
29 C.F.R. § 788.13

Counting the eight employees.

The determination of the number of employees employed in the named operations is to be made on an occupational and a workweek basis. Thus the exemption will be available in one workweek when eight or less employees are employed in the exempt operations and not in another workweek when more than that number are so employed. For a discussion of the term “workweek” see part 778 of this chapter. The exemption will not be defeated, however, if one or more of the eight employees so engaged is replaced during the workweek, for example, by reason of illness. But if additional employees are employed during the workweek in the named operations, even if they work on a different shift, the exemption would no longer be available if the total number exceed eight. Similarly, all of an employer's employees employed in any workweek in the named operations must be counted in the eight regardless of where the work is performed or how it is divided. Thus if an employer employs four employees in felling timber and preparing logs at one location and five at another location in those operations, the exemption would not be available. Similarly, if he employs six employees in such operations and three other employees in transportation work as discussed in § 788.11, the exemption could not apply. Under such circumstances he would be employing more than eight employees in the named operations. The fact that some of these employees may not be engaged in commerce or the production of goods for commerce or may be engaged in other exempt operations will not affect these conclusions (*Woods Lumber Co. v. Tobin*, 199 F. 2d 455 (C.A. 5)). Except for replacements, therefore, all of an employer's employees employed in the named operations in a workweek must be counted, regardless of where they perform their work or in which of the named operations or combinations of such operations they are employed. The length of time an employee is employed in the named operations during a workweek is also immaterial for the purpose of applying the numerical limitation. Thus, even if an employee would not himself be exempt because he is engaged substantially in nonexempt work (see § 788.17), nevertheless, if, as a regular part of his duties, he is also engaged in the operations named in the exemption, he must be counted in determining whether the eight employee limitation is satisfied.

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