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

FLSA2026-14

November 17, 2026

Dear **Name***:

This letter explains the proper application of the exemption in section 13(a)(3) of the Fair Labor Standards Act (FLSA or Act) for employees of seasonal amusement or recreational establishments to certain employees of your client, a concessions company that provides food and beverage services at events including a state fair and concerts.

For the reasons set forth below, your client's food and beverage operations are, for purposes of this exemption, part of the same establishments as the state fair and concerts that host them, both of which have an amusement or recreational purpose. In accordance with the Wage and Hour Division's (WHD or Division) longstanding approach to eating and drinking places on the premises of amusement or recreational establishments, your client's employees who work at the state fair and concerts thus would be exempt under section 13(a)(3), provided each such establishment meets one of the exemption's two seasonality tests.

BACKGROUND

Your client provides concessions services at various events, including the state fair and concerts, and it hires seasonal employees to staff these events on a per-event basis. It does not employ any seasonal employees on a full-time basis. And while it does not guarantee that any seasonal employees it hires for a particular event will be offered a position at any subsequent event, it nevertheless employs some seasonal workers for more than one event. You state that the typical duties of your client's seasonal employees at these events are directly related to concessions: delivering materials to the event, setting up and staging the temporary concessions facility (typically a tent or similar structure), stocking and restocking the food and beverages being sold, preparing the food, selling food and beverages directly to the public attending the event, cleaning up the concessions area after the event, and tearing down the temporary concessions facility. Your client employs seasonal employees at the state fair for a period of approximately 3 months, including time performing set-up activities before the fair is open to the public and tear-down activities after it is closed to the public. Your client also employs seasonal employees at each concert for approximately two weeks, including set-up and tear-down activities.

GENERAL LEGAL PRINCIPLES

A. The Fair Labor Standards Act

The Act requires covered employers to pay all non-exempt employees at least the federal minimum wage for all hours worked. 29 U.S.C. § 206. In addition, the FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [the employee] is employed" to all non-exempt employees for all hours worked in excess of 40 hours in a workweek. *Id.* § 207(a)(1). These wage and hour requirements are minimum standards—a federally mandated floor—and the

Act does not prohibit an employer from paying more than the federal minimum wage or establishing a more generous policy for overtime pay. *See id.* § 218(a).

The Act includes numerous exemptions from its wage and hour requirements. In particular, section 13(a)(3) provides an exemption from the Act's minimum wage and overtime pay requirements for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" if the establishment satisfies the statutory test of seasonality in either subparagraph (A) (the "calendar test") or subparagraph (B) (the "receipts test"). 29 U.S.C. § 213(a)(3).

When construing or applying the Act, the Division must give the text a "fair . . . interpretation," and not one influenced by, much less predicated on, notions that a law's so-called "remedial" provisions should be interpreted "broadly" and provisions limiting those statutory rights—whether characterized as exemptions, definitions, exceptions, or exclusions—be construed "narrowly," or in favor of or against a party. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88–89 (2018) (cleaned up); WHD Op. Ltr. FLSA2026-9 (July 22, 2026), at 4 n.7 (collecting WHD letters and cases); WHD Op. Ltr. FLSA2026-4 (Jan. 5, 2026), at 1-2; WHD Op. Ltr. FLSA2021-3 (Jan. 15, 2021), at 3; s*ee also BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 239 (2021); *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427, 439 (2019); *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014). Accordingly, WHD applies a "fair reading" or "fair interpretation" to all of the Act's provisions, including the section 13(a)(3) exemption. *See* WHD Op. Ltr. FLSA2021-3, at 3. A fair reading is "neither artificially broad nor unnaturally narrow." WHD Op. Ltr. FLSA2026-9, at 4 n.7; *see also Dep't of Lab. v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (describing "fair" as "neither narrow nor broad"). The Division must "interpret each FLSA exemption the same way [it] would any other statutory provision—with full attention to its text." *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, 904 F.3d 208, 216 (2d Cir. 2018); WHD Op. Ltr. FLSA2026-5 (May 28, 2026), at 2; WHD Op. Ltr. FLSA2026-4, at 2; *see also* WHD Op. Ltr. FLSA2026-9 (July 22, 2026), at 5 n.7.

B. Requirements of the Section 13(a)(3) Exemption

Section 13(a)(3) of the Act has its origins in the 1961 amendments, when Congress amended section 13(a)(2)—which at the time provided a minimum wage and overtime exemption for employees of retail or service establishments—to provide, in part, a specific exemption for employees of certain such establishments, including employees of a "retail or service establishment . . . if such establishment is an amusement or recreational establishment that operates on a seasonal basis." Pub. L. 87-30, § 9, 75 Stat. 65, 71 (1961). In 1966, Congress recodified the exemption for seasonal amusement or recreational establishments in section 13(a)(3)—which to that point had exempted from the requirements of sections 6 and 7 employees of establishments engaged in laundering, cleaning, or repairing clothing or fabrics (subject to certain conditions)[1]—and added the calendar and receipts tests of seasonality. *See* Pub. L. 89-601, § 201(b)(2), 80 Stat.

[1] The 1966 amendments removed such laundering establishments from the exemption. *See* Pub. L. 89-601, § 202, 80 Stat. 830, 833 (1966) (repealing the prior version of section 13(a)(3), which Congress enacted in 1949, *see* Oct. 26, 1949, Ch. 736, § 11, 63 Stat. 910, 917).

830, 833 (1966).[2] In 1977, Congress amended section 13(a)(3) to cover any employees of an "organized camp" or "religious or non-profit educational conference center," as well as to specifically exclude from the exemption most concessionaires in national parks and forests, and in the National Wildlife Refuge System, for which Congress simultaneously created a partial overtime exemption in section 13(b)(29) of the Act. *See* Pub. L. 95-151, § 4(a)–(b), 91 Stat. 1245, 1249 (1977).

Five years ago, the Division addressed in depth the history, meaning, and application of the exemption in section 13(a)(3) of the Act to consolidate previous guidance from various sources and clarify application of the exemption. *See* WHD Op. Ltr. FLSA2021-3. Here the Division builds on that effort. As set forth in greater detail below and in that guidance, to satisfy the requirements of the section 13(a)(3) exemption, an employee must be employed by (a) an establishment; (b) that has an "amusement or recreational" purpose, or is an organized camp or religious or non-profit educational conference center; and (c) that satisfies one of the two statutory tests of seasonality. *See id*.

1. Definition of Establishment

Section 13(a)(3) is an establishment-based exemption. This means that the application of the exemption to any individual employee turns not on his or her occupation, job, duties, or work, but rather "the character of the establishment by which [the] employee is employed." 29 C.F.R. § 779.302 (listing section 13(a)(3) as an example of an exemption pursuant to which "if the establishment meets the tests enumerated in the[] section[], employees 'employed by' that establishment are generally exempt from sections 6 and 7"). The Division's regulations define an "establishment," as a "distinct physical place of business," not "an entire business or enterprise[.]" 29 C.F.R. § 779.23; *see also id.* § 779.303 ("the term *establishment* as used in the Act means a distinct physical place of business") (emphasis in original). WHD and the courts have consistently applied this definition under section 13(a)(3). *See, e.g.*, WHD Op. Ltr. FLSA2021-3, at 6 (explaining WHD's longstanding application of this definition under section 13(a)(3)); *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 79 (2d Cir. 2015) (applying this definition of "establishment" under section 13(a)(3)); *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285, 289–90 (10th Cir. 1973) (same).[3]

As a result, WHD and the courts have generally considered business operations at physically separate locations to be separate establishments, including where they are operated by the same employer. *See, e.g.*, WHD Op. Ltr. FLSA2006-37 (Sep. 28, 2006) (employer's base camps located throughout North America constituted separate establishments); *Chen*, 798 F.3d at 79 (employer's festival was a separate 13(a)(3)-exempt establishment since it "took place at [a convention center], not at the location of [the employer's] . . . office or any other . . . event," and "[t]his physical

[2] The 1966 amendments thus 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 or service establishments. *See* WHD Op. Ltr. FLSA2021-3, at 5.

