



FLSA2021-3

January 15, 2021

Dear **Name,* Name,* and Name***:

This letter responds to each of your requests for an opinion regarding whether the three entities you represent satisfy the requirements of Section 13(a)(3) of the Fair Labor Standards Act (FLSA or Act). 29 U.S.C. § 213(a). In light of the overlapping issues presented and the broader clarity achieved by a more comprehensive discussion of Section 13(a)(3) of the Act, the Wage and Hour Division (WHD) is responding to these requests in a single letter. The opinions in this letter are based exclusively on the facts you have presented in your requests and, in some cases, in subsequent telephone conversations with my staff. Each of you represents that you do not seek this opinion for any party that the WHD is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

A. First entity: Outdoor excursions, but no amusement or recreational events at permanent establishment.

The first entity organizes, leads, and facilitates a wide variety of nature walks, hikes, day-trips, and other backpacking and overnight camping excursions for children, primarily those 13 years of age or younger. The entity has three full-time employees and 17 part-time employees who facilitate and lead its events, trips, and other outings.

These events take place throughout nearby forests, rivers, mountains, fields, and beaches. On these outings, children have an opportunity to experience, enjoy, and explore nature. While doing so, they also learn about the importance of environmental stewardship, participate in challenges to develop leadership skills, and foster self-confidence. These trips range from short events lasting a few hours in a single afternoon, to week-long day camps, to overnight camping excursions. Although shorter events and day hikes are provided throughout the year, overnight trips are not offered during the colder months between November and April.

The first entity leases office space solely for administrative purposes. The office does not serve a programmatic function. Events are not held there. Outings never meet at, leave from, or return to the office. Instead, the entity has eschewed a physical presence for an online one. On its website, the entity posts upcoming events, trips, and other outings and allows customers to sign up and submit payment. The amount of the fee depends on the type of event. Shorter events (such as those lasting two and one-half hours) may cost between \$8 and \$12 per person. The first entity may charge \$450 to \$600 per person to attend a week-long day camp; a week of overnight camping may cost between \$800 and \$1,000 per person.

The first entity asks whether it qualifies as an “amusement and recreational establishment, organized camp, or religious or non-profit educational conference center” under Section 13(a)(3) of the FLSA. We presume, as requested, that the entity satisfies the seasonality test in Section 13(a)(3)(B), which is discussed further below.

B. Second entity: Employer using accrual accounting for tax and accounting purposes and receiving donations.

The second entity is a non-profit religious ministry that runs a ranch-style camp and retreat center. While it operates year-round, the center has distinct high and slow seasons. Summer is the center’s busiest when it increases its staff more than 250 percent and conducts the majority of its annual operations. During the winter months, the center hosts group retreats from churches and other similar organizations, but with less frequency than in the summer months.

Since 2003, the second entity has used an accrual accounting method in which revenue is recognized as received at the time the entity provides the corresponding service. This contrasts with cash accounting where revenue is recognized in the month it is received or collected. In addition, as a non-profit, the center receives both solicited and unsolicited charitable donations from individuals and organizations throughout the year. These include donations to support the center’s general operations, contributions during capital campaigns, and “an annual contribution from an affiliated non-profit entity when necessary to ensure” that the center breaks even in a particular year.

The second entity asks whether an employer that uses an accrual method of accounting for tax and accounting purposes may also use that method for purposes of compliance with Section 13(a)(3)(B). Additionally, it asks whether such an employer must include some or all types of charitable donations when calculating average receipts under that section.

C. Third entity: Event production at various locations, but no amusement or recreational activities at permanent establishment.

The third entity is a family-owned and operated employer that produces up to 2,400 events in a normal year for individuals, companies, non-profits, schools, universities, and a variety of public entities across the state in which it is located. The entity helps to plan the activities and provides the requested amusement rides, attractions, entertainment, concession equipment, personnel, and related items—delivering, installing, and often operating them at the event site. On a given day the entity might provide a single costumed performer for a small group meeting in one town. That same evening across the state in which the entity is located it also might stage an event for a client filling a city block with its inflatable rides, dunk tanks, water slides, concessions, carnival games, stilt walkers, face painters and other entertainment. The vast majority of these events lasts no more than a single day. The entity maintains a warehouse and administrative offices at which it stores and maintains inventory and conducts necessary year-round sales and business activities. It does not offer any of the above services to the public at this location.

The third entity notes that it satisfies the Receipts Test in Section 13(a)(3)(B), but questions whether it qualifies as an amusement or recreational establishment. It argues that while the Act uses “establishment language,” supporting case law and legislative history speak of “activities”

and suggest they might suffice. It asks whether the exemption may apply to an employer that provides amusement or recreational activities but not at its own location or facility.

LEGAL PRINCIPLES

A. FLSA generally.

The FLSA requires employers to pay each covered employee at least the federal minimum wage for all hours worked, and overtime compensation—at not less than one and one-half times the employee’s regular rate of pay—for all hours worked in excess of 40, in a workweek. 29 U.S.C. §§ 206, 207. However, “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” is exempt from both requirements if it satisfies one of two tests of seasonality. 29 U.S.C. § 213(a)(3). As set forth in greater detail below and in prior guidance, to satisfy the requirements of the exemption an employer must (1) be an establishment; (2) that is “amusement or recreational” in character, or an organized camp, or a religious or non-profit educational conference center; and (3) satisfy Subparagraph (A) or (B), which set out seasonality requirements for the establishment.

