overtime exemption as illustrated in the following table:

Hours of work permitted during each such workweek without payment of overtime compensation

Annual workweeks	01/01/1976 – 12/31/1977
6 weeks	60
4 weeks	56
2 weeks	48
2 weeks	44
Balance of year	40

20v01 Cotton ginning.

Includes the following operations, when performed during the period or periods when cotton is being received for ginning: the receiving of seed cotton at the gin; the handling, cleaning, ginning, and baling of the cotton; the handling of the baled cotton and cottonseed; and any operations or services necessary or incident to the foregoing, including the placing of the cotton and cottonseed in storage or transportation facilities on or near the premises.

20v02 Active versus dead season.

The exemption does not include operations which are performed during periods when the establishment is not receiving cotton for ginning, that is, during the dead season. Thus, the employees engaged in performing repair work at the gin during the dead season are not exempt under section 13(i).

20v03 Principles in 29 CFR 780.

The principles in 29 CFR 780.800 -.814 are applicable for purposes of section 13(i).

20w EMPLOYEES ENGAGED IN SUGAR PROCESSING: SECTION 13(j)

20w00 Statutory provisions.

- (a) Section 13(j) provides a partial overtime exemption “for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—
 - (1) Is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and
 - (2) Receives for any such employment during such workweeks—
 - a. In excess of ten hours in any workday, and
 - b. In excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.”

- (b) Unlike expired sections 7(c) and 7(d) (repealed 12/31/1976) that applied on a calendar-year basis, section 13(j), like former section 13(b)(26), is applicable during the active season within a period of 52 consecutive weeks. This means an employer may start his or her exemption year in any workweek during the active season and can select the section 13(j) exemption weeks available from the rest of the subsequent 51 workweeks.
- (c) Prior to the 1977 amendments (effective 01/01/1978), section 13(j) replaced 13(b)(26) and the latter provided a partial overtime exemption as illustrated in the following table:

Hours of work permitted during each such workweek without payment of overtime compensation

Annual workweeks	01/01/1976 – 12/31/1977
6 weeks	60
4 weeks	56
2 weeks	48
2 weeks	44
Balance of year	40

20w01 Exempt operations.

- (a) The following operations are considered processing of sugar cane within the meaning of section 13(j):
 - (1) the unloading of sugar cane at the mill;
 - (2) the processing of sugar cane into sugar, syrup, and molasses;
 - (3) the immediate refining, as one of a connected series of operations, of raw sugar produced from sugar cane ground on the premises;
 - (4) the refining, by the introduction into such series of operations of raw sugar which has been produced during the same grinding season in other cane processing plants of the same employer, except where the refined sugar made from such transferred raw sugar produced during the cane processing season constitutes half or more of the refined sugar produced during the cane processing season, or where purchased raw sugar is refined during the cane processing season;
 - (5) the burning, removing from the premises, or dehydrating of bagasse resulting from the processing of sugar cane;
 - (6) the extraction of calcium aconitate from “B” molasses, including the drying of the cake;
 - (7) the handling, baling, bagging, packing and storing of the sugar, syrup, molasses, bagasse or calcium aconitate; and
 - (8) the placing of these products in storage or transportation facilities on or near the premises.

- (b) The following operations are considered processing of sugar beets within the meaning of section 13(j):
- (1) receiving the sugar beets at the factory site or at receiving stations operated by the beet sugar factory;
 - (2) the transportation of the beets from such receiving stations to the factory when performed by employees of the sugar beet processor;
 - (3) the production of sugar from the beets and the further extraction of sugar from the sugar beet molasses by mixing and concurrently processing the molasses with the beet juice obtained directly from the sugar beets;
 - (4) the following operations when performed by employees of the sugar beet processor on or near the premises of the beet sugar plant while the sugar beets are being received at the factory or are being processed into sugar: the powdering of sugar; the compressing and artificial drying of wet beet pulp; the weighing, handling, packaging, bagging, and storing of sugar, wet beet pulp, dried beet pulp and molasses; the removal of these products from the premises and placing them in transportation facilities; and
 - (5) the testing of equipment, maintenance, repairs, etc.