[3] The meaning and history of the term "establishment," as it is used in section 13(a)(3) and throughout the FLSA, are discussed in detail in WHD's 2021 opinion letter, WHD Op. Ltr. FLSA2021-3.

separation is determinative"); *Yellowstone Park Lines,* 478 F.2d at 287–90 (concessions "located at widely separated" locations within a national park constituted separate establishments).

Multiple business operations on the same premises, on the other hand, will generally be considered the same establishment, regardless of whether each such operation is controlled or operated by a separate employer. *See, e.g.*, 29 C.F.R. § 779.304(a) (a store with multiple separate departments will be considered a single establishment where such departments are operated as integral parts of a unit, even if there is diversity of ownership of departments). Stated differently, "it is only in rare instances that two or more business activities on the same premises are characterized by the physical and functional separation requisite to constitute more than one establishment for the purposes of" establishment-based exemptions such as section 13(a)(3). WHD Op. Ltr. 1967-208 (June 22, 1967). Similarly, section 779.305 confirms that for multiple business operations on the same premises to be separate establishments, "physical separation is a prerequisite." Additionally, each such physically separated business operation must functionally operate as a separate unit, having separate records and bookkeeping and its own employees. 29 C.F.R. § 779.305; *see generally* WHD Op. Ltr. FLSA2021-3, at 6–7.[4]

In situations involving multiple business operations at the same location, WHD has looked to section 779.305 and its other regulations addressing establishment-based exemptions, *see* 29 C.F.R. §§ 779.302–.311, to identify the relevant establishment for purposes of section 13(a)(3)'s requirements. *See, e.g.*, WHD Op. Ltr. FLSA2021-3, at 6–7; WHD Op. Ltr. FLSA-811 (Nov. 30, 1984) (concluding that an amusement park and a restaurant on the same premises would be considered a single establishment under section 13(a)(3) (citing 29 C.F.R. § 779.305)); *see also* WHD Op. Ltr. FLSA-176 (June 30, 1977) (pointing to "the basic guidelines for determining the scope of an establishment . . . in sections 779.302 through 779.311" in examining whether multiple business operations were part of the same establishment within the meaning of section 13(a)(3)). And courts have similarly looked to the three-part test in section 779.305 in such cases as well. *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1159 (11th Cir. 2008) (two greyhound racing businesses operating at the same race track at different times were a single establishment for section 13(a)(3) purposes because they "[did] not meet [section 779.305's requirement] . . . that each business be 'functionally operated as a separate unit having separate records, and separate bookkeeping'") (quoting 29 C.F.R. § 779.305); *Chao v. Double JJ Resort*, 375 F.3d 393, 398 (6th Cir. 2004) (directing district court, on remand, to use the three-part test in

[4] For multiple business operations on the same premises to constitute separate establishments, each operation must also be engaged in "functionally unrelated activities." 29 C.F.R. § 779.305; *see* WHD Op. Ltr. FLSA2003-1 (Mar. 17, 2003) ("Two or more physically separated portions of a business located on the same premises may constitute more than one establishment if they are physically separated from the other activities and 'distinct and separate from and unrelated to that portion of the business devoted to other activities.'" (quoting 29 C.F.R. § 779.305)). As section 779.305 makes clear, the three-part test articulated therein—whether the business operation is physically separate, functionally operates as a separate unit with separate records and bookkeeping, and has its own employees—applies in determining whether "the retail portion of an establishment would be considered a separate establishment from the *unrelated* portion[.]" *Id.* (emphasis added). Section 779.305 illustrates the principle that physically separate business operations on the same premises must be engaged in "functionally unrelated" activities to constitute separate establishments by explaining that "food service activities of such retail or service establishments as drugstores, department stores, and bowling alleys" are generally "not . . . a separate establishment[.]" *Id.*

section 779.305 to determine whether different parts of a resort complex constitute separate establishments for purposes of section 13(a)(3)); *Marshall v. New Hampshire Jockey Club, Inc.,* 562 F.2d 1323, 1330, 1333 (1st Cir. 1977) (looking in part to section 779.305 in concluding that two horseracing businesses that used a racetrack at separate times were "different businesses, functionally and economically separate and physically distinguishable" and thus separate establishments under section 13(a)(3)).

2. "Amusement or Recreational"

An establishment is an "amusement or recreational" establishment if it is "frequented by the public" for the purpose of "amusement or recreation." 29 C.F.R. § 779.385; WHD Op. Ltr. FLSA2021-3, at 7. To be "frequented by the public" an establishment must be generally accessible to the public. *See* WHD Op. Ltr. FLSA2021-3, at 7 (noting that membership requirements and access fees do not mean an establishment is inaccessible); WHD Op. Ltr. FLSA2018-26 (Nov. 8, 2018). And the Division considers an establishment visited by the public "for its amusement and recreation" if the establishment's existence and purpose is to provide amusement and recreation to the public. *See* WHD Op. Ltr. FLSA2021-3, at 7. Since section 13(a)(3) contains an exemption that "depend[s] on the character of the establishment by which an employee is employed[,]" 29 C.F.R. § 779.302, it is the nature of the establishment—not the work of a particular employee of that establishment—that determines whether it has the requisite amusement or recreational purpose. WHD Op. Ltr. FLSA2021-3, at 3–4, 7; *see* 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.").[5]

[5] We are aware of one circuit court decision that appears to reach a conclusion that differs from the Division and other federal appellate courts regarding the application of section 13(a)(3)'s amusement or recreational purpose test. *See Brennan v. Six Flags Over Georgia, Ltd*., 474 F.2d 18, 19 (5th Cir. 1973) ("The nature of the work is what gives rise to the need for an exemption; the exemption is not a subsidy accorded to an employer because of his principal activities."). As WHD has previously explained, we disagree with this decision to the extent it is inconsistent with the view that whether an individual is employed by an establishment with an amusement or recreational purpose under section 13(a)(3) depends on the nature of the establishment, rather than the duties of the employee. *See* WHD Op. Ltr. FLSA2003-1 (discussing cases applying establishment-based exemptions and disagreeing with *Six Flags Over Georgia*, 474 F.2d at 19); WHD Op. Ltr. FLSA2021-3, at 3–4 and 4 n.1 (explaining that WHD's interpretation of the statute is compelled by the statutory text and regulations and supported by the weight of circuit court precedent). We note, moreover, that the Fifth Circuit has subsequently issued multiple decisions regarding the section 13(a)(3) exemption that are consistent with WHD's view that whether an employee is exempt depends on the nature of the establishment. *See Brennan v. Texas City Dike & Marina, Inc.,* 492 F.2d 1115, 1119–20 (5th Cir. 1974) (holding that the "principal activity" of an establishment determines whether its employees are exempt under the section 13(a)(3) exemption and concluding that a marina was ineligible for the exemption since it was "principally engaged in selling boats, motors and trailers"); *Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 546 (5th Cir. 1989) (holding that a fireworks stand was not an amusement or recreational establishment and citing *Texas City Dike,* 492 F.2d at 1118, for the proposition that "the exemption was not intended to cover establishments whose sole or primary activity is selling goods"). Twenty years ago, the Division withdrew two letters suggesting that whether an employee is exempt under section 13(a)(3) depends on the activities of the employee, *see* WHD Op. Ltr. FLSA2006-37. Similarly, today it further withdraws a non-Administrator letter (WHD Op. Ltr. Sep. 29, 1999, 1999 WL 1788159) to

Both the Division and the courts have identified types of establishments that generally have an amusement or recreational purpose, including amusement parks, sports events, beaches, fairgrounds (state and county fairs), museums, and theatres. *See* WHD Op. Ltr. FLSA2021-3, at 7–8 (citing opinion letters and providing a list of establishments that have been recognized as having an amusement or recreational purpose); *see also, e.g.*, *Chen*, 798 F.3d at 82–83 (a carnival-like festival involving "games, sporting activities, and exhibitions," alternatively described as a "sports event" and "theme park," was an amusement or recreational establishment); *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 595 (11th Cir. 1995) (operations of minor league baseball team were an amusement or recreational establishment). Similarly, establishments such as hotels and motels, retail stores, and, as discussed further below, eating and drinking places generally lack an amusement or recreational purpose for purposes of section 13(a)(3). *See* WHD Op. Ltr. FLSA2021-3, at 8 (citing opinion letters and providing a list of establishments that have been recognized as not having an amusement or recreational purpose); *see, e.g.*, *Double JJ Resort*, 375 F.3d at 397 (resort hotel was not itself an amusement or recreational establishment); *Mr. W Fireworks*, 889 F.2d at 546 (declining to apply exemption to a fireworks stand).