When construing or applying the FLSA, WHD must give the text a “fair ... interpretation.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (cleaned up); *CTS Corp. v. Waldburger*, 573 U.S. 1, 13 (2014). While the Department of Labor and federal courts previously applied the convention that exemptions to the FLSA should be construed narrowly—and its minimum wage and overtime requirements interpreted broadly—in furtherance of its “remedial” purpose, *see, e.g., Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), the Supreme Court “reject[ed] this principle” because it relies on the “flawed premise that the FLSA pursues its remedial purpose at all costs.” *Encino*, 138 S. Ct. at 1142 (cleaned up); *see also Waldburger*, 573 U.S. at 13 (the “proposition that remedial statutes should be interpreted in a liberal manner” cannot be a “substitute for a conclusion grounded in the statute’s text and structure” because “almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial ... no legislation pursues its purposes at all costs”) (cleaned up). Instead, the Court instructed that exemptions be afforded the same “fair interpretation” as any other statutory provision because the FLSA’s exemptions are “as much a part of the FLSA’s purpose as the [minimum wage and] overtime-pay requirement[s].” *Encino*, 138 S. Ct. at 1142 (citing and quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage[.]”). Accordingly, WHD affords all provisions of the FLSA the same fair construction. *See Encino*, 138 S. Ct. at 1142; *Waldburger*, 573 U.S. at 13.

B. Amusement or recreational establishments.

The Act does not define the phrase “amusement or recreational establishment.” The application of Section 13(a)(3) does not depend on the compensation or duties of each individual *employee*, but rather turns on the attributes and operations—what WHD has historically referred to as the “character”—of the *employer*. *See, e.g.,* WHD Op. Ltr. FLSA2009-11; WHD Op. Ltr. FLSA-

824 (June 8, 1979); WHD Op. Ltr. (July 6, 1967). In other words, if an employer qualifies as an amusement or recreational establishment under Section 13(a)(3), all employees employed by that establishment are exempt. *See Hamilton v. Tulsa Cty. Pub. Facilities Auth.*, 85 F.3d 494, 497 (10th Cir. 1996) (“By its own terms, [Section 13(a)(3)] of the FLSA exempts employees employed by amusement or recreational establishments; it does not exempt employees on the basis of the work performed at an amusement or recreational establishment.”) (citations omitted); *Marshall v. N.H. Jockey Club*, 562 F.2d 1323, 1331 n.4 (1st Cir. 1977) (an establishment-based exemption “turns on the nature of the employer’s business, not on the nature of the employee’s work”); WHD Op. Ltr. FLSA2003-1 (for purely establishment based exemptions “[e]mployee duties are irrelevant,” rather, “[t]he nature of the employer’s business, not the work performed by a particular employee, determines whether establishment-based exemptions ... apply”); WHD Op. Ltr. FLSA-809 (Sept. 17, 1974) (Section 13(a)(3) grants a “complete exemption”); WHD Op. Ltr. (July 21, 1970) (Section 13(a)(3) grants “a complete minimum wage and overtime pay exemption for any employee employed by an establishment which is an amusement or recreational establishment”); *see also* 29 C.F.R. § 779.302 (distinguishing exemptions, expressly included in Section 13(a)(3), that depend solely on the character of the establishment from those that depend on both the character of the establishment and the particulars of the work performed by the individual employee).¹ However, the origins of the exemption are found, not in Section 13(a)(3), but rather in Section 13(a)(2), an exemption covering retail stores that Congress repealed in 1989. *See* Pub. L. 101-57, § 3(c)(1), 103 Stat. 939.

1. Definition of “establishment.”

a. Supreme Court construes the term enacted by Congress.

Originally, the FLSA exempted from its minimum wage and overtime requirements “any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.” Act, § 13(a)(2), 52 Stat. 1060, 1067. In 1961, Congress

¹ A small number of rescinded opinion letters suggested that employees of bona fide Section 13(a)(3) establishments “whose activities are not of the same character as those activities for which the establishment was created” are not covered by Section 13(a)(3). *See* WHD Op. Ltr. FLSA2001-15; WHD Op. Ltr. (May 23, 2000). Such statements conflict with the unambiguous text of Section 13(a)(3), the Department’s regulations, and the weight of court decisions and WHD’s letters outlined above. *See* 29 U.S.C. § 213(a)(3) (exempting “any employee employed by an establishment which is an ...”) (emphasis added); 29 C.F.R. §§ 779.23, 779.302. As a result, WHD withdrew most of these letters nearly 15 years ago. *See* WHD Op. Ltr. FLSA2006-37. This leaves 29 C.F.R. § 779.308. To avoid interpretations or applications of this regulation that might be in tension with the Act or other regulations in Part 779, WHD adheres to, and will continue to apply, it consistent with the cases it cites. *See Gieg v. DDR, Inc.*, 407 F.3d 1038, 1050–52 (9th Cir. 2005). Where an employee is solely performing work for an employer “engaged in a business endeavor ... *truly* separate from, and not at all related to, the exempt business of the establishment,” such an employee would fall outside the establishment-based exemption. *See Gieg*, 407 F.3d at 1050 (emphasis in original). Merely working in a distinct department is insufficient—the department must be “engaged in truly separate business endeavors ... wholly *extraneous* to the work targeted by the relevant exemption.” *Id.* at 1052 (internal punctuation replaced by added emphases). This approach is consistent with the longstanding position taken by the Department and avoids any tension outlined above. *See, e.g.*, WHD Op. Ltr. FLSA2006-37; WHD Op. Ltr. FLSA2003-1.

amended Section 13(a)(2) to encompass “any employee employed by any retail or service establishment . . . if such establishment . . . is an amusement or recreational establishment that operates on a seasonal basis.” Pub. L. 87-30, 75 Stat. 65, 71. It limited the applicability of the exemption to only those entities that qualified as both “amusement or recreational” and “retail and service” establishments. *Id.* Five years later, in 1966, Congress relocated the portion of the exemption covering amusement and recreational establishments to Section 13(a)(3). Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 201(b)(2), 80 Stat. 830, 833.² The 1966 amendments broadened the scope of the exemption for amusement or recreational establishments, now found in Section 13(a)(3), to include establishments that did not qualify as retail and service establishments. Congress did not abandon the concept of seasonality, but rather replaced the “seasonal basis” requirement with two alternative tests directed toward identifying with greater precision employers with “very sharp peak and slack seasons,” whose “economic status may make higher wages impractical,” or experiences that “offer non-monetary rewards,” even if their operations were not limited to a specific, recurring season. *See Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1259 (6th Cir. 1987); *see also Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 77 (2d Cir. 2015).

