
29 C.F.R. § 779.316

Establishments outside “retail concept” not within statutory definition; lack first requirement.

The term “retail” is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions. The same is true of an electric power company selling electrical energy to private consumers. As to establishments of such businesses, therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term “retail or service establishment” is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a “retail concept” cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. (95 Cong. Rec. pp. 1115, 1116, 12502, 12506, 21510, 14877, and 14889; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290; *Phillips Co. v. Walling*, 324 U.S. 490; *Kirschbaum Co. v. Walling*, 316 U.S. 517; *Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945; *Goldberg v. Roberts* 291 F. 2d 532 (CA-9); *Wirtz v. Idaho Sheet Metal Works*, 335 F. 2d 952 (CA-9), affirmed in 383 U.S. 190; *Telephone Answering Service v. Goldberg*, 290 F. 2d 529 (CA-1).) It is plain, therefore, that the term “retail or service establishment” as used in the Act does not encompass establishments in industries lacking a “retail concept”. Such establishments not having been traditionally regarded as retail or service establishments cannot under any circumstances qualify as a “retail or service establishment” within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. Industry usage of the term “retail” is not in itself controlling in determining when business transactions are retail sales under the Act. Judicial authority is quite clear that there are certain goods and services which can never be sold at retail. (*Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz v. Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

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