3. Calendar Test and Receipts Test

To meet the requirements of the section 13(a)(3) exemption, an establishment must also satisfy either the calendar test or the receipts test, both of which Congress designed to ensure that the exemption would apply to *seasonal*, not typical year-round, establishments. *See* 29 U.S.C. § 213(a)(3)(A), (B); 29 C.F.R. § 779.385; *see also* WHD Op. Ltr. FLSA2021-3, at 8 (citing *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1259 (6th Cir. 1987) and *Yellowstone Park Lines,* 478 F.2d at 288)). 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). 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." *Id.* § 213(a)(3)(B); *see also* WHD Op. Ltr. FLSA2021-3, at 8 (explaining the operation of both the calendar and receipts tests and discussing them in detail).

C. WHD's Longstanding Approach to Eating and Drinking Businesses Under Section 13(a)(3)

1. Eating and Drinking Places Do Not, In and Of Themselves, Have an Amusement or Recreational Purpose

Since the 1966 amendments, the Division has consistently made clear that establishments primarily serving food and beverages—*i.e.*, eating and drinking places—do not have an amusement or recreational purpose within the meaning of the section 13(a)(3) exemption. *See, e.g.*, WHD Op. Ltr. 1967-195 (July 5, 1967) ("Establishments such as . . . restaurants and the like . . . are generally not within the categories of establishments commonly recognized as inherently of an amusement or recreational character."); WHD Field Operations Handbook (FOH) 25j02(a) (same); *see also* WHD Op. Ltr. FLSA-208 (Sep. 12, 1978) ("eating places do not have an amusement or

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the extent that it suggests that the nature of the work performed by an employee, and not the character of the establishment, governs whether the exemption applies.

recreational character"); WHD Op. Ltr. FLSA2021-3, at 8 (listing restaurants among the types of establishments that generally do not have an amusement or recreational purpose).

To some, this may seem perplexing, counterintuitive, or downright wrong. Indeed, the public frequents restaurants, bars, coffee shops, and other eating and drinking places expressly for enjoyment or leisure with friends and family. As the Division has long explained, however, the Act, read as a whole, makes abundantly clear that Congress not only did not include eating and drinking places within the ambit of exempt amusement or recreational establishments, but also has since legislated in a manner that confirms that construction.[6]

When Congress created the section 13(a)(3) exemption from minimum wage and overtime for seasonal amusement and recreational establishments in 1966, other provisions of the Act separately addressed "restaurants and the like," including exemptions in both subsections 13(a) and (b). *See* WHD Op. Ltr. FLSA-611 (Aug. 10, 1976). Specifically, at that time, the Act contained multiple exemptions for employees of eating and drinking places, including a minimum wage and overtime exemption for retail or service establishments in section 13(a)(2), which applied to certain small restaurant establishments, and an additional overtime exemption for restaurant establishments in section 13(b)(8) without regard to their sales volume—which together operated as a coordinated treatment of eating or drinking places by the Act.[7] As such, reading

[6] When construing and applying provisions in federal law, individual words and phrases "must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 721 (2022) (citation and punctuation omitted); *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) ("statutes should not be read as a series of unrelated and isolated provisions") (citation and punctuation omitted). Of course, where Congress uses plain language, we must apply and enforce it pursuant to the ordinary understanding of those terms. *See, e.g.*, WHD Op. Ltr. FLSA2019-13 (Sep. 10, 2019) (applying this principle). But often "meaning" (even seemingly plain meaning) or "ambiguity" in "certain words or phrases may only become evident when placed in context." *King v. Burwell*, 576 U.S. 473, 486 (2015) (citation omitted). As the Division is charged with enforcing the FLSA as a whole—not its provisions in isolation—for the six decades since the 1966 amendments, it has consistently interpreted and applied section 13(a)(3) according to its language and place in the Act.

[7] In 1961, Congress amended the section 13(a)(2) exemption, which originally applied to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," Act of June 25, 1938, Ch. 676, § 13(a)(2), 52 Stat. 1060, 1067, by generally limiting it to employees of retail or service establishments not in an enterprise (as defined in 29 U.S.C. § 203(s)) or in an enterprise with sales below a certain threshold. *See* Pub. L. 87-30, § 9, 75 Stat. 65, 71 (1961). However, Congress provided an exception to these new limitations for employees of certain categories of retail or service establishments, including "any retail or service establishment . . . if such establishment . . . is a hotel, motel, [or] restaurant," or, as discussed above, "an amusement or recreational establishment that operates on a seasonal basis." *Id*. Congress amended section 13(a)(2) again in 1966, repealing the exception for hotels, motels, and restaurants, thereby requiring such businesses to meet the same standard as other retail or service establishments to meet the exemption. *See* Pub. L. 89-601, § 201(a), 80 Stat. 830, 833 (1966); *see also* 29 C.F.R. § 779.338(a) (explaining the effects of the 1961 and 1966 amendments). In 1966, Congress also created a new overtime exemption for hotels, motels, and restaurants in section 13(b)(8). *See* Pub. L. 89-601, § 201(b)(1), 80 Stat. 830, 833 (1966); *see also* 29 C.F.R. § 779.387 (discussing the section 13(b)(8) exemption). The section 13(b)(8) overtime exemption for restaurants covered employees of certain establishments engaged in the selling and serving of food for consumption on the premises,

section 13(a)(3) as encompassing employees of restaurants and similar establishments would have made the provision not only duplicative of other exemptions but also inconsistent with the Act's coordinated treatment of eating and drinking places, pursuant to which eating and drinking places were generally exempt from overtime but not the minimum wage, and only certain small eating and drinking establishments were exempt from both the minimum wage and overtime. Such redundancy and inconsistency with the statutory scheme weigh strongly against such construction.[8] And while Congress has maintained the exemption for seasonal amusement or recreational establishments in section 13(a)(3), it subsequently narrowed and then repealed these other exemptions encompassing restaurant and other food service employees.[9]

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including full-service restaurants, plus certain refreshment stands, cafes, and coffee shops. *See* 29 C.F.R. § 779.387; WHD Op. Ltr. 1975-22 (May 1, 1975).

In 1966, Congress also enacted in section 13(b)(18) of the FLSA an overtime exemption for food service employees of retail or service establishments that are not restaurants—replacing what had been a minimum wage and overtime exemption for such employees. *See* Pub. L. 89-601, § 210(a)–(b), 80 Stat. 837 (enacting section 13(b)(18), 29 U.S.C. § 213(b)(18), which exempted from overtime "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs" and repealing section 13(a)(20), 29 U.S.C. § 213(a)(20), which provided a minimum wage and overtime exemption for such employees). In addition to food service employees of other retail establishments such as department stores, the section 13(b)(18) overtime exemption applied to food service employees of establishments such as bars and cocktail lounges and those selling and serving food or drinks for consumption away from the premises. *See* 29 C.F.R. § 779.388(a); WHD Op. Ltr. 1975-22. Simultaneously with creating the section 13(a)(3) exemption for employees of seasonal amusement or recreational establishments in 1966, Congress thus enacted or otherwise preserved in a narrower form (in the case of the section 13(a)(2) exemption) multiple other exemptions for employees of establishments providing food and drinks for consumption both on and off the establishment's premises.

