

FLSA-205

January 26, 1978

This is in reply to your recent letter, addressed to the Secretary of Labor, concerning the application of the Fair Labor Standards Act to a constituent in ***, New Hampshire, who holds a special use permit issued by the Secretary of Agriculture. The permit authorizes your constituent to use an area in a national forest as a public ski and recreation area known as *** Mountain. The letter deals with the special exemption in Section 13(a)(3) of the Act, which was recently amended.

Section 13(a)(3), prior to the Fair Labor Standards Amendments of 1977, exempted from the minimum wage and overtime provisions of the Act any worker employed by "an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year". The effect of this provision was to exempt various amusement and recreational establishments, including certain concessioners in national forests and other federal lands, if they met either of the seasonality tests in Section 13(a)(3).

In 1977 Congress, because of its concern that this exemption denied the Act's protection to employees of certain contractors doing business with the federal government, amended Section 13(a)(3) and created a new Section 13(b)(29). These amendments, which took effect January 1, 1978, deny to certain specified federal concessioners the benefits of the Section 13(a)(3) exemption for which they might otherwise have qualified prior to the 1977 amendments.

With reference to your constituent's ski area, the amendments make clear that private entities which are engaged in providing services and facilities directly related to skiing in a national park or a national forest, or on Land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, are exempt from paying the minimum wage, but must pay overtime after 56 hours in the workweek. (Private entities not directly related to skiing are denied the minimum wage exemption, and in addition must pay overtime after 56 hours.)

Your constituent's specific question is whether or not the special use permit he holds is a contract within the meaning of the Section 13(a)(3) exemption. It is such a contract. Regardless of the title or nature of the agreement between the Secretary of Agriculture (or the Secretary of the Interior) and the private entity providing services or facilities, the Section 13(a)(3) and Section 13(b)(29) Language as added by the 1977 amendments applies. This was made clear in the report of the House Committee on Education and Labor, where the provision originated, in the House floor debates, and during the meeting of the House-Senate conference committee.

In short, if your constituent's ski operation meets one of the alternative seasonality tests in the section 13(a)(3) exemption, then to the extent that it is directly related to skiing it is exempt from the Act's minimum wage provisions but must pay overtime after 56 hours in the workweek. If the ski operation does not meet either of the seasonality tests, it is not entitled to either the Section 13(a)(3) or the Section 13(b)(29) exemption, and therefore must pay its employees at least the minimum wage, as well as overtime after 40 hours in the workweek.

The Contract Work Hours and Safety Standards Act may also affect the situation your constituent describes. On contracts with the Federal government which are subject to this Act, Laborers and mechanics employed by the contractor or subcontractor must be paid at least one and one-half times their regular rate of pay for hours worked in excess of eight in a day or 40 in a workweek. These requirements apply regardless of the provisions of the Fair Labor Standards Act.

For your constituent's information, we enclose a copy of the Contract Work Hours and Safety Standards Act, as well as a statement explaining how the Fair Labor Standards Act applies to concessioners under the 1977 amendments.

Sincerely,

Herbert J. Cohen
Acting Administrator
Wage and Hour Division

Xavier M. Vela
Administrator

Enclosures