

FLSA-720

May 13, 1976

This is in reply to your letter of April 28, 1976, in which you request information concerning the application of the Fair Labor Standards Act to your entertainment park, ***. You state you operate from May through October and 95% of your income is produced in that six-month period. During the off-season, November through April, your employees are involved in construction and expansion of your physical facilities. You state you are currently paying the statutory minimum wage and overtime compensation for your construction workers. You plan to open on May 29 for seasonal operation and plan to pay overtime for all hours worked over 48 in a workweek if your workers are exempt; if they are not exempt, you will continue your present practice.

As you know, section 13(a)(3) of the Fair Labor Standards Act provides a complete exemption from both its minimum wage and overtime pay requirements for employees employed in an amusement or recreational establishment, if (A) it is not open more than 7 months in a calendar year, or (B) its average receipts during any six months of the preceding calendar year did not exceed 1/3 of its average receipts for the other six months. Based on the information you submitted in your letter, it appears that *** would meet both of these requirements.

I will answer your specific questions in the order in which you presented them:

1) Employees of a section 13(a)(3) exempt establishment who engage in construction or reconstruction work do not qualify for the Section 13(a)(3) exemption in any workweek in which they are so engaged. For example, employees of an amusement park who, in addition to routine maintenance and repair work, engage in the erection of new structures, buildings, and places of entertainment designed to continue the public's interest, are not within the section 13(a)(3) exemption in any workweek that some (there is no tolerance for such nonexempt work) construction work is performed.

2) The answer to this question would depend on the actual facts in the case. Maintenance employees who engage in maintenance and repair work which is a routine, normal incident to the operation of the exempt entertainment park would come within the exemption for the entire year. However, as indicated above, those members of the maintenance crew who are engaged in constructing and reconstructing facilities (buildings, rides, towers, parking lots, fences, driveways, walkways to other structures) during the "park" season as well as during the "off" season would not be exempt from the monetary requirements of the law in either season, since such work would be considered "construction" work and not ordinary maintenance and repair work which is a normal incident to the operation of the establishment. The section 13(a)(3) exemption is an "establishment" exemption and the Courts have consistently refused to extend the "establishment" exemption to employees of an establishment whose activities are not of the same character as those activities for which the establishment was created. The construction, addition and modification of existing amusement park buildings, rides, etc. and the replacement of deteriorated components is in no sense a characteristic aspect of amusement park activities. In fact, the work would be economically, functionally and physically like that of a construction company's employees who are clearly entitled to the benefits of the Act. Therefore, any maintenance and/or construction employees who perform the above type of construction work in any workweek would lose the exemption in that workweek.

3) With regard to the workers at the steam-powered sawmill, which you state is operated solely for

demonstration purposes as a part of the entertainment package and only during operating hours and days, we would consider such employees to come within the establishment exemption, provided that the production of the lumber is on a small scale and the profits realized from its sale, if it is sold, are small in relation to the entire operation. We would consider such production as incidental to the operation of the sawmill for amusement purposes and the exemption would apply to the employees engaged in its operation. However, if the sawmill is operated after the season closes, or before the park opens in the morning or closes in the evening, those employees working in that operation would not be exempt in weeks in which they are so engaged.

If you have any further questions with regard to this matter, I am sure our Knoxville Area Office will be pleased to be of assistance to you. They are in a better position to ascertain the necessary facts in a given situation and are always happy to be at your service.

Sincerely,

William Hoffman, Director
Division of Minimum Wage
and Hour Standards
Wage and Hour Division