Even though it abandoned the “retail and service” requirement for amusement and recreational entities in its 1966 amendments, Congress retained—and repeated—the term “establishment,” in the new Section 13(a)(3). Specifically, rather than simply exempting all employees of “an amusement or recreational establishment” or defining “establishment” in Section 3, Congress instead exempted all employees of “*an establishment which is an amusement or recreational establishment.*” Pub. L. 89-601, § 201(b)(2), 80 Stat. at 833 (emphasis added). And in 1977, Congress again left “establishment” alone while adding organized camps and religious or non-profit educational conference centers to the list of amusement or recreational establishments that may qualify for the Section 13(a)(3) exemption. Fair Labor Standards Amendments of 1977, Pub. L. 95-151, § 11, 91 Stat. 1245, 1252.

Two decades earlier, in 1945, the Supreme Court had addressed the meaning of “establishment” in the retail or service context of the original Section 13(a)(2). *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945). In *A.H. Phillips*, an employer that operated a chain of 49 retail grocery stores in Massachusetts and Connecticut, a separate warehouse, and an office facility argued that the entire operation was a “retail establishment” under Section 13(a)(2) and, as a result, claimed that employees who worked in the warehouse and office building supporting the retail operations were exempt from the minimum wage and overtime requirements. *Id.* at 492-93. Construing the exemption narrowly, as was its new practice at the time, the Court rejected the argument, concluding that the term “establishment” in Section 13(a)(2) did not refer to an entire business or enterprise, but instead “exempts only those employees engaged in a retail or service establishment operating primarily in local commerce.” *Id.* at 496. The Court reasoned that “Congress used the word ‘establishment’ [in 13(a)(2)] as it is normally used in business and in government—as meaning a distinct physical place of business.” *Id.* at 496 (footnote omitted); *see also Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027, 1027 (1957) (summarily

² Congress also created two statutory tests to determine whether an entity is the type of seasonal employer for which the exemption is designed—the “Calendar Test” of Section 13(a)(3)(A) and the “Receipts Test” of Section 13(a)(3)(B), both of which are described in Legal Principles § C.

reversing judgment because “five physically separate warehouses do not constitute a single ‘retail establishment’”) (citations omitted).

b. WHD adopts the Court’s construction.

Relying upon what it perceived to be Congress’ endorsement and adoption of *A.H. Phillips* and *Mitchell* in the 1966 amendments, WHD promulgated interpretive regulations adopting the Court’s construction of “establishment” for the retail and service establishments exemption in Section 13(a)(2). The Department applied the construction in *A.H. Phillips* to all uses of the term “establishment” in the Act, stating simply that its definition “is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation.” See 35 FR 5856, 5862 (citing *A.H. Phillips*, *Mitchell*, and legislative history); 29 C.F.R. § 779.23 (meaning of “establishment” from regulation applies to use of term in Sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act).

In the decades since, the Department has adhered to this interpretation in the context of Section 13(a)(3), regardless of the fact that Congress repealed Section 13(a)(2) in 1989. See Pub. L. 101-57, § 3(c)(1), 103 Stat. 939. WHD has interpreted “establishment,” as it is used in Section 13(a)(3) and throughout the FLSA, see, e.g., 29 U.S.C. §§ 203(r), (s), 206(d), as a “distinct physical place of business,” which it contrasts with “an entire business or enterprise,” which may include several separate places of business. See 29 C.F.R. §§ 779.23, 779.303-.305; *A.H. Phillips*, 324 U.S. at 496; WHD Op. Ltr. FLSA2018-26; WHD Op. Ltr. FLSA2009-11; WHD Op. Ltr. FLSA2006-39; WHD Op. Ltr. FLSA2006-37; WHD Op. Ltr. FLSA2003-1; WHD Op. Ltr. FLSA-807 (Oct. 4, 1974) (municipal recreational area comprising multiple fields, courts, and pools constitutes an establishment); WHD Op. Ltr. (July 21, 1970) (multiple facilities within a national park do not constitute a single “establishment” for purposes of Section 13(a)(3) exemption).³ Courts have affirmed that this definition of “establishment” applies to Section 13(a)(3). See, e.g., *Chen*, 798 F.3d at 79; *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285, 289–90 (10th Cir. 1973).

As a corollary of its “establishment” requirements, WHD has clarified that several business operations on the “same premises and even under the same roof” may constitute separate establishments. Such a collection of entities may qualify as separate establishments if each operation (1) is physically separated; (2) functionally operates as a separate unit having separate records and bookkeeping; and (3) does not exchange employees more than occasionally.⁴ See 29

³ In 1977, Congress made further revisions to Section 13(a)(3), only one of which is relevant here. Specifically, Congress expanded the scope of the exemption to explicitly encompass “organized camp[s]” and “religious or non-profit educational conference center[s].” Pub. L. No. 95-151, § 11, 91 Stat. 1245, 1252 (1977).

⁴ Echoing the Court’s comments in *A.H. Phillips*, WHD has explained that employees who work in “central offices” or “warehouses” in support of several distinct establishments do not qualify for the exemption. See *A.H. Phillips*, 324 U.S. at 498 (“warehouse and central office” employees “plainly and unmistakably” fall outside both the “terms” and the “spirit” of Section 13(a)(2)); see also WHD Op. Ltr. (Aug. 9, 1967) (“employees employed in a central office or warehouse rather than by a particular establishment ... [and those] performing central functions” would not be exempt”); WHD Op. Ltr. (July

C.F.R. § 779.305 (all three elements must be satisfied); *see also Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1158 (11th Cir. 2008) (test applies to Section 13(a)(3)); WHD Op. Ltr. FLSA2018-26 (citations omitted).

