U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 2, 2003 **YR2003-1**

Dear ***Name****,*

This is in response to your letter seeking guidance on a number of issues relating to the child labor provisions of the Fair Labor Standards Act (the FLSA). These issues have arisen because the City of *Name* desires to hire children under the age of 16 in various occupations in park, recreation and library facilities owned and operated by the City.

Section 3(l), defining "oppressive child labor," expressly prohibits children under the age of 16 from performing any work other than that which the Secretary of Labor permits, by order or regulation, because it does not interfere with their schooling or health and well-being (see 29 U.S.C. 203(l), *see also* 29 CFR 570.117-.119). The Secretary's declaration of what forms of labor are not deemed "oppressive" for children between the ages of 14 and 16 appears in Child Labor Regulation No. 3 (Reg. 3) (29 CFR Part 570.31-.38). Copies of the FLSA and Regulations, 29 CFR Part 570, are enclosed for your convenience.

Reg. 3 identifies a number of occupations or activities which are specifically prohibited for these youngsters without regard to the industry or the type of business in which their employer is engaged (*e.g.* "operating….any power-driven machinery other than office machines") (sec. 570.33). This section of Reg. 3 incorporates by reference all of the prohibitions contained in the Hazardous Occupations Orders (29 CFR 570.50-.68) which identify occupations that are "particularly hazardous" and, therefore, banned for 16- and 17-year-olds (*e.g.* occupations involved in the operation of power-driven metal forming, punching and shearing machines) (see sec 570.33(e)). Further, Reg. 3 contains special rules for 14- and 15-year-olds employed in retail, food service and gasoline service establishments; certain activities are expressly authorized in such employment (sec. 570.34(a)) whereas other activities are expressly prohibited (sec. 570.34(b)). For example, clerical work, cashiering and clean-up work are authorized whereas "all work requiring the use of ladders, scaffolds, or their substitutes" is prohibited. These special rules apply only in the designated types of business.

Because the City of *Name* is not a retail, food service or gasoline service establishment, the special rules in section 570.34 (both authorizations and prohibitions) are not applicable to the employment of minors by the City, except where there is some discrete operation or division which could legitimately be characterized as such an establishment and therefore would be subject to these rules (*e.g.*, minors employed in a food service operation at a City park). A strict interpretation of Reg. 3 would prohibit the City of *Name* from employing 14- and 15-year-old workers in *any* jobs other than those which occur in those discrete operations or divisions that may be characterized as retail, food service or gasoline service establishments. However, in recognition of the importance of youth employment programs operated by the City of *Name* and other public sector employers, to provide safe and meaningful developmental opportunities for young people, the Department of Labor, as a matter of prosecutorial discretion, will not cite Reg. 3 Occupations violations for the employment of 14- and 15-year-olds by State and local governments as long as that employment falls within the occupations authorized by Reg. 3 (section 29 CFR 570.34(a)) and does not involve any of the tasks or occupations prohibited by Reg. 3 (sections 29 CFR 570.33 and 570.34(b)). The other provisions of Reg. 3 – particularly the restrictions on hours of work – are fully applicable to the employment of such minors and will be enforced.

Your letter inquires about the use of ladders by employees who are 15 years of age. Although Reg. 3 does not define the terms ladder and stepladder, regulations issued by the Department of Labor's Occupational Safety and Health Administration (OSHA) do. The Wage and Hour Division relies upon these definitions when enforcing the youth employment provisions of the FLSA. Regulation 29 CFR Part 1910.21(c)(1) states that a ladder is "an appliance usually consisting of two side rails joined at regular intervals by cross-pieces called steps, rungs, or cleats, on which a person may step in ascending or descending." Section 1910.21(c)(2) of that same Regulation defines stepladder to mean "a self-supporting portable ladder, nonadjustable in length, having flat steps and a hinged back. Its size is designated by the overall length of the ladder measured along the front edge of the side rails." You will note that neither definition is dependent upon a minimum height or number of steps. Reg. 3 contains no

provisions for waivers or exemptions regarding the use of ladders by 14- and 15-year-old employees. Pertinent sections of this Regulation are enclosed.

Your letter also inquires whether the City may employ 15-year-olds as lifeguards at City swimming pools. The occupation of "lifeguard" is not specifically authorized in Reg. 3 as an occupation that 14- and 15-year-olds may perform. Therefore, a strict interpretation of the statute and Reg. 3 would prohibit any employee under age 16 from working as a lifeguard. However, the Department, relying on the expertise of the American Red Cross in the matter of water safety and, as a matter of discretion, does not and will not assert a violation with regard to the employment of a 15-year-old by a State or local government in the occupation of "lifeguard" at a swimming pool *provided that* the minor has been trained and certified by the American Red Cross and is working in conditions acceptable to the American Red Cross.[1] The Department would not assert a violation if such youth used a ladder to access, and descend from, the lifeguard chair. Nor would the Department assert a violation if such youth, as part of their lifeguard duties, tested water quality for temperature and/or pH. levels, using all of the tools of the testing process including adding chemicals to the test water sample. But these youths are prohibited from entering or working in any chemical storage areas, including the area where the filtration and chlorinating systems are housed.[2] These youths are also prohibited from performing any water processing operations, including, but not limited to, adding certain chemicals to the water or back flushing the filtration system (see section 570.33(a)). Please note that this enforcement position would not permit youths under 16 years of age who are subject to the provisions of the FLSA to be employed as lifeguards at locations other than swimming pools, such as rivers, lakes, reservoirs and seaside or oceanside beaches.

