



**FLSA2006-39**

October 12, 2006

Dear **Name\***:

This is in response to your request for an opinion letter regarding the application of section 13(a)(3)<sup>1</sup> of the Fair Labor Standards Act (FLSA) to employees of a client who provides vacation excursions of three to ten days on small American-flagged vessels. You ask whether these overnight vacation cruises are exempt as amusement or recreational in nature under the FLSA. Subject to the limitations outlined below, we conclude that the described cruises generally have an amusement and/or recreational character as their primary activity under the 13(a)(3) FLSA exemption and that the employees in question would therefore be exempt.

Your client provides overnight vacation cruises that give passengers an opportunity to visit, learn about, and experience a variety of sights and natural venues. The primary activities of the vessels include sightseeing, exploring sights and nature, nature-related and sight-related discussions and lectures, group activities and programs, meals, and other similar activities. The passengers are not engaged in any business activity, and the voyage is not for purposes of transportation, as it typically returns passengers to the place from which it departed. The price of a ticket for these excursions is three times or more greater than that paid for comparable land-based meals and/or rooms, even though the rooms are small and stark.

The vessels are operated by marine crews.<sup>2</sup> On-board services are provided by cooks, wait staff, porters, naturalists, lecturers, narrators, and general housekeeping staff. You state that we are to assume that each vessel has its own workforce, operates independently of other vessels, and either does not operate for more than seven months in a calendar year or has average receipts for any six months of that year that are not more than 33.3 percent of the average receipts for the other six months of the year. You also state that your client, as an entity, would meet this criteria as well. Thus, whether each excursion vessel would qualify as a separate establishment or the enterprise itself is viewed as a single establishment, you ask that we assume that your client meets the seasonality test of section 13(a)(3) of the FLSA. You ask only whether employees who work on your client's vessels are involved in "amusement or recreational" activities under section 13(a)(3).

Section 13(a)(3) of the FLSA provides an exemption from the minimum wage and overtime pay requirements for any employee employed by an amusement or recreational establishment if (A) it does not operate for more than seven months in any calendar year or (B) during the preceding calendar year, its average receipts for any six months of such year were not more

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<sup>1</sup> Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

<sup>2</sup> You represent that the marine crews are, for purposes of this request, covered by the seaman's overtime exemption of section 13(b)(6) of the FLSA. You do not request an opinion with respect to these individuals, and we, therefore, do not provide one.

than 33 1/3 percent of its average receipts for the other six months of such year. As used in the FLSA regulations, the term “establishment” refers to a “distinct physical place of business.” 29 C.F.R. § 779.303. For further information on the establishment criteria see 29 C.F.R. § 779.305.

Whether or not an establishment has an “amusement or recreational” character for purposes of the section 13(a)(3) exemption depends on its principal or primary activity. We have previously recognized that riverboat cruises conducted for sightseeing and entertainment purposes may qualify for exemption. *See* Field Operations Handbook (FOH) § 25j17. Based on the information you have provided, it appears that your client’s vessels have an “amusement or recreational” character. As described above, the primary activities of the vessels include sightseeing, exploring sights and nature, nature-related and sight-related discussions and lectures, group activities and programs, meals, and other similar activities. Moreover, the overnight vacation cruises are advertised and listed in various recreational directories, websites, and brochures reviewed by individuals seeking to identify things to do during their free time and for vacation activities. The cost of a ticket appears to reflect a significant premium for the nature/sight-seeing aspect of the excursion, making these vessels different from a resort hotel. The principal activity of these vessels thus appears to be “selling recreational activities.” *Chao v. Double JJ Resort Ranch*, 375 F.3d 393, 397 (6th Cir. 2004). Of course, other factors may weigh against a finding that your client’s vessels have an “amusement or recreational” character. For example, in *Brennan v. Texas City Dike & Marina, Inc.*, 492 F.2d 1115, 1119-20 (5th Cir. 1974), the court examined the establishment’s primary source of income in determining the nature of the establishment. Thus, if the majority of your client’s income is derived from food, drink, lodging, concessions, and gifts, rather than from the premium portion of ticket sales paid for the nature-related and sight-related aspects of the excursion and entertainment, that would weigh against your client’s vessels having an amusement or recreational character. *See* FOH § 25j17; Wage Hour Opinion Letter November 22, 1982 (copy enclosed).<sup>3</sup>

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

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<sup>3</sup> The Department is withdrawing the opinion letter dated November 22, 1982 to the extent it concludes that a vessel cannot be an establishment.

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.

Sincerely,

Paul DeCamp  
Administrator

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