[8] *See Chevron USA, Inc. v. Plaquemines Parish*, 608 U.S. 1, 15 (2026) (courts "generally do not read a statute in a way that makes part of it redundant") (cleaned up) (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) ("caution[ing] against reading a text in a way that makes part of it redundant")); *King*, 576 U.S. at 486 (a court's duty "is to construe statutes, not isolated provisions") (cleaned up). Section 13(a)(3)'s comparatively narrow focus on *seasonal* businesses would make it a peculiar and illogical place to house an exemption for restaurants, bars, and similar establishments—especially *sub silentio*. Generally, the restaurant industry is not seasonal within the meaning of section 13(a)(3). While surely some eateries and "watering holes" might satisfy either seasonality test, many would not, drawing a peculiar line between parts of the same industry. Indeed, the history of the FLSA, recounted here and in other letters, reveals that Congress clearly, specifically, and consistently has addressed how the Act applies to the restaurant industry. Of course, as the Division has made clear, simply because an establishment serves food or beverages does not mean it *cannot* meet the section 13(a)(3) exemption. *See* WHD Op. Ltr. 2021-3 (Jan. 15, 2021). To the contrary, as discussed *infra*, WHD has confirmed that many food and drink businesses located at beaches or similar summer vacation spots only open for the summer season likely meet the requirements of section 13(a)(3).

[9] In 1974, Congress amended section 13(b)(8), converting it from a full to a partial overtime exemption for restaurants, and it repealed the separate overtime exemption for food service employees at retail establishments in section 13(b)(18). *See* Pub. L. 93-259, §§ 13(a)–(b), 15, 88 Stat. 55, 64, 65 (1974). As

In 1977, Congress repealed the section 13(b)(8) overtime exemption for restaurants at the same time it expanded section 13(a)(3). *See* Pub. L. 95-151, §§ 11, 14(b), 91 Stat. 1249, 1252 (1977). Had Congress envisioned that the seasonal amusement or recreational establishment exemption would serve as the new full or partial replacement to section 13(b)(8) for the restaurant industry, it likely would have clarified such a significant expansion in section 13(a)(3) itself. This is especially true since in the same statute Congress amended the section 13(a)(3) exemption to add the comparatively small universe of "religious or non-profit educational conference center[s]."[10]

Finally, Congress's treatment of workers who receive tips, many of whom are servers at restaurants, lends further support not only to the Division's longstanding interpretation, but also to Congress's agreement and acceptance of it. Since 1966, when Congress extended the minimum wage to restaurant and other food service workers, Congress has authorized employers, under section 3(m) of the Act, to count a portion of employees' tips towards their FLSA wage obligations.[11] And it has since enacted additional protections for those employees paid with a tip credit,[12] in addition to extending overtime requirements to restaurant and other food service employees.[13] If eating and drinking businesses generally fell within the scope of section 13(a)(3), the Act's minimum wage and overtime requirements would not apply to restaurant workers—largely nullifying the impact of the FLSA's tip credit provisions and protections. Congress's enactment of and amendments to section 3(m), together with its expansion of the Act's coverage, thus reinforce that eating and drinking places are not generally amusement and recreational establishments under the Act.

Perhaps the Sixth Circuit summarized it best, commenting on the distinction between restaurants and amusement and recreational establishments: "[r]iding a roller-coaster ride is different than

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discussed *infra*, Congress repealed the section 13(b)(8) overtime exemption in 1977. *See* Pub. L. 95-151, § 14(b), 91 Stat. 1249, 1252 (1977). It repealed the section 13(a)(2) exemption in 1989. *See* Pub. L. 101-157, § 3(c)(1), 103 Stat. 938, 939 (1989).

[10] Those looking to the legislative record of the 1977 amendments will not find any support whatsoever for the notion that the seasonal amusement exemption was tacitly adding to its scope even seasonal (to say nothing of all) restaurants, bars, and similar businesses. At least one committee report asserted to the contrary. *See* H.R. Rep. No. 95-521, at 34 (1977) (explaining that "[t]he minimum wage and overtime exemption provided by 13(a)(3) applied to employees of such seasonal recreational or amusements activities as amusement parks, carnivals, circuses, and sports events but does not include," for instance, "restaurants").

[11] *See* Pub. L. 89-601, §§ 101(a), 201(a), 80 Stat. 830, 833 (1966) (adding section 3(m), 29 U.S.C. § 203(m) and revising section 13(a)(2), 29 U.S.C. § 213(a)(2)).

[12] In 1974, Congress amended section 3(m) to provide that an employer cannot take a tip credit unless the employer notifies its employees it is using the tip credit and its employees retain all their tips (except for a tip pool limited to employees who customarily and regularly receive tips). *See* Pub. L. 93-259, § 13(e), 88 Stat. 55, 64–65 (1974) (currently codified at 29 U.S.C. 203(m)(2)(A)). Additionally, in 2018, Congress amended section 3(m) of the Act to enhance its protections for workers who receive tips, including those paid with a tip credit. *See* Consolidated Appropriations Act, 2018, Pub. L. 115-141, § 1201, 132 Stat. 348, 1148–49 (2018) (reorganizing section 3(m), 29 U.S.C. § 203(m), and adding section 3(m)(2)(B), *id.* at 203(m)(2)(B)).

[13] *See supra* n.7, n.9.

buying dinner and renting a room. One is recreational and the other is a necessity of life." *Double JJ Resort*, 375 F.3d at 397 (endorsing the Secretary's view that a resort hotel was not itself an amusement or recreational establishment).

2. An Employee of an Eating or Drinking Place May Be Exempt Under Section 13(a)(3) if the Eating or Drinking Place is Part of a Seasonal Amusement or Recreational Establishment

While eating and drinking places generally lack an amusement or recreational purpose, the Division has long explained that employees of certain eating or drinking businesses nonetheless may come within the section 13(a)(3) exemption, provided two conditions are met.

First, the eating or drinking place must be part of the same establishment as a host amusement or recreational establishment. This condition is usually met if the eating or drinking place is on the same premises as the host establishment and thus can or may only be accessed by entering the premises (either indoor or outdoor) of the host establishment. For instance, WHD has determined that a restaurant "house[d]" in a "theater facility" that was "open only when a show is scheduled in the theater," was an "integral part" of the same establishment as the theatre and thus was part of an amusement or recreational establishment for purposes of section 13(a)(3). WHD Op. Ltr. June 16, 1999.[14] *See also, e.g.*, WHD Op. Ltr. FLSA-811 (proposed restaurant on the premises of an amusement park considered part of the same establishment as the amusement park where, among other factors, the restaurant would "not be physically separated from the rest of the amusement park"); WHD Op. Ltr. 1967-208 ("It is only in rare instances that two or more business activities

[14] For purposes of the since-repealed exemptions in sections 13(a)(2), 13(b)(8), and 13(b)(18), both courts and the Division historically treated a specific category of food service operations—independently owned and operated food services in industrial plants, office buildings, government installations, hospitals, and colleges—differently from other instances where two businesses are on the same premises. Courts and the agency grounded this special treatment in a committee report stating that the 1961 amendments (which, in the case of restaurant and other food service employees became the overtime exemptions in sections 13(b)(8) and 13(b)(18) in 1966) were "intended to continue the exemption for independently owned and operated restaurants in industrial plants, office buildings, Government installations, hospitals, or colleges, such as were involved in *McComb v. Factory Stores* (81 F. Supp. 403 (1948))." H.R. Rep. No. 87-75, p. 10 (1961); *see also* S. Rep. No. 87-145, p. 28 (1961) (same). Some courts, relying on these committee reports, indicated that functional separation was sufficient for such food service operations to be separate establishments from their hosts for purposes of those exemptions—analysis that differs from that applied (even by the same courts) to other types of establishments under those exemptions or section 13(a)(3). *Compare Hodgson v. Crotty Bros. Dallas,* 450 F.2d 1268, 1272–73, 1278–79, 1282 (5th Cir. 1971) (quoting S. Rep. No. 87-145 and finding cafeteria at private school had sufficient functional separation to constitute separate establishment for purposes of section 13(b)(18)), *with Alvarez Perez,* 515 F.3d at 1158 and *Sundial Associates,* 588 F.2d at 123. WHD's opinion letters have similarly treated the types of operations listed in the committee reports differently from other businesses. *See* WHD Op. Ltr. 1967-181 (July 11, 1967) (recognizing special treatment for independently owned and operated restaurant located in an industrial plant, office building, governmental installation, hospital or college); *see also* 29 C.F.R. 779.386. This strand of case law and related authorities are not relevant here as they deal with a subset of food service providers operating at specific venues that committee reports indicated warranted special treatment, and none of these were amusement or recreational businesses.

on the same premises are characterized by the physical and functional separation requisite to constitute more than one establishment for the purposes of the exemptions."); *cf.* WHD Op. Ltr. FLSA-816 (Feb. 1, 1982) (declining to apply 13(a)(3) exemption to restaurant located outside state park).[15] Where an eating or drinking place is part of the same establishment as a host amusement or recreational facility, this single establishment will be considered to have an amusement or recreational purpose. This is true regardless whether the eating or drinking place is operated by a third-party concessionaire. *See* FOH 25j04(a) (where "food and souvenir employees" work for a concessionaire "on the premises" of, for instance, "an amusement park [or] baseball park," it is "usually the case" that "the concessionaire and the host [will] constitute a single establishment").