2. Definition of “amusement or recreational.”

An establishment is an “amusement or recreational” establishment if it is (1) “frequented by the public” (2) “for its amusement or recreation.” *See* 29 U.S.C. § 213(a)(3); 29 C.F.R. § 779.385; WHD Op. Ltr. FLSA2018-26. An establishment is “frequented by the public” if it is generally accessible to the public. *Id.* This is easily satisfied in most cases, as WHD has made clear that the requirement does not prohibit exempt establishments from requiring membership or charging a fee for access. *See, e.g.*, WHD Op. Ltr. FLSA2018-26; *see also* WHD Op. Ltr. WH-312 (May 7, 1975) (stating that country clubs with non-prohibitive fees may be considered to be frequented by the public). Similarly, an establishment is frequented by the public “for its amusement and recreation” if it exists “for the purpose of amusement or recreation.” WHD Op. Ltr. FLSA2018-26. The nature of the employer’s business—not the work of a particular employee—determines an entity’s purpose. *Id.*; *Hamilton v. Tulsa Cty. Pub. Facilities Auth.*, 85 F.3d 494, 496-98 (10th Cir. 1996); *see also* WHD Op. Ltr. FLSA2003-1 (“The nature of the employer’s business, not the work performed by a particular employee, determines whether establishment-based exemptions ... apply.”). This inquiry takes into account all relevant circumstances. *See, e.g.*, WHD Op. Ltr. FLSA2006-39; WHD Op. Ltr. FLSA-718 (Jan. 14, 1977); *see also Chessin v. Keystone Resort Mgmt., Inc.*, 184 F.3d 1188, 1194 (10th Cir. 1999) (declining “to require an enterprise to derive a certain percentage of revenue from strictly recreational activities in order to be considered recreational” and instead “examin[ing] the totality of the circumstances”). The amount of income derived from the recreational or amusement aspects of the enterprise, compared to other aspects, is an important factor. *See Brennan v. Tex. City Dike & Marina, Inc.*, 492 F.2d 1115, 1119–20 (5th Cir. 1974); *see, e.g.*, WHD Op. Ltr. FLSA2006-39 (if the majority of the entity’s income were derived from sale of food, drink, lodging, concessions, and gifts rather than the premium for the “nature-related and sight-related aspects of the excursion,” it would “weigh against” finding the entity had an “amusement or recreational character”). But the enterprise’s need, or not, for the exemption to stay in business is irrelevant since that has nothing to do with whether the enterprise has an amusement or recreational purpose. *See Marshall*, 562 F.2d at 1332 (“The economic security of the [business] owner ... was not made a test for applying the exemption....”); *Valladares v. Insomniac, Inc.*, No. 14-00706-VAP, 2015 WL 12656267 (C.D. Cal. Jan. 29, 2015) (rejecting argument that a high-revenue entity should be barred from claiming the exemption because it does not “need” it because “a defendant’s revenue is irrelevant to whether the [] exemption applies”).

Applying these standards, WHD historically has found that recreational areas, parks, tennis courts, swimming pools, golf and miniature golf courses, ice skating rinks, hockey fields, football fields, summer camps, playgrounds, stadiums, sports events, zoos, fairgrounds (state and county fairs), arts and crafts programs, theaters, vessels such as riverboats, campsites, campgrounds, beaches, boardwalks, and museums may generally qualify as “amusement or

21, 1970) (same); WHD Op. Ltr. FLSA-809 (Sept. 17, 1974) (same); WHD Op. Ltr. FLSA-807 (Oct. 4, 1974) (maintenance crews working solely for an exempt park would be exempt, but not if they were employed by a central office to clean all city parks); WHD Op. Ltr. FLSA-1032 (Feb. 3, 1986).

recreational establishments” under Section 13(a)(3). *See* WHD Op. Ltr. FLSA2018-26; WHD Op. Ltr. FLSA2006-39; WHD Op. Ltr. (June 16, 1999); WHD Op. Ltr. FLSA-208 (Sept. 12, 1978); WHD Op. Ltr. FLSA-807 (Oct. 4, 1974). In contrast, hotels, motels, conventions, restaurants, gas stations, shops, retail stores, souvenir stands, town and county membership clubs, municipal governments or departments, marinas, and apartment or condominium facilities with amenities not available to the public generally do not usually qualify for the exemption. *See* WHD Op. Ltr. FLSA2018-26; WHD Op. Ltr. FLSA2009-5; WHD Op. Ltr. FLSA-1032 (Feb. 3, 1986); WHD Op. Ltr. FLSA-208 (Sept. 12, 1978); WHD Op. Ltr. FLSA-807 (Oct. 4, 1974).

C. Calendar Test and Receipts Test.

To qualify for the Section 13(a)(3) exemption, the establishment must also satisfy either the Calendar Test or the Receipts Test. 29 U.S.C. §§ 213(a)(3)(A), (B); 29 C.F.R. § 779.385. These tests are designed to ensure that only truly seasonal employers qualify for the exemption. *See Brock*, 817 F.2d at 1259 (the “logical purpose . . . is to exempt the type of amusement and recreational enterprises . . . which by their nature, have very sharp peak and slack seasons [that] may require longer hours in a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards”); *Brennan*, 478 F.2d at 288 (exemption “allow[s] recreational facilities to employ young people on a seasonal basis and not have to pay the . . . minimum wages required by the [FLSA]”).

An establishment satisfies the Calendar Test if “it does not operate for more than seven months in any calendar year.” 29 U.S.C. § 213(a)(3)(A). For existing establishments, WHD generally reviews the current or previous calendar year. A “calendar year” is the period beginning January 1 and ending December 31. An entity “operates” for purposes of the test during any month in which it is open as an amusement or recreational establishment, summer camp, or religious or non-profit educational conference center. *See* WHD Op. Ltr. FLSA2009-5; WHD Op. Ltr. (Jan. 24, 1975). As a result, an establishment satisfies the Calendar Test even when some of the exempt employees work more than seven months in the year—or even year-round—maintaining the facility, or if the facility is being used for other purposes, provided it is not open as the amusement or recreational establishment more than seven months in the calendar year. *Id.*

An establishment satisfies the Receipts Test if “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.” 29 U.S.C. § 213(a)(3)(B). The months in each category may, but are not required to, be consecutive. In essence, the establishment must average total receipts for the six months in which receipts were smallest, average its total receipts for the remaining six months in which receipts were largest, and compare these figures to ensure the former is 33⅓ per centum *or less* than the latter. *Id.* Viewed from the opposite perspective, the average total receipts for the six months in which receipts were largest must be *more than* three times (or 300 percent) the average receipts for the remaining six months in which receipts were smallest. *See id.*

OPINION

A. The first entity is not an amusement or recreational establishment.

We presume, as requested, that the first entity satisfies the Receipts Test. As a result, we address only whether it qualifies as an establishment with an amusement or recreational character. We conclude that it does not.