Your letter also seeks guidance as to the City's employment of 14- and 15-year-olds in City libraries. Reg. 3 has no explicit provision concerning such employment. The Department, as a matter of discretion, will not assert a violation with regard to such employment by a State or local government *provided that* the minor's work is in the nature of office and clerical work (as allowed by section 570.34(a)(1)) and involves none of the specifically prohibited activities identified in Reg. 3 (*e.g.*, use of power-driven machinery other than office machines; work on ladders). The Department would not assert a violation if such youth used a one- or two-step footstool in the library. The Department will enforce the restrictions on such a minor's hours of work (sec. 570.35(a)).

Further, your letter presents questions concerning minor employees operating golf carts in the course of their employment at City parks. With regard to younger minors – 14 and 15 year of age – Reg. 3 prohibits the operation of "any power-driven machinery other than office machines" (sec. 570.33(b)). This ban totally precludes such a minor operating a golf cart, regardless of where the cart would be driven (*i.e.*, on park grounds or on public roads).

The operation of golf carts by older minors 16 and 17 years of age would be subject to the restrictions of Hazardous Occupations Order No. 2 (HO 2) (29 CFR part 570.52). Golf carts meet the definition of "motor vehicles" and fall with the scope of the HO 2 prohibition of "the occupation of motor-vehicle driver…on any public road…" The regulation covers a wide variety of "vehicle[s] propelled or drawn by mechanical power and designed for use as a means of transportation" (*e.g*., motorcycles; automobiles; semi-trailers) (sec. 570.52(c)(1)). Under this definition, the size of the vehicle is not a consideration. The regulation provides an exception from the prohibition for the "incidental and occasional … operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight" under certain conditions (sec. 570.52(b)(1)). However, since golf carts are neither "automobiles" nor "trucks," this exception is not applicable to the operation of such vehicles.

The HO 2 prohibition applies to the operation of motor vehicles on any public road or highway, but not to such activity in other locations (sec. 570.52(a)). In identifying a "public road," the Department would look to the generally accepted definition of a public road as "a road or way established and adopted (or

[1] The Wage and Hour Division first stated this position in our letter dated August 10, 2000, to the Grant Wood Area Chapter of the American Red Cross.
[2] The American Red Cross training manual, *Lifeguarding* Today, also prohibits lifeguards from entering such areas.

accepted as a dedication) by the proper authorities for the use of the general public, and over which every person has a right to pass and to use it for all purposes of travel or transportation to which it is adapted and devoted. The proper test in determining whether [a] road is a 'public' or 'private road' is [the] use to which such roadway is put, and [the] fact that [the] road has been constructed at public expense is not conclusive" (*Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 938 n. 11 (6th Cir. 1997), *citing Black's Law Dictionary* 1329 (6th ed. 1990)). Under this standard, a pathway or road in or at the perimeter of a City park would not be considered a public road, if it is used only by pedestrians, bicyclists, golf carts, and similar traffic to access parts of the park grounds for recreational purposes. But if the pathway or road is used by automobiles or trucks to traverse the park or to access park facilities for purposes such as delivery of goods, then it would be considered a public road on which a minor employee would not be permitted to operate a golf cart.

Your letter also inquires whether 16-year-old lifeguards may drive their own vehicles from pool to pool on a public road during their hours of work (*i.e.,* during the time when they are paid by the City). Such activity is prohibited by the recently enacted statutory provision at 29 U.S.C. 213(c)(6) (copy enclosed), which provides that "employees who are under 17 years of age may not drive automobiles or trucks on public roadways." Please note that this 1998 amendment to the FLSA supersedes the HO 2 provision with respect to 16-year-olds driving on public roads incidentally and occasionally (sec. 570.52(b)(1)). I am enclosing a fact sheet that addresses the 1998 amendment.

Finally, your letter asks whether the City is responsible for its contractors' compliance with the child labor restrictions. The FLSA and regulatory provisions are applicable to the "employer" of the minors. Therefore, the City is responsible for child labor compliance where the City is the sole employer or where it is a joint employer (along with the contractor). The Department encourages the City to oversee the operation of its contractors – whether or not the City is an employer of the minors – to assure that the minors are employed only in safe and appropriate conditions.
We trust that this information is responsive to your request.

Sincerely,

Tammy D. McCutchen, Administrator

Enclosures

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7) .*