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

FLSA2009-5

January 14, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether the minimum wage and overtime exemption for seasonal amusement or recreational establishments in the Fair Labor Standards Act (FLSA)[1] applies to lifeguards at a town beach. It is our opinion that this exemption applies to these lifeguards.

The town employs 27 seasonal lifeguards who are employed for less than seven months of the year to protect swimmers at the local beach. You wish to confirm that these individuals are exempt from the FLSA's minimum wage and overtime pay requirements. We assume for purposes of this letter that these individuals are employed by the town exclusively as lifeguards at the beach, which is open to the public for lifeguard-protected swimming for less than seven months of the year, and that they are not employed by the town in any other capacity.

Section 13(a)(3) of the FLSA provides an exemption from minimum wage and overtime requirements for any employee employed by an establishment that is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center that either "does not operate for more than seven months in any calendar year," 29 U.S.C. § 213(a)(3)(A), or, "during the preceding calendar year," has "average receipts for any six months of such year [of] not more than 33 1/3 per centum of its average receipts for the other six months of such year." *Id.* § 213(a)(3)(B).

As used in the FLSA, the term "establishment" refers to a distinct physical place of business rather than to an entire business or enterprise, which may include several separate places of business. *See* 29 C.F.R. § 779.23. A city or town's entire municipal government, for example, cannot qualify as an amusement or recreational establishment. Likewise, parks department employees who are employed by a central, non-recreational agency facility do not qualify for the exemption, even if they are employed only seasonally. *See* FOH §§ 25j04(b); 25j10; Wage and Hour Opinion Letter October 5, 1999 (copy enclosed). Employees who work solely at a separate and distinct amusement or recreational facility operated by a municipality, however, do qualify for the exemption if the seasonal amusement or recreational establishment tests are met:

> Among the activities that the Department has determined may be amusement or recreational establishments operated by a city are stadiums, golf courses, swimming pools, summer camps, ice skating rinks, zoos, beaches, and boardwalk facilities . . . . For example, lifeguards on a beach and other

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

> employees who are engaged in work solely connected with the operation of the beach would come within the exemption provided the establishment (the beach) is not open as a recreational facility (*i.e.*, protected swimming) for more than 7 months in any calendar year.

Wage and Hour Opinion Letter May 12, 1986 (copy enclosed). *See also* Wage and Hour Opinion Letter January 17, 1986 (copy enclosed); FOH § 25j11.

To be exempt under section 13(a)(3), an employee must be employed in an amusement or recreational establishment that meets either the seasonal operations test contained in section 13(a)(3)(A) or the seasonal receipts test contained in section 13(a)(3)(B) discussed above. A state or local government-operated amusement or recreational establishment; such as a public beach, that has operating costs that are met wholly or primarily from general tax revenues, as we assume is the case here, does not qualify for the exemption under the seasonal receipts test in section 13(a)(3)(B). Such an establishment, however, may qualify under the seasonal operations test in section 13(a)(3)(A). *See* FOH § 25j12.

Finally, the exemption is not lost simply because some of the exempt employees work more than seven months in the year:

> The fact that some of the lifeguards [may] work more than seven months in the year maintaining the equipment would not serve to deny the exemption under section 13(a)(3), provided the establishment (the beach) is not open as a recreational facility (*i.e*., protected swimming) for more than seven months in any calendar year.

Wage and Hour Opinion Letter January 24, 1975 (copy enclosed). Therefore, assuming that the beach in question is, in fact, not open for protected swimming for more than seven months in any calendar year, the lifeguards are exempt from the overtime and minimum wage requirements of the Act pursuant to section 13(a)(3).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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