1. The entity has an amusement or recreational character.

There is no doubt that the first entity has an amusement or recreational character. Its staff facilitate hikes, camping trips, and other events in forests, rivers, mountains, fields, and beaches that are widely available to the public for an accessible fee. These excursions allow children and others to experience, enjoy, and explore nature while learning the importance of environmental stewardship, developing leadership qualities, and developing self-confidence. The first entity “sells” and provides an experience—not a tangible product—where children have fun as they learn about nature and themselves while cultivating personal skills and character traits. In this way, the first entity is precisely the sort of “amusement or recreational” operation that Section 13(a)(3) is designed to cover.

2. The entity’s amusement and recreational activities do not take place in an establishment.

But merely satisfying some of the elements of the Section 13(a)(3) exemption is insufficient. While the first entity’s outdoor operations are unquestionably recreational, its novel structure does not readily align with familiar notions of an “establishment.” Unlike traditional amusement or recreational facilities, the first entity has traded a traditional physical presence for a modern virtual one. As noted above, the entity does not have a fixed location besides its administrative offices; rather, patrons sign up and pay for the entity’s events online, which are held at various outdoor locations. In contrast, the Department’s regulations on the term “establishment” date to the World War II-era “corner drug store.” As alluded to above, in 1944, the *A.H. Robbins* Court rejected the efforts of an interstate chain of 49 retail grocery stores to shoehorn itself into an exemption meant for local retail businesses.⁵ The Department has applied this construction of “establishment” across all uses of the term in the FLSA, even those pre-dating the 1966 amendments. Accordingly, the Department’s longstanding interpretative regulations, which have been in place and acknowledged by the courts for nearly 50 years, explicitly require that an establishment be a “distinct physical place of business.” See 29 C.F.R. §§ 779.23, 779.303–

⁵ *A.H. Phillips* is one of the seminal cases espousing the principle that “any exemption from humanitarian and remedial legislation such as the Fair Labor Standards Act must be narrowly construed.” 324 U.S. at 493. As noted above, however, the Supreme Court has rejected this approach when construing the FLSA, potentially leaving decisions that turned on the principle in some doubt. See *Encino, supra*; see also *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 228 (2d Cir. 2018) (citing *A.H. Phillips* for the principle and *Encino* for the Court’s rejection of it). Unless or until the Court addresses the matter, *A.H. Phillips* remains good law—as are the Department’s regulations adopting it. Even without the rejected presumption, the Court’s construction aligned with contemporary dictionaries. See OED (“a house of business”) (1933); Webster’s Giant Illustrated Dictionary (“a place of business”) (1943). Additionally, there is little doubt that the 49-store interstate operation in *A.H. Phillips* was not an “establishment.”

779.305; *Brennan*, 478 F.2d at 289–90 (applying this definition under Section 13(a)(3)); *Chen*, 798 F.3d at 79 (same); *see also* WHD Op. Ltr. FLSA2018-26, WHD Op. Ltr. (July 21, 1970).

a. An establishment requires a physical location.

The Department has not specifically elaborated on the “physical” requirements that apply to bona fide small, single-site, local amusement or recreational establishments other than to ensure they are not a multi-site enterprise. WHD has also never explained why the term “establishment” under Section 13(a)(3) requires a physical location in the specific context where the employer does not operate a multi-site or interstate enterprise, much less one without a retail concept. Indeed, a distinct physical amusement and recreational establishment *is* the entire enterprise wherever an employer lacks multiple locations. The Department’s regulations state as much, confirming that the concepts of establishment and enterprise are not always distinct and may, in fact, overlap. *See* 29 C.F.R. § 779.303 (the “term ‘establishment’ is not synonymous with the words ‘business’ or ‘enterprise’ when those terms are used to describe multiunit operations,” the term “‘enterprise’ may be composed of a single establishment.”).

However, to constitute an exempt establishment, an entity that offers amusement or recreational services must have a physical location that is in some way used in any of the activities that comprise its amusement or recreational character. The requirement is not onerous and easily satisfied in most circumstances. In the vast majority of such establishments, the requirement merits no comment and is presumed. This is because as long as an entity uses its physical location and structure in some aspect of its amusement or recreational activities, it satisfies this requirement. *See* 29 C.F.R. § 779.308. The regulations do not demand that a business use its physical location for a majority of its amusement or recreational operations to qualify for the exemption. Minimal, occasional, or infrequent use of the facility in amusement or recreational activities is likely sufficient.

Here, the first entity’s only distinct physical location—the office it leases—is entirely divorced from the functions that afford its amusement or recreational character. The office does not serve any programmatic role whatsoever. Not a single event or other program is held there. Trips or other outings never meet at, leave from, or return to the office. It does not play any role in the first entity’s amusement or recreational character beyond bookkeeping and administrative support, which is insufficient to qualify for the Section 13(a)(3) exemption. 29 C.F.R. § 779.308.

b. The physical location must be distinct and controlled by the entity.

