



FLSA2006-37

September 28, 2006

Dear **Name***:

This is in response to your letter inquiring whether wilderness expedition course instructors, assistant instructors, course directors, and logistic support personnel are exempt under Fair Labor Standards Act (FLSA) section 13(a)(3).¹ It is our opinion that the employees described in your letter are exempt as employees of seasonal amusement and recreational establishments.

The employer is a non-profit educational organization that runs seven schools, six of which operate educational recreational expeditions from 45 base camps located across North America, mostly within the United States. With a few exceptions, the base camps operate for less than seven months during the year, based upon climate conditions appropriate to the particular expeditions (*e.g.*, white water rafting, dog sledding, skiing, and canoeing). For the few camps that run expeditions more than seven months during the year, more than two-thirds of each camp's revenue routinely is received in six months or less, coinciding with the peak operational season of the particular base camp. You ask whether the section 13(a)(3) exemption applies to the identified employees at the base camps; you do not ask whether it applies to employees at the schools.

We proceed with a discussion below of the possible application of section 13(a)(3) in the event that some or all of the individuals employed by the company are *enterprise* or *individually covered* under the FLSA. See 29 U.S.C. § 203; 29 C.F.R. §§ 776.0-.21; [Fact Sheet #14](#). If a base camp qualifies for the section 13(a)(3) exemption, then all the employees of that base camp are exempt from the FLSA overtime requirements.

FLSA section 13(a)(3) 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,” 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).

The first step in applying the section 13(a)(3) exemption is to determine whether the seven different schools of the company and their approximately 45 base camps qualify as separate establishments or whether the company is to be considered a single establishment. The Regulations define “establishment” as “‘a distinct physical place of business’ rather than ‘an entire business or enterprise’ which may include several separate places of business.” 29 C.F.R. § 779.23. It appears from your description that the separate base camps are physically remote from one another. Thus, each base camp would meet the definition of a separate

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.

establishment, and exemption status depends upon whether the individual base camp meets the requirements of section 13(a)(3).

The second step in applying section 13(a)(3) is to determine whether each establishment qualifies as “amusement or recreational,” an “organized camp,” or a “religious or non-profit educational center.” 29 U.S.C. § 213(a)(3). Based on your description of the base camps’ activities, the primary activities are traditional recreational activities such as hiking, rafting, and skiing. Thus, the base camps qualify as “amusement or recreational” facilities. *See Wage and Hour Opinion Letters* September 22, 1999 and February 18, 1999 (copies enclosed).

The final step in applying section 13(a)(3) is to determine whether each base camp meets the requirements of section 13(a)(3)(A) regarding the duration of the base camp’s operation or section 13(a)(3)(B) regarding the base camp’s receipts. You state that most of the company’s base camps operate less than seven months during the year due to climatic conditions. Thus, those base camps satisfy section 13(a)(3)(A).

Those base camps that operate more than seven months during the year, however, must be analyzed under section 13(a)(3)(B). The test enunciated in this subpart, often referred to as the “receipts test,” requires that the average revenues from the six months with the smallest receipts cannot be more than one third the average of the six months with the greatest receipts. These six months need not be sequential. *See Field Operations Handbook* § 25j01. You state that of the base camps that operate longer than seven months, “more than two-thirds of their revenue from such expeditions are routinely received during six month periods or less.” However, this information is insufficient for us to determine whether these camps meet the test in section 13(a)(3)(B). First, the 33-1/3 percent figure in the receipts test refers to a comparison between two periods of the year, not a comparison against a yearly revenue total; *i.e.* the revenue from the “low” six months may not exceed one third of the revenue from the “high” six months, *not*, as suggested by your statement, one third of the annual revenue.² Second, the receipts test requires further study of each year’s revenue, because the test is based on receipts “during the preceding calendar year.” If the test is met, all employees of the base camps are exempt under section 13(a)(3), not just instructors, directors, and support personnel.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

² A comparison to the yearly revenue total is, of course, possible, but would require that the revenue from the “low” six months not exceed 25 percent of the yearly revenue total.

³ We are withdrawing Wage and Hour Opinion Letters FLSA2001-15 and May 23, 2000 to the extent they conclude that certain employees of an otherwise-qualifying establishment do not qualify for the section 13(a)(3) exemption because their activities are not of the “same character” as those activities for which the establishment was created.

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 the above is responsive to your inquiry.

Sincerely,

Paul DeCamp
Administrator

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