Second, this amusement or recreational establishment, including the eating or drinking place on its premises, must meet one of the statutory tests of seasonality. *See, e.g.*, WHD Op. Ltr. June 16, 1999 (concluding that section 13(a)(3) exemption applied to theatre with restaurant on the premises, as the theatre and the restaurant both operated for less than seven months per year and thus, the single combined establishment met calendar test); WHD Op. Ltr. FLSA-811 (section 13(a)(3) exemption would continue to apply to amusement park following the opening of a restaurant on the premises, as the combined operations of the amusement park and restaurant would meet receipts test).

a. *WHD's approach fully effectuates both section 13(a)(3) and the Act as a whole*

The Division's consistent fair reading of the exemption, under which employees of eating or drinking places are exempt under section 13(a)(3) only if the eating or drinking place is part of an amusement or recreational establishment that operates on a seasonal basis, effectuates congressional intent, as set forth in the Act. As discussed at length above, the Act makes clear that Congress did not generally include eating or drinking places intrinsically or inherently within the category of amusement or recreational establishments for purposes of section 13(a)(3). *See supra* General Legal Principles Sec. C.1. The Division's approach applies the elements of section 13(a)(3), fully and fairly interpreted within the text and history of the broader statutory scheme. *See id.* It exempts those employees of eating or drinking places that are part of an establishment

[15] In a January 2009 letter, WHD concluded that the section 13(a)(3) exemption did not apply to employees of a concessionaire that provided catering services at a recreational establishment to persons who use the facility. *See* WHD Op. Ltr. FLSA 2009-11 (Jan. 15, 2009). Although such facts were sufficient to consider an eating or drinking place on the premises of a host facility to be part of the same establishment as the host in other opinion letters, *see supra*, the party who requested the January 2009 letter specifically inquired whether a recreational establishment and a concessionaire "that are *not* a single establishment . . . may both [independently] claim the section 13(a)(3) exemption." *Id.* (internal quotations omitted) (emphasis added). Answering a question premised on the concessionaire as a *separate* establishment from the host facility, WHD concluded that the employees of the concessionaire were not exempt under section 13(a)(3), in part because an establishment that primarily serves food or drinks does not have an amusement or recreational purpose. *See id.* The letter thus squarely confirms the Division's consistent position that a concessionaire or other eating or drinking place that is part of the same establishment as a host amusement or recreational establishment may come within the section 13(a)(3) exemption, provided the establishment meets the section 13(a)(3) criteria. Indeed, as if to emphasize the point, the letter recites WHD's longstanding factors governing the determination of a "single establishment," citing section 779.305 and WHD Op. Ltr. FLSA-811 (which relied on section 779.305). *Id.* at 2.

that satisfies the elements of section 13(a)(3)—and not employees of restaurants, bars, and similar businesses writ large, which would expand the scope of the exemption beyond what the text of the section, and the Act, can bear.

The Division has applied the section 13(a)(3) exemption in this manner for decades, and it treats concessionaires that provide food or drinks at facilities such as amusement parks the same as other eating and drinking places operating at such establishments. As with other eating or drinking places, WHD considers employees of concessionaires operating at a host amusement or recreational establishment exempt as long as the concessionaire and the host establishment constitute a single establishment that operates on a seasonal basis, and it has likewise opined that the concessionaire and the host establishment will usually constitute a single establishment. *See* WHD Op. Ltr. FLSA-824 (June 8, 1979) (concluding that "employees of a fast food business employed at a concession in a professional baseball park" would be exempt provided the concessionaire and the host constituted a single establishment that met all the section 13(a)(3) requirements); WHD Op. Ltr. 1967-208 (opining that this same principle would apply to food and souvenir vendors employed by a concessionaire at an amusement park or ballpark, and explaining that "two or more business activities" on the same premises will "rare[ly]" constitute separate establishments); *see also* 29 C.F.R. § 779.385 (identifying "the concessionaires at amusement parks and beaches" as "typical examples" of seasonal amusement or recreational establishments).

b. *WHD's approach is supported by applicable regulations and case law*

The Division's approach aligns with the Department's "establishment" regulations in Part 779—and, in particular, section 779.305—and authorities applying those regulations. *See supra* General Legal Principles Sec. B.1. As explained above, section 13(a)(3) "depend[s] on the character of the establishment by which [the] employee is employed." 29 C.F.R. § 779.302. And section 779.305 provides that multiple business operations on the same premises are properly considered separate establishments for section 13(a)(3) purposes only if each such business operation is physically separate and, if so, functionally operates as a separate unit and has its own employees. *See Alvarez Perez,* 515 F.3d at 1158 ("because 29 C.F.R. § 779.305 lists the three requirements in the conjunctive," multiple business operations at the same location "must satisfy each of them" in order to qualify for the section 13(a)(3) exemption as separate establishments) (citing *Gilreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504, 510 (8th Cir. 1970)).

Courts construing and applying section 779.305 generally support that where an eating or drinking place is on the premises of a host amusement or recreational establishment, such as where an eating or drinking place can only be accessed by entering the premises of a host amusement or recreational establishment, section 779.305's physical separation prerequisite is rarely met, and both business operations will be considered a single establishment. *See Marshall v. Sundial Associates*, *Ltd.,* 588 F.2d 120, 123 (5th Cir. 1979) (concluding that a short-term rental business that operated in a condominium complex was not a separate establishment for purposes of the since repealed section 13(b)(8) overtime exemption for hotels and restaurants, notwithstanding that it had a "separate business identit[y], bookkeeping and payrolls," because it was "completely physically intertwined" with the condominium complex); *see also Alvarez Perez*, 515 F.3d at

1157–58 (favorably citing *Sundial Associates* in a 13(a)(3) case).[16] And these authorities further support that where multiple businesses on the same premises constitute a single establishment under section 779.305, section 13(a)(3)'s amusement purpose and seasonality requirements are applied to the businesses together. *See Alvarez Perez,* 515 F.3d at 1156, 1159–60 (plaintiff-employees were not exempt under section 13(a)(3) because the two defendant-businesses for which they worked were a single establishment under section 779.305, and that establishment did not meet section 13(a)(3)'s seasonality requirements, because while each business separately would meet these tests, together they did not); *see also Sundial Associates*, 588 F.2d at 123 (plaintiff-employees were not exempt from overtime under section 13(b)(8) exemption for restaurants, hotels, and motels because while the short-term rental business they worked for "may be a hotel for many purposes," the single combined establishment comprised of the rental business and condominium complex did not constitute a hotel); *Gilreath*, 421 F.2d at 507–08, 510 (plaintiff-employees were not exempt under the section 13(a)(2) exemption because the defendant-businesses were a single establishment under section 779.305, and that single establishment did not meet the section 13(a)(2) requirements). Put another way, where multiple business operations (such as an eating or drinking place and a host amusement or recreational establishment) do not meet all the section 779.305 criteria, and thus constitute a single establishment, this single establishment (*i.e.*, both businesses together) must meet section 13(a)(3)'s seasonality requirement for an employee who works for one of the businesses that comprises this single establishment to meet the statutory requirements of the exemption.

Accordingly, the section 13(a)(3) exemption applies to an employee of an eating or drinking place (including one operated by a third-party concessionaire) on the same premises as a host amusement or recreational establishment, provided that two conditions are met. The eating or drinking place must have a sufficient connection to the host to be part of the same establishment possessing the requisite amusement or recreational purpose, as is often the case, and this single combined establishment, comprised of the eating or drinking place and the host facility, must meet one of section 13(a)(3)'s seasonality tests.