Moreover, the first entity is not transformed into a multi-site employer because some of its trips and events occur in different locations or, on multi-day trips, involve setting up “camp” overnight at a location. For a location to be considered “distinct” and “physical” for purposes of the Section 13(a)(3) exemption, it must generally be a discrete and fixed location that is used seasonally. *See* Legal Principles § B.2 (pools, beaches, fairgrounds, golf courses, and recreation areas, among other operations with fixed locations, have been considered seasonal and recreational establishments); WHD Op. Ltr. FLSA2006-37 (45 base camps located throughout the United States that operated for weeks and months at a time as a base for regional trips constituted separate establishments under Section 13(a)(3). For a discrete location to be considered an entity’s “place of business,” the entity must also own, lease, or otherwise exercise

control over the location and use it for a business purpose. *See generally* 29 C.F.R. § 779.225 (when an entity leases and occupies a physically separate location and uses it to run a distinct business, its operation will be considered a distinct establishment).

A discrete location that an entity uses on a temporary, non-recurring basis may constitute a distinct physical place of business but only if, as in the case of a fixed location, the entity takes possession of it, exercises control over it, and uses it for a business purpose. For instance, WHD has recognized that carnivals and circuses, which are typically mobile, may qualify as seasonal amusement and recreational establishments. *See e.g.*, WHD Op. Ltr. FLSA-718 (Jan. 14, 1977). Although a carnival may operate in various locations, when it comes to town, it obtains the rights to use a particular discrete location (often a fairgrounds or parking lot) for a number of days, the perimeter of which it may establish with fencing, and sets up revenue-generating rides, games, and other attractions at the location. In other words, even if its presence is temporary, a carnival occupies and controls a discrete physical location for the duration of its presence and transforms the location into its place of business. Courts have also recognized that certain festivals—which, like carnivals, exercise control over discrete locations such as amphitheaters and convert them into temporary places of business with stages, rides, and other attractions—may qualify as establishments. *See Chen*, 798 F.3d at 82 (five-day fan festival held at convention center, which involved entertainment such as batting cages, a replica baseball diamond, and music, constituted an exempt amusement and recreational establishment); *Valladares*, 2015 WL 12656267, at *3 (music festival, for which employer occupied amphitheater for 12 days, built stages and art exhibits, and installed rides, constituted an exempt establishment).

The first entity's outdoor events are not comparable to carnivals or festivals. The hikes, excursions, and other events that it facilitates are not confined to a discrete location that it controls like a fairgrounds or amphitheater. Moreover, its physical presence is limited to, at most, camping overnight; it does not bring in rides, games, or other attractions. The locations at which it holds its events are thus not distinct physical places of business.

3. Conclusion: The first entity is not a qualifying establishment.

As a result, based on the facts presented, the first entity's only discrete physical location is an administrative office that, while an establishment, fulfills no amusement or recreational function. Accordingly, the first entity does not qualify as an "establishment which is an amusement or recreational establishment" under the Department's regulations.

B. Accrual accounting does not satisfy the Receipts Test, and charitable donations are not receipts.

The second entity is a non-profit that uses an accrual method of accounting for tax and other purposes. The second entity poses two questions regarding the Receipts Test, representing that it satisfies the other requirements of Section 13(a)(3). First, it asks whether it may use an accrual method of accounting for purposes of compliance with Section 13(a)(3)(B). Second, it asks whether it must include some or all types of discretionary charitable donations when calculating average receipts under the Receipts Test.

1. Accrual accounting does not satisfy the receipts test.

As explained above, an employer satisfies the Receipts Test if “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.” 29 U.S.C. § 213(a)(3)(B); *see* Legal Principles § C. At issue is the meaning of “receipts.” It is beyond doubt that the term “receipts” encompasses the money actually received by an employer paid in exchange for goods and services provided at the time it was received. The question here is whether the term “receipts” may also refer to revenue or income deemed received for accounting purposes at the time the corresponding good or service is provided.

The answer is no. In Section 13(a)(3)(B), “receipts” refers to money actually received by the employer in exchange for goods or services at the time—here during the month—it was received. It does not incorporate concepts of accrual accounting, even though that method of bookkeeping is widespread, more accurately reflects the operation of most businesses than a cash receipts method, and may be an effective method of identifying seasonality.

This construction gives “receipts” its fair, plain, and ordinary meaning—the act of receiving money paid for goods or services, not the accounting of the completion of the transaction or associated provision of goods or services. A dictionary contemporaneous with the enactment of Section 13(a)(3) defines “receipt” as “3. [f]act or action of receiving or being received into a person’s hands or possession.” The Concise Oxford Dictionary of Current English (1964). Modern dictionaries likewise support this construction. *See Black’s Law Dictionary* (11th ed. 2019) (the “act of receiving something ... by taking physical possession” or “[s]omething received,” with the following example, “post the daily receipts in the ledger”); Merriam-Webster.com Dictionary (accessed Aug. 27, 2020) (“the act or process of receiving ... Something received.”). Tellingly, *Black’s Law Dictionary* contains a separate entry, “accountable receipt,” distinct from “receipt,” that refers to a “written acknowledgment of the receipt of money or goods to be accounted for by the receiver.” *Black’s Law Dictionary* (11th ed. 2019) (“An account receipt differs from an ordinary receipt, which merely notes that the money has been paid”). Had Congress intended to incorporate accrual accounting principles, it would have used different language.

Although WHD has neither squarely answered this question in its regulations nor addressed the issue in its opinion letters, this opinion aligns with numerous letters cited above that recount the requirements of Section 13(a)(3)(B). *See* Legal Principles § C. WHD has never applied the Receipts Test based on revenue or in an accrual accounting context. Although the second entity points to two opinion letters in support of its request, neither lends credence to its proposed construction of the Act. In 2006, WHD used “revenue” language in its description of the Receipts Test, but ultimately concluded that it lacked sufficient information to apply the test. *See* WHD Op. Ltr. FLSA2006-37. Moreover, in that letter WHD used “receipts” interchangeably with “revenue,” suggesting that it did not intend to opine on the propriety of using an accrual accounting method. *Id.* (characterizing the Receipts Test as requiring 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*”) (emphasis added). In another opinion letter, WHD cited *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d. 590 (11th Cir. 1995), a case in which the court of appeals affirmed application of the Receipts Test using revenue. *See* WHD Op. Ltr. (Mar. 6,

1996). But in that letter WHD did not address the underlying question here—and neither did the Eleventh Circuit in *Jeffrey*, 64 F.3d. at 595–96. In that case the parties did not question the district court’s application of the Receipts Test based on revenue; as a result, the court of appeals did not consider it. *See id.* These opinion letters do not support construing “receipts” as revenue or income as used in accrual accounting.

