

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

DEALERS IN LUMBER AND BUILDING MATERIALS ADVISED ON
COVERAGE OF FAIR LABOR STANDARDS ACT

Status of employees engaged in the distribution of lumber and building materials under the Fair Labor Standards Act was further clarified today when the Wage and Hour Division, U. S. Department of Labor, made public a letter dealing with this subject, which had been prepared by the office of the General Counsel. The letter explains the scope of the retail establishment exemption as it applies to dealers in lumber and building materials, and points out that a retail lumber establishment does not include a business which sells materials for purposes of resale in any form, or for other business and industrial uses. The letter follows in part:

"For purposes of enforcement it is our position that any establishment which is engaged exclusively in the distribution of merchandise may be considered a retail establishment if 50 percent or more of the dollar value of its total sales are retail sales. Accordingly, any establishment engaged exclusively in the distribution of lumber and building materials would be considered a retail establishment if 50 percent or more of the dollar value of total sales are retail sales.

"A retail sale in our opinion is a sale of goods in small quantities to individuals for private use and not for business or industrial purposes. Thus a sale of lumber and building materials to a private individual for the construction, maintenance and repair of a private home or garage (or appurtenant structure such as a fence or walk) would be a retail sale. Such sales of course are made in relatively small quantities. It is our opinion that the courts will not consider the sale to be a retail sale if the materials are sold for purposes of resale in any form or for other business and industrial uses. The division, therefore, will not regard the following types of sales as retail sales:

- "(1) Sales to dealers who intend to resell the goods purchased.
- "(2) Sales to industrial concerns which use the materials for the fabrication of furniture, boxes, crates, automobiles, toys, ships, etc.
- "(3) Sales to building contractors or other business concerns for the construction, maintenance, and repair of buildings, railroads, highways, bridges and other structures, except where the sale is made to a contractor who purchases materials on behalf of an individual private consumer. A sale to a contractor will be considered to be a sale 'on behalf of an individual private consumer' where the materials are purchased for the construction, maintenance or repair of a single private dwelling (garage or fence, etc.) ordered by the individual homeowner. For example, an individual property owner may have a contractor build a house for private use. The sale of materials to the contractor for this purpose will be considered as a transaction essentially similar to a sale to the homeowner and, accordingly, it will be classified as a retail sale.
- "(4) Sales to federal, state or municipal governments.

"It should be noted that in the language of the statute the exemption applied to employees of retail 'establishments.' What constitutes the establishment depends upon the facts in each particular case. If a firm operates two or more separate establishments, the sales of each establishment must be considered separately in determining whether such establishment may properly be considered a 'retail establishment.' The total sales of the enterprise as a whole will not determine the retail or non-retail character of separate establishments within the organization. Thus, for example, a company may operate two separate lumber yards in different parts of the city. Each lumber yard would be considered as a

separate establishment for purposes of the exemption. If one lumber yard made more than 50 percent of its total dollar volume of sales at wholesale such lumber yard would not be a 'retail' establishment for purposes of the exemption even though the combined dollar volume of the sales of both lumber yards was 50 percent at retail. Conversely, if one lumber yard sold more than 50 percent at retail, it would not cease to be a retail establishment merely because the combined dollar volume of sales of both lumber yards was more than 50 percent at wholesale.

"In some cases it may be difficult to determine whether wholesale selling or manufacturing takes place in a separate establishment. Generally, if the wholesale or manufacturing branch of the business is distinct and separate from the retail branch -- as where a physically separate portion of the premises is devoted to such activities -- such wholesale or manufacturing branch taken alone would ordinarily be considered as a separate establishment and the exemption would not apply to employees of such branch.

"It is obvious that an establishment engaged in manufacturing operations cannot be regarded as a retail establishment, even though its sales are made to individuals for private consumption. Thus, a lumber yard engaged in constructing sashes and doors or millwork is not a retail establishment notwithstanding the fact that more than 50% of its sales may be made to private homeowners. Of course if the firm has a separate retail outlet, this outlet may be a separate retail establishment for purposes of the exemption."

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