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[16] In addition to typically being physically integrated, a restaurant, bar, or other eating or drinking place on the same premises as a host amusement or recreational establishment will often be economically dependent on the host establishment for business, as its customers may or can only access the eating or drinking place via the host. For instance, an eating or drinking place on the same premises as an amusement or recreational establishment, such as a concession stand or restaurant at an amusement park, may serve food or drinks primarily or solely to persons patronizing the host establishment. Relatedly, the eating or drinking place and host establishment may be regarded by customers as being part of a single, unified operation, given the relationship between the services they provide—amusement or recreational activities, plus food and drinks to enjoy while engaging in amusement or recreation—regardless of whether the eating or drinking place is a separate legal entity or has separate employees. Such economic and functional interdependence further supports the conclusion that an eating or drinking place on the premises of a host amusement or recreational establishment constitutes the same establishment for purposes of section 13(a)(3). *See supra* n.4 (explaining that under section 779.305, multiple physically segregated business operations on the same premises must be engaged in "functionally unrelated activities" to constitute separate establishments); s*ee also* 29 C.F.R. § 779.306 (where "a departmentalized retail store, having leased departments," performs such functions as "control[ling] the space location, determin[ing] the type of goods that may be sold, [and] determin[ing] the pricing policy," each "leased department" would be "an integral part of the retail store and considered to be such by the customers").

3. WHD Continues to Apply Its Longstanding Textual Approach

In 2016, the United States Court of Appeals for the Second Circuit created a somewhat different approach to eating and drinking places under the section 13(a)(3) exemption. The case involved employees who worked for a company that operated food, beverage, and souvenir concessions at a professional baseball stadium. The Second Circuit held that certain "concessionaires" that operated on the premises of "an amusement or recreational host facility" necessarily have a "recreational character" and, therefore, "qualify as 'amusement or recreational' establishments in their own right for the purposes of the exemption" in section 13(a)(3). *Hill v. Delaware North Companies Sportservice*, 838 F.3d 281, 287, 292 (2d Cir. 2016). The court defined "concessionaires" as "establishments whose purpose is to sell goods and services on the premises of an amusement or recreational host facility to the host's customers for their use or consumption on the host's premises as they participate in the host's amusement or recreational activities." *Id.* at 292.[17]

The Second Circuit relied on two committee reports accompanying the 1961 amendments to the Act and the Department's interpretive regulation at section 779.385, which identify "concessionaires at amusement parks and beaches" as examples of seasonal amusement or recreational establishments. *See* 838 F.3d at 288–290 (citing H.R. Rep. No. 87-75, at 10 (1961); S. Rep. No. 87-145, at 28 (1961); and 29 C.F.R. § 779.385).[18] The court reasoned that "[w]ith the word 'at,'" as drafted and contained in the legislative committee reports, "Congress distinguished between concessionaires and the amusement parks and beaches that host them," and, in the view of the court, made "clear that concessionaires at places of amusement or recreation had the amusement or recreational character required for the exemption." *Id.* at 289; *see also id.* at 290 (section 779.385's identification of "concessionaires at amusement parks and beaches" as "[t]ypical examples" of seasonal amusement and recreational establishments" "implies that concessionaires at amusement or recreational sites can be establishments frequented by the public for its amusement or recreation") (internal quotations omitted). For these reasons, the court declined to accept WHD's longstanding view that the exemption applies to employees of a

[17] Significantly, however, the court did "not preclude[e] the possibility that" business operations that meet its definition of "concessionaire" "might also qualify because their operations and those of their host establishments constitute a single qualifying establishment." 838 F.3d at 292.

[18] The House and Senate Committee Reports accompanying the 1961 amendments—which, as explained above, first enacted a specific exemption for employees of seasonal amusement or recreational establishments, then within section 13(a)(2)—note that "amusement and recreational establishments operating on a seasonal basis" are "typically those operated by concessionaires at amusement parks and beaches." H.R. Rep. No. 87-75, at 10; S. Rep. No. 87-145, at 28. Section 779.385, which cites these reports, likewise identifies "the concessionaires at amusement parks and beaches" as "[t]ypical examples" of seasonal amusement or recreational establishments. 29 C.F.R. § 779.385 (citing H.R. Rep. No. 87-75, at 10; S. Rep. No. 87-145, at 28). And the Division has treated them as such in its application of the section 13(a)(3) exemption.

concessionaire at a host amusement or recreational establishment only to the extent the concessionaire and host facility are a single establishment. *See id.* at 292.[19]

[19] The Second Circuit maintained that the Division lacked a consistent position with respect to application of the exemption to employees of concessionaires that provide food or drinks or other goods or services on the premises of a host amusement or recreational establishment. The court contrasted the aforementioned January 2009 letter, WHD Op. Ltr. FLSA2009-11, with statements in FOH 25j02 regarding concessionaires in national parks and similar areas administered by the federal government. *See* 838 F.3d at 292. The Division respectfully disagrees with the court's analysis, and the resulting characterization of the Division's approach. With respect to the January 2009 letter, as discussed above, *see supra* n.15, the entity submitting the request asked whether a concessionaire serving food and drinks on the premises of an amusement or recreational establishment could meet the section 13(a)(3) exemption if it was not part of the same establishment as the host establishment. The Division answered that question, explaining that, if the two entities were to be evaluated *separately* under section 13(a)(3), the entity serving food and drinks would not meet the statutory requirements of the exemption. Neither in that letter nor at any other time has the Division stated that in such an arrangement it *would*—or should—apply the section 13(a)(3) exemption as requested. Far from evidencing a purported schism, as the Second Circuit posited, the January 2009 letter reaffirms WHD's 60-year-long position and practice: an employee of an eating or drinking place is exempt where the eating or drinking place is part of the same establishment as a host facility with an amusement or recreational purpose and the combined establishment meets one of the seasonality tests.

It must be noted that, for more than five decades, the Division has recognized a limited exception to the rule that an eating or drinking place does not itself have an amusement or recreational purpose: concessionaires providing said food and beverage services in national parks. Following the enactment of section 13(a)(3) in 1966, WHD determined, based on its reading of portions of the legislative history of the amendments, that Congress intended—even if it did not make such intent clear in the text of the Act—that for purposes of the new section 13(a)(3) exemption such concessionaires be considered amusement or recreational establishments in their own right. *See* WHD Op. Ltr. FLSA-611 (discussing the legislative debates leading to the 1966 amendments). The House Committee Report accompanying the 1977 amendments to the FLSA, which largely removed concessionaires in national parks, national forests, and the National Wildlife Refuge System from the section 13(a)(3) exemption, expressly approved the Division's reading of congressional intent, explaining that "concessioners providing accommodations, food and other consumer goods in national parks" were the "only exception" that Congress had recognized to the principle that establishments that provide such goods or services do not have an amusement or recreational purpose in themselves. H.R. Rep. No. 95-521, at 34 (1977) (internal quotations omitted). Buoyed by these reports and the 1977 amendments, WHD has continued to consider food and beverage concessionaires at national parks, plus those in national forests and the National Wildlife Refuge System, to be amusement or recreational establishments, but they now largely fall within the section 13(b)(29) partial overtime exemption for amusement or recreational establishments that operate under an agreement with the Department of the Interior or the Department of Agriculture, not section 13(a)(3). *See* FOH 25j02(c); WHD Op. Ltr. FLSA-721 (Aug. 21, 1978). The Division's reliance half a century ago on a congressional committee's discussion of an issue in a report was both typical and accepted at the time, even if the agency would not take similar action on such grounds today. Nevertheless, in recognition of its longstanding practice and reliance interests, the Division continues to apply this narrow exception in national parks, national forests, and the National Wildlife Refuge System. Regardless, for present purposes one further point is telling: the fact that Congress discussed concessionaires at national parks as the "only exception" to the general rule that eating or drinking places are not exempt amusement or recreational establishments reinforces *both* the Department's longstanding position for such establishments *and* the general rule.