The Sixth Circuit is the only federal court of appeals to have squarely addressed this question and it reached the same conclusion. *See Bridewell v. Cincinnati Reds*, 155 F.3d 828 (6th Cir. 1998). In *Bridewell*, the Sixth Circuit likewise found the term “receipts” “clear and unambiguous” and noted that if Congress wanted to allow the application of the Receipts Test “to hinge upon the method of accounting used by an establishment or on the income accruing to that establishment, then it should have chosen appropriate statutory language.”⁶ *Id.* at 830. While the Sixth Circuit was sympathetic to the merits of using an accrual accounting of income to determine seasonality under Section 13(a)(3)(B), it ultimately concluded that the plain language of the FLSA could not support such a policy. *Id.* at 830–31.

The second entity argues that the Supreme Court’s decision in *Encino* wipes clean the slate and allows WHD to confront the issue afresh—that is, without applying the narrow construction canon cited in *Bridewell*. As explained above, *Encino* prohibits statutory constructions that artificially narrow the Act’s exemptions or expand the minimum wage and overtime requirements. Instead, the Court instructed that the FLSA’s language be given a “fair” reading. *See* Legal Principles § A. Rather than a fair reading of the FLSA’s text, reading “receipts” to mean “income” or “revenue” in an accrual accounting framework replaces an overly narrow construction with an overly broad one not supported by the language Congress used. That unduly broad construction is no “fairer” than the unduly narrow construction the Supreme Court rejected in *Encino*.

Finally, while WHD does not discount the potential policy merits of using an accrual method of accounting to determine seasonality under Section 13(a)(3)(B), the Act currently forecloses their consideration.

2. Charitable gifts and donations are not receipts.

The second entity also asks whether some or all charitable gifts and donations must be counted as receipts for purposes of Section 13(a)(3)(B). For purpose of the Receipts Test, an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center must include all payments received in exchange for an amusement or recreational product or service provided by the entity to the giver. Bona fide charitable gifts and donations are not such payments and, therefore, are not counted under the Receipts Test.

As stated above, the plain and ordinary meaning of the word “receipt” is the “[f]act or action of receiving or being received into a person’s hands or possession.” That arguably could include

⁶ The *Bridewell* court explained that an earlier decision of the Sixth Circuit, in which the court had remanded with instructions “to determine what method of accounting accurately reflects [defendant’s] ‘receipts’ for the purposes of the seasonality exemption,” was dicta. *Bridewell*, 155 F.3d at 831 (citing *Brock*, 817 F.2d at 1259).

charitable donations. However, the context and content of both the Act and the Department’s interpretive guidance suggest that “receipts” was not originally intended to encompass charitable gifts. The history of the exemption lies in local “for profit” retail and service businesses that would not receive charitable donations. *See* Legal Principles § B.1.a. Both Congress and the Department explicitly invoked “for profit” business language in both the FLSA and interpretive regulations. *Id.* § B.1.a–b. Indeed, as explained above, “receipts” refers to money actually received by the employer in exchange for goods or services. Opinion § B.1. It is not surprising that the Department’s regulations concerning Section 13(a)(3) are set forth in Part 779 and are integrated with regulations relating to retail businesses. Together, the language and the history of Section 13(a)(3) leave little doubt that the term “receipts” did not originally include charitable gifts.

But this does not answer the question. In 1977, Congress amended Section 13(a)(3) to cover “organized camps” and “religious or *non-profit*” educational conference centers. 29 U.S.C. § 213(a)(3) (emphasis added); *see* Legal Principles § B.1.a. This expressly encompassed at least one type of non-profit employer, the non-profit educational conference center. Congress did not, however, amend the Receipts Test in 1977 even as it expanded the scope of Section 13(a)(3). This suggests that Congress did not seek to change the application of either test of seasonality to both for-profit and non-profit entities covered by the exemption.⁷ *See, e.g., Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 174 (2009) (“When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”).

Ultimately, however, the context and purpose of the Receipts Test presents the strongest evidence that “receipts” does not include charitable donations, even after 1977. That test is one of two ways Congress allowed for an amusement or recreational establishment to demonstrate that it is, in fact, a seasonal entity for which the exemption is designed. *See* Legal Principles § C; *Brock*, 817 F.2d at 1259; *Chen*, 798 F.3d at 77; *Brennan*, 478 F.2d at 288. The Receipts Test achieves this objective by examining the timing of average receipts to determine whether the public patronizes the entity overwhelmingly during certain months and far less so in others. But the Receipts Test fulfills this purpose only when the receipts in question are those paid for the amusement and recreational experience, goods, or service provided by the establishment. In contrast, charitable gifts are by definition not given in exchange for an amusement and recreational experience, good, or service. *See generally* IRS Pub. 526. Moreover, they may be given at any time, frequently near the conclusion of the giver’s tax or fiscal year. Regardless, the timing of the receipt of a charitable gift often bears little connection with, and is therefore not indicative of, the seasonality of the establishment. This is especially true regarding charitable donations given during capital campaigns as well as planned and estate gifts. As a result, when a non-profit establishment applies the Receipts Test, it must count all money actually received by the employer in exchange for goods or services, but not bona fide charitable donations.⁸

⁷ Section 13(a)(3) does not impose any requirements or limitations regarding the ability of an amusement or recreational establishment to organize itself as a non-profit or accept charitable donations, subject to IRS requirements.

⁸ WHD’s analysis here is analogous to its longstanding approach to state or local government-operated amusement or recreational establishments whose operating costs may be supported by tax revenues.

