

29 C.F.R. § 779.325

Functions of the Secretary and the courts.

It may be necessary for the Secretary in the performance of his duties under the Act, to determine in some instances whether a sale or service is recognized as a retail sale or particular industry. In the exceptional case where the determination cannot be made on the basis of common knowledge or readily accessible information, the Secretary may gather the information needed for the purpose of making such determinations. Available information on usage and practice in the industry is carefully considered in making such determinations, but the “word-usage of the industry” does not have controlling force; the Secretary “cannot be hamstrung by the terminology of a particular trade” and possesses considerable discretion as the one responsible for the actual administration of the Act. (*Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190; and see 95 Cong. Rec. 12501-12502, 12510.) The responsibility for making final decisions, of course, rests with the courts. An employer disagreeing with the determinations of the Secretary and claiming exemption has the burden of proving in a court proceeding that the prescribed percentage of the establishment's sales or services are recognized as retail in the industry and that his establishment qualifies for the exemption claimed by him. (See *Wirtz v. Steepleton*, cited above, and 95 Cong. Rec. 12510.)

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