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

FLSA2009-11

January 15, 2009

Dear **Name***:

This is in response to your letter regarding the application of Fair Labor Standards Act (FLSA) section 13(a)(3)* to your client, a concessionaire at a privately-owned recreational establishment. It is our opinion that your client does not qualify as a recreational establishment and therefore may not claim the section 13(a)(3) exemption.

Your client holds an exclusive contract with the owner of a recreational establishment to provide various catering services to the general public and to private parties who use the facility. All of your client's operations are conducted at the establishment. No other legal relationship exists between the owners of the recreational establishment and your client. We assume that the recreational establishment contracting for the catering services is, for purposes of this response, within the scope of the section 13(a)(3) exemption. In addition, for the purpose of this response, we assume that your client is an enterprise covered by the FLSA. You inquire whether a recreational or amusement establishment and a concessionaire that are not a "single establishment," but are two separate legal entities working under a mutually beneficial contract, may both claim the section 13(a)(3) exemption.

Section 13(a)(3) of the FLSA provides a minimum wage and overtime exemption 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," 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." 29 U.S.C. § 213(a)(3)(A)-(B).

In order to claim the section 13(a)(3) exemption, the employer must be an amusement or recreational establishment. Under 29 C.F.R. § 779.23, an 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." Furthermore, the terms "employer," "establishment," "business," and "enterprise" are not synonymous. *See* 29 C.F.R. §§ 779.203 and 779.303. The section 13(a)(3) exemption "depends upon the character of the establishment in which the employee is employed. Restaurants are not generally recognized as amusement or recreational in character. Employees of a

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

restaurant operating on the premises of an amusement or recreational establishment . . . may come within the section 13(a)(3) exemption provided the operations of the restaurant and host establishment constitute a single establishment." Wage and Hour Opinion Letter Feb. 1, 1982 (copy enclosed).

"The exemption in section 13(a)(3) does not extend to employees who although actually working in an establishment are not 'employed by' the establishment." Wage and Hour Opinion Letter Jan. 17, 1968 (copy enclosed). Wage and Hour Division Fact Sheet #18 states, "an employee, to be exempt, must be 'employed by' the exempt establishment. If the concessionaire and host establishment constitute a single establishment, as is usually the case, the tests apply on the basis of all the operations of the establishment, including those of the concessionaire."

Factors considered in determining a "single establishment" "include: (a) physical separation from other activities, (b) functional operation as a separate unit with separate records and separate bookkeeping and (c) no interchange of employees between units." Wage and Hour Opinion Letter Nov. 30, 1984 (copy enclosed); *see also* 29 C.F.R. § 779.305. It is our understanding that your client operates as a separate unit with separate records and bookkeeping from the recreational establishment and there is no interchange of employees between the two entities. Further, based on the information you provided, your client is not itself an amusement or recreational establishment, but is a legal entity separate from the recreational establishment where its employees work. Thus, your client and the recreational establishment with which it contracts are not a "single establishment." Because your client and the recreational establishment are separate legal entities, and because your client does not qualify as an amusement or recreational establishment, your client is ineligible for the section 13(a)(3) exemption.

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).**