If WHD were to consider charitable donations “receipts” for purposes of Section 13(a)(3)(B), there is potential that entities would seek to affect the timing of charitable donations to bring themselves within the scope of the exemption.⁹ For example, consider an amusement and recreational establishment that operates year round and takes in \$10,000 every month. Such an entity would not qualify for the exemption under either the Calendar Test or Receipts Test. However, a single charitable gift of \$121,000 received at any time throughout the year—or an equal sum focused in any six months or fewer—satisfies the Receipts Test and would qualify the entity for the exemption. While any construction of the Receipts Test may lend itself to incentivized behavior, at least theoretically, WHD believes that including charitable gifts would create an avenue that would too easily allow nonprofits effectively to time the gifts to obtain Section 13(a)(3)’s complete exemption.¹⁰

C. The third entity is not an amusement or recreational establishment.

The third entity requests WHD to clarify what it perceives as incongruity between the “establishment language” of the Act and the “activities” emphasized in supporting case law and legislative history. Specifically, the third entity asks whether it qualifies for the Section 13(a)(3) exemption by providing amusement and recreational activities even though it does not do so at its own location or at a fixed establishment. Depending on WHD’s answer to this question, the third entity believes it may qualify for the exemption.

However, as explained above, the question implies tension where there is none. As explained above, language regarding “establishment” and “activities” addresses different requirements of Section 13(a)(3). An employer generally must (1) be an establishment; (2) that is “amusement or recreational” in character, an organized camp, or a religious or non-profit educational conference center; and (3) satisfy either test of seasonality. 29 U.S.C. § 213(a)(3); *see* Legal Principles § A. WHD determines such character by analyzing an entity’s “attributes and operations.” Legal Principles § B.2. In other words, to qualify for the total exemption of Section 13(a)(3), an

When determining whether such an establishment meets the Receipts Test, WHD considers receipts from admission fees. In contrast, a state or local government-operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to qualify under Section 13(a)(3)(B), though it may qualify under Section 13(a)(3)(A). *See* WHD Op. Ltr. FLSA-717 (May 12, 1986); WHD Op. Ltr. FLSA2009-5.

⁹ To be clear, WHD is not asserting that the second entity (or the first or third for that matter) is such an operation, or has or would engage in such conduct.

¹⁰ Judicial authority is scant and provides little reasoning on this issue. For instance, in *Easley v. Camp Warren*, No. 4:91-CV-158, 1992 WL 470817, at *2 (W.D. Mich. Dec 1, 1992), a district court applying Section 13(a)(3)(B) stated that it would “construe the phrase ‘total receipts’ to include defendant’s receipt of charitable donations.” But the court offered no explanation for its interpretation, nor did it identify where it found the phrase “total receipts” that it was construing. In *West v. City of Ft. Pierce*, the court criticized the defendant for presenting only receipts from ticket sales and not those from “donations, pledges, memberships, rental fees, event service fees, beverage sales, souvenir sales, and sponsorship fees,” which it held should be included in receipts. No. 07-CV-14335, 2008 WL 3270849, *7 (S.D. Fla. Aug. 8, 2008). Like *Easley*, the *West* court did not explain why it considered charitable gifts (or pledges for that matter) to be “receipts,” though the other categories of excluded receipts certainly should have been. To the extent *Easley* and *West* are inconsistent with the interpretation above, WHD disagrees with them.

employer that is not an organized camp or religious or nonprofit educational conference center must be both an establishment and possess an amusement or recreational character.

Based on the facts presented, the third entity is not an “establishment which is an amusement or recreational establishment” under the Department’s regulations and, therefore, does not qualify for the exemption. Like the first entity, the third entity has a location, a warehouse and administrative offices, which it uses exclusively in a support capacity. Background § C. It does not have any fixed locations that have an amusement or recreational character.

Also like the first entity, the third entity’s production of temporary events at various locations does not convert it into a multi-site employer. As noted above, establishments are typically fixed places of business. A temporary location may constitute a distinct physical place of business, and thus an establishment, but only if a firm converts the location into its temporary place of business by taking possession of it, exerting control over it, and using it to generate revenue. *See, e.g., Chen, 798 F.3d at 79.*

The third entity’s events have more of a physical presence than the first entity’s events, as the third entity supplies, installs, and, in some cases, operates amusement rides and other attractions. However, unlike, for instance, a carnival or a multi-day music festival, the third entity’s events do not appear to involve taking temporary possession of an event space, such as a fairground or a convention center, and converting it into its place of business. Indeed, the third entity distinguishes its operations from that of carnivals, noting that it provides activities “similar to ... mobile carnivals.” Rather, the third entity helps clients such as businesses, non-profits, and universities produce (“co-produce[s]”) events, which appear to be held on its clients’ premises. Its events are also of very limited duration, typically lasting only one day. *See* Opinion § A.2; *see also Valladares, 2015 WL 12656267, at *4 n.7* (entity that organized a multi-day music festival deemed exempt under Section 13(a)(3) had entered into a license agreement with the amphitheater where it held the festival, which gave it the right to use amphitheater on certain days of the year). Accordingly, the temporary locations where the third entity co-produces its events do not constitute additional establishments of the third entity. Because these locations do not constitute distinct establishments, WHD does not opine on whether the third entity’s events have an amusement or recreational character.

CONCLUSION

The meaning and application of both Section 13(a)(3) and the Department’s interpretative regulations are derived, and cannot be separated, from the exemption’s retail language and history. To qualify for the Section 13(a)(3) exemption, an entity must have a physical location that it uses in some way in any of the activities that comprise its amusement or recreational character. In addition to satisfying the requirements of an establishment, unless the employer is an organized camp or educational conference center, its activities must reveal an amusement or recreational character. Finally, in determining seasonality under the Receipts Test, while an entity must count all payments for goods or services that were actually received by the employer during the month they were received, regardless of the entity’s accounting of such payments, it may not count bona fide charitable donations.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

We trust that this letter responds to your inquiries.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M. Stanton". The signature is written in a cursive, flowing style.

Cheryl M. Stanton
Administrator

***Note: The actual names were removed to protect privacy in accordance with 5 U.S.C. § 552(b).**