



UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
Washington, DC 20210



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FIELD ASSISTANCE BULLETIN No. 2020-6

MEMORANDUM FOR: Regional Administrators  
Deputy Regional Administrators  
Directors of Enforcement  
District Directors

FROM: Cheryl M. Stanton  
Administrator

SUBJECT: Temporary enforcement position regarding exempt 13(a)(3)  
establishments running alternative programming in 2020 because  
of the COVID-19 pandemic

This Field Assistance Bulletin (“FAB”) outlines the Wage and Hour Division’s (“WHD”) temporary enforcement position regarding the application of section 13(a)(3) of the Fair Labor Standards Act (“FLSA”) to existing amusement or recreational establishments, organized camps, or religious or non-profit educational conference centers that modified, replaced, canceled, or reduced normal operations in 2020 in light of the COVID-19 pandemic. Where the conditions outlined below exist, WHD shall not bring enforcement actions for violations of the minimum wage or overtime requirements of the FLSA against such establishments, even if the operations or programming of such establishments offered in 2020 might not satisfy the Department’s regulations under section 13(a)(3).

### **Background**

The FLSA requires employers to pay each employee at least the federal minimum wage for the first 40 hours worked in each workweek and overtime pay at not less than one and one-half times the employee’s regular rate of pay for all hours worked over 40 in a workweek, unless an exemption applies. 29 U.S.C. §§ 206, 207, 213. One exemption provides that the minimum wage and overtime requirements do not apply to “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,” provided the establishment operates on a seasonal basis based on one of two additional tests. 29 U.S.C. § 213(a)(3); 29 C.F.R. §§ 779.23; 779.385. An establishment operates on a seasonal basis 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 than 33⅓ per centum of its average receipts for the other six months of such year” (the “receipts test”). 29 U.S.C. § 213(a)(3); 29 C.F.R. § 779.385.

### **Temporary Enforcement Position**

Even as parts of the United States economy are beginning to re-open, employers of all sizes and types are modifying their operations in response to the COVID-19 pandemic and related restrictions imposed by government and public health authorities. Particularly vulnerable are seasonal amusement or recreational establishments whose employees are exempt from the minimum wage and overtime requirements under section 13(a)(3) of the FLSA. Many such establishments, especially those operating in the summer months, have been compelled to cancel or substantially curtail their normal operations because they cannot offer their regular amusement or recreational programming (or cannot do so safely) under the circumstances. Additionally, restrictions and health requirements related to COVID-19 effectively closed some of these establishments for all or part of their year.

To make ends meet in 2020, some of these establishments creatively adapted to withstand the devastating impact of the COVID-19 pandemic on the financial health of their organizations. Some offered alternative services or programs within COVID-19 restrictions and recommendations, or otherwise made use of their facilities in related new ways. For example, a sports camp compelled to cancel its operations in 2020 might elect to rent its athletic fields to local schools or organizations who need more space to comply with distancing requirements.

These alternatives provided critical income that allowed such establishments to retain full time or key employees and cover their fixed costs in 2020 while they plan to return to conventional operations in 2021. And while these alternatives may save innumerable establishments from permanent closure, these alternative activities also may not satisfy the requirements of the section 13(a)(3) exemption. In particular, in the case of establishments that have traditionally qualified as seasonal amusement or recreational establishments, these alternative activities may conflict with the requirement that the establishment exist for the purpose of amusement or recreation. In light of the financial burdens already imposed by the COVID-19 pandemic, related government orders, and the recommendations of public health, the Department is mindful of imposing greater compliance burdens on such establishments that may impact their survival in 2020 and recovery in 2021.

As a result, WHD shall apply this enforcement position and not bring enforcement actions against seasonal establishments that, prior to 2020, operated as amusement or recreational establishments, organized camps, or religious or non-profit conference centers within the meaning of section 13(a)(3) for violations of the minimum wage or overtime requirements of the FLSA alleged to have occurred in 2020, provided the establishments:

- (1) canceled or limited their regular seasonal programming or operations for reasons related to COVID-19;
- (2) adopted related alternative programming or operations solely for 2020;

- (3) paid their employees at least the same wage levels and rates that they received when the establishment was operating as an amusement or recreational establishment, organized camp, or religious or non-profit conference center; and
- (4) have taken steps to abandon those alternatives and return to their normal operations in 2021.

Additionally, when applying the receipts tests in 2021, WHD will look to receipts from either 2019 or 2020.

This enforcement position does not extend to establishments that did not operate as an exempt 13(a)(3) establishment prior to 2020, or whose normal operations or programming prior to 2020 did not meet (or would not have met) the requirements of section 13(a)(3). Similarly, this enforcement position does not apply to new or additional operations or programming that prior to January 2020 the establishment planned to implement or that the establishment intends to continue beyond 2020 or the COVID-19 pandemic.<sup>1</sup>

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<sup>1</sup> WHD recognizes the potential that the COVID-19 pandemic may impact seasonal establishments into 2021 and that, if the pandemic persists, such establishments may make plans for alternative programming and operations in 2021 as well as 2020 even as they take steps to return to their normal operations. In the event COVID-19 presents similar obstacles to the normal operations of seasonal establishments next year, this non-enforcement position shall continue through 2021.