In many instances, the Division's approach to, and the Second Circuit's interpretation of, the exemption will reach the same outcome. But not always. As discussed below, the court's approach, by allowing for application of the statutory exemption to a food and drink business at an amusement or recreational facility, even where the food and drink business, together with the host facility, do not satisfy one of the statute's seasonality tests, provokes tension with the rest of the Act governing food and drink businesses, and its consistent and uniform history—particularly the 1966 and 1977 amendments. As a result, the Division respectfully disagrees with the Second Circuit's interpretation to the extent it is premised on the parsing of, and reliance on, the word "at" in two 1961 committee reports. The Division's longstanding interpretation of section 13(a)(3) is the best reading of the statute, particularly in light of other provisions of the Act applicable to food and drink businesses, as clarified by Congress, specifically in the 1966 and 1977 amendments.

As a preliminary matter, under its longstanding approach, the Division would consider an eating or drinking place that meets the Second Circuit's definition of a "concessionaire"—an "establishment[] whose purpose is to sell goods and services on the premises of an amusement or recreational host facility to the host's customers for their use or consumption on the host's premises as they participate in the host's amusement or recreational activities," *Hill*, 838 F.3d at 292—part of the same amusement or recreational establishment as its host. As explained above, the Division has long agreed that an eating or drinking place is part of the same amusement or recreational establishment as a host facility with an amusement or recreational purpose where, for instance, the eating or drinking place can only be accessed by entering the premises of the host establishment—a condition that would clearly be satisfied in the case of an eating or drinking place that meets the Second Circuit's definition of a "concessionaire." *See supra* General Legal Principles, Sec. C.2.

The central difference between the Second Circuit's approach and that of WHD is the application of section 13(a)(3)'s seasonality tests. The Second Circuit only requires the concessionaire to satisfy a seasonality test; the Division requires this of the combined establishment (*e.g.*, the concessionaire and host together).[20] WHD's approach more faithfully applies the text of section 13(a)(3) within the broader statutory scheme and also reflects the economic and business reality of a combined establishment.

As discussed above, the statute as carefully adjusted by Congress across three significant amendments—in 1961, 1966, and 1977—makes clear that eating or drinking businesses generally are subject to the requirements of sections 6 and 7 and are not *in themselves* amusement or recreational establishments exempt under section 13(a)(3). The fact that separate exemptions existed for eating and drinking places when Congress enacted the section 13(a)(3) exemption for seasonal amusement or recreational establishments in 1966 demonstrates that Congress did not intend for eating and drinking places to constitute amusement or recreational establishments under

[20] As a result, the Second Circuit's test exempts employees of certain eating and drinking places that operate on the premises of a host amusement or recreational establishment, where the eating and drinking place meets one of the seasonality tests, but the eating or drinking place and the host establishment, considered together, do not. Precisely how many employees fall within this category is unclear. However, it is not likely to be a very significant number because WHD expects that the operations and revenues (*e.g.*, high and low seasons) relevant to the calendar and receipts tests of seasonality, respectively, of most eating and drinking places at typical amusement and recreational establishments are likely to track those of their host establishments.

section 13(a)(3). This reading is reinforced by Congress's subsequent repealing of those other exemptions including, for instance, in the 1977 amendments (which the Second Circuit did not consider). *See supra* General Legal Principles Sec. C.1.; General Legal Principles Sec. C.2.a. The statute and its history, therefore, resist the Second Circuit's conclusion that an eating or drinking place that meets its definition of a "concessionaire," a term not included in the Act, is an amusement or recreational establishment "in its own right," and, therefore, may meet the requirements of the exemption based solely on whether the eating or drinking place operates on a seasonal basis, regardless whether the combined establishment meets the statutory requirements. *See Hill*, 838 F.3d at 292, 296.

With respect to the 1961 committee reports and 29 C.F.R. § 779.385,[21] the description of typical amusement and recreational establishments as "concessionaires at amusement parks and beaches" predicates the exemption of a concessionaire's employees on the concessionaire's relationship with the amusement park or beach. Neither establishes that a concessionaire that provides food or drinks is exempt "in [its] own right," as the Second Circuit concluded—that is, independent of mere location at the amusement park or beach. *See Hill*, 838 F.3d at 292. Indeed, the Second Circuit in *Hill* emphasized the quintessentially recreational character of the host establishment, a baseball stadium, in concluding that the 13(a)(3) exemption applied to the employees of the concessionaire at issue, which provided food and beverages (and sold souvenirs) on the stadium's premises. *See id.* at 288 (concluding that the concessionaire had "an amusement or recreational character" because "[t]he food, drink, and merchandise that [it] sells at Oriole Park are predominately for baseball game attendees' use and consumption as they watch the game, and they enhance the amusement or recreational value of watching the game"). The 1961 committee reports must be viewed in light of the 1966 and 1977 amendments to the Act, which, as discussed above, demonstrate and reinforce that Congress did not intend eating and drinking places to be considered amusement or recreational establishments in themselves. Thus, the Division's longstanding approach not only more closely aligns with the economic and operational reality of each combined entity, given the close relationship between the character of a host amusement or recreational establishment and that of a concessionaire on its premises, but it is also more faithful to the requirements of section 13(a)(3) as well as other provisions of the Act applicable to food and drink businesses.[22]

Moreover, although section 779.385 lists "concessionaires at amusement parks and beaches" as examples of seasonal amusement or recreational establishments, the regulation does not purport to answer the antecedent question of whether such a concessionaire itself constitutes an "establishment" for purposes of section 13(a)(3). That question is addressed elsewhere in the Department's regulations set forth in 29 C.F.R. Part 779, especially section 779.305, which provide the Department's framework for determining whether multiple business operations on the same premises constitute a single establishment or separate establishments. *See supra* General Legal Principles Sec. B.1.; General Legal Principles Sec. C.2.b. Read in context, section 779.385

[21] The Division promulgated section 779.385 in 1961, revising it in 1970 in response to Congress's enactment of the 13(a)(3) exemption. *See* 26 Fed. Reg. 8333, 8365 (Sep. 2, 1961); 35 Fed. Reg. 5856, 5897–98 (Apr. 9, 1970).

[22] *See supra* n.6.

identifies a typical factual scenario in which the exemption may apply but does not displace the Department's establishment regulations.

The Second Circuit did not address the Department's establishment regulations or pertinent case law applying these regulations, including section 779.305, to section 13(a)(3) and other establishment-based exemptions. *See supra* General Legal Principles Sec. B.1.; General Legal Principles Sec. C.2.b. As explained above, the Department's regulations and circuit court decisions applying them confirm the merit of the Division's approach—namely, that two or more business operations on the same premises should be considered a single establishment for purposes of section 13(a)(3), unless they are physically and functionally separate businesses, with their own employees. These authorities also support the conclusion that an eating or drinking place that meets the Second Circuit's definition of a "concessionaire"—one that is on the premises of, and which serves patrons of, a host amusement or recreational establishment—would not meet the criteria to be considered a separate establishment.[23] Where an employee works for an eating or drinking place that would meet the *Hill* definition of a "concessionaire," section 13(a)(3)'s seasonality test should be applied to this combined establishment (including both the eating or drinking place and the host); it should not be applied to just the eating or drinking place in a manner that potentially exempts employees of an entity that does not meet the statutory requirements.[24]

The Division continues to apply its longstanding approach to eating and drinking places on the premises of a host amusement or recreational facility, under which an employee of an eating or drinking place, including one operating as a concessionaire, is exempt where the eating or drinking place is part of the same establishment as a host amusement or recreational establishment and the combined establishment meets one of section 13(a)(3)'s seasonality tests. Establishments in New York, Vermont, and Connecticut should rely on this letter only to the extent that it is consistent with *Hill*.

OPINION

For your client's employees to be exempt under section 13(a)(3), your client's concessions operations must be part of an establishment with an amusement or recreational purpose and which

[23] *See supra* General Legal Principles Sec. C.2.b. (explaining that two or more businesses that do not meet the section 779.305 criteria of physical and functional separation will generally be considered the same establishment for purposes of section 13(a)(3) and other establishment-based exemptions, citing *Alvarez Perez*, 515 F.3d at 1156–60, *Sundial Associates*, 588 F.2d at 123, and *Gilreath*, 421 F.2d at 507–08, 510).

[24] As noted above, *see supra* n.17, *Hill* does "not preclude[e] the possibility that" employees who work for business operations that meet its definition of "concessionaire" might also be exempt under section 13(a)(3) "because their operations and those of their host establishments constitute a single qualifying establishment." 838 F.3d at 292. Rather, it "merely provid[es] an alternative path for archetypal concessionaires to qualify as 'amusement or recreational' establishments in their own right for the purposes of the exemption." *Id*. Thus, *Hill* does not appear to preclude an employee of an eating or drinking place on the premises of a host establishment (including one that would meet its definition of "concessionaire") from being considered exempt where, in accordance with WHD's longstanding approach, the eating and drinking place and the host are considered a single establishment that meets section 13(a)(3)'s amusement purpose and seasonality requirements. Moreover, as also noted above, *see supra* n.20, we expect that the universe of employees who are exempt under *Hill* but not under WHD's longstanding approach is small.

operates on a seasonal basis. *See supra* General Legal Principles Sec. C.2. As explained below, we conclude that the state fair and the concerts at which your client provides concessions services are establishments with an amusement or recreational purpose and that your client's concessions services are sufficiently integrated into the operations of the state fair and concerts, respectively, to be part of these establishments. Accordingly, your client's employees who work at the state fair and at concerts would be considered exempt under section 13(a)(3), provided each establishment (including your client's concessions operations) meets one of section 13(a)(3)'s tests of seasonality.[25]

A. Your Client's Concessions Operations at the State Fair and Concerts are Part of Establishments with an Amusement or Recreational Purpose

As discussed above, section 13(a)(3) is an establishment-based exemption. Since an "establishment" is a "distinct physical place of business," not "an entire business or enterprise," 29 C.F.R. § 779.23, the Division separately examines each physically separate location where your client operates—operations at the state fair and at concerts—to determine whether it is an establishment that meets the section 13(a)(3) statutory criteria.

1. The State Fair and the Concerts are Establishments With an Amusement or Recreational Purpose

Based on the information you have provided, both the state fair and concerts at which your client offers concessions services are establishments—distinct physical places of business. The Division has expressly recognized that state fairs are establishments. *See, e.g.*, WHD Op. Ltr. FLSA2021-3, at 7; WHD Op. Ltr. 1967-208. You state that the state fair is held annually at a specific location, a fairground, which the state fair converts into a place of business by holding a variety of activities, exhibits, and events.

With respect to the concerts, your client employs seasonal employees at each concert for approximately 2 weeks, including the time the concert is open to the public and any set-up and tear-down activities. We do not know whether these concerts are recurring (*e.g.*, annual) events or whether the entities that hold these concerts also hold other concerts at the same location at different times of the year (for instance, before or after the concerts at which your client employs seasonal employees). However, the Division considers carnivals to be an example of a 13(a)(3)-exempt establishment, even if a carnival's physical presence may be temporary, and courts likewise have considered certain multi-day festivals to be establishments within the meaning of the exemption. *See* WHD Op. Ltr. FLSA2021-3, at 11 (discussing carnivals as an example of a 13(a)(3)-exempt establishment); *Chen*, 798 F.3d at 74, 82 (5-day carnival-like event held at convention center was establishment for purposes of section 13(a)(3)); *Valladares,* 2015 WL 12656267, at *8 (music festival that involved a total of 12 days of work was establishment for

[25] Your client also provides concessions services at various other events besides the state fair and concerts (including holiday celebrations at municipalities, arts festivals, and weddings). We do not have sufficient information from your request to determine whether these other events are establishments and have an amusement or recreational purpose. Therefore, we cannot determine whether your client's employees who work at these events are exempt from section 13(a)(3) of the Act when they are working at these events.

section 13(a)(3) purposes). Applying these standards, and in recognition that analogous events have been recognized as establishments, we consider the concerts to be establishments as well.[26]

The state fair and concerts also both have an amusement or recreational purpose. As discussed above, the nature of an establishment, not the duties of any employee, determines whether the establishment has an amusement or recreational purpose under section 13(a)(3). *See supra* General Legal Principles Sec. B.2. And both state fairs and events closely analogous to concerts (in particular, music festivals) have been recognized as having an amusement or recreational purpose. *See* WHD Op. Ltr. FLSA2021-3, at 7 (identifying state and county fairs as amusement or recreational establishments); *Chen*, 798 F.3d at 82 (carnival-like event had amusement or recreational purpose); *Valladares*, 2015 WL 12656267, at *9–10 (reaching same conclusion with respect to music festival).

2. Your Client's Concessions Operations are Part of the Same Establishment as the State Fair and Concerts

Based on the information you have provided, your client's concessions operations are sufficiently integrated into the state fair and concerts, respectively, to constitute part of the same establishment as these events. As discussed, we have generally considered eating or drinking places on the same premises as a host amusement or recreational establishment, such as where the eating or drinking place can only be accessed by entering the host's premises, to be part of the same amusement or recreational establishment as the host amusement or recreational establishment. *See supra* General Legal Principles, Sec. C.2. We understand that your client's concessions operations are on the premises of the state fair and the concerts. And your request explains that your client sells food and beverages directly to the public attending these events. Accordingly, your client's concessions services at the state fair and at concerts are part of an establishment with an amusement or recreational purpose within the meaning of section 13(a)(3).

B. Your Client's Seasonal Employees at the State Fair and at Concerts are Exempt Under Section 13(a)(3) Provided the Establishments Meet One of the Seasonality Tests

Since your client's concessions operations are part of the same establishments as the state fair and concerts that host them, and each such establishment has an amusement or recreational purpose, your client's employees at the state fair and concerts would be exempt under section 13(a)(3), so long as each establishment satisfies either the calendar test or the receipts test of seasonality. As discussed above, this means that each establishment—including the host establishment and your

[26] To the extent that multiple concerts are held over the course of the year at the same location as each concert at which your client provides concessions services, the relevant establishment for purposes of section 13(a)(3)'s requirements may include multiple concerts. *See, e.g.*, *Valladares,* 2015 WL 12656267, at *8 (recognizing that, under 29 C.F.R. 779.305, "the [defendant's] various . . . [music] festivals that take place at [a particular amphitheater] in a given year may constitute a single establishment"); *Alvarez Perez*, 515 F.3d at 1159–60 (multiple greyhound racing operations that used same racetrack at different times of the year constituted a single establishment).

client's concessions operations—must, considered together, meet one of section 13(a)(3)'s tests of seasonality, the calendar test or the receipts test.

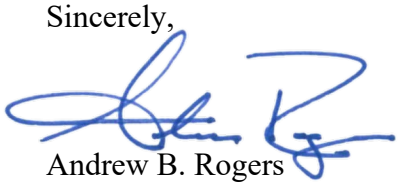
The information available to us suggests that in the case of your client's concessions operations at the state fair and concerts, each establishment likely meets the calendar test, pursuant to which an establishment must operate for no more than seven months per year. Your request explains that your client employs seasonal employees at the state fair for a period of approximately 3 months, which includes the time the fair is open to the public and the time your client's seasonal employees are setting up and tearing down concessions facilities. And your client employs seasonal employees at each concert for approximately two weeks, including the time the concert venue is open to the public and the time your client's seasonal employees are performing setup and teardown work. To the extent that in the case of the state fair and concerts, respectively, each establishment—including the host—operates for no more than seven months per year, the establishment would meet the calendar test.[27]

We are unable to opine on whether the state fair and concert establishments meet the receipts test, which requires that "during the preceding calendar year," an establishment's "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). For both the state fair and concerts, we do not have any information regarding the receipts of the host facility. *See* WHD Op. Ltr. FLSA2021-3, at 8 (explaining the requirements of the receipts test).

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the Wage and Hour Division of the United States Department of Labor for the 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 is responsive to your inquiry.

Sincerely,



Andrew B. Rogers
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).** You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your

[27] To the extent that the relevant establishment for purposes of section 13(a)(3) includes multiple concerts held at the same location, *see supra* n.26, the combined operations of all the concerts that make up the establishment would need to be considered in determining whether the establishment meets one of the seasonality tests.

request. 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. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.