

FLSA-721

August 21, 1978

This is in reply to your letter of February 14, 1973, requesting our views on the application of amended section 13(a)(3) and new section 13(b)(29) on the Fair Labor Standards Act in the four situations cited in your letter. It is important to keep in mind that the purpose of the 1977 Amendment to section 13(a)(3) with respect to concessioners in certain Federal lands was to deny to those concessioners the exemption to which, before the 1977 Amendments, they would otherwise have been entitled. The 13(b)(29) exemption grants to these very concessioners a partial overtime exemption. We have responded to the four issues in the order of their presentation.

Issue No. 1 Does the exception to the "amusement or recreational establishment" exemption for employees of concessioners in national parks and forests and in the national wildlife refuge system, set forth in section 13(a)(3), apply only to employees of such concessioners who are employed within the boundaries of the national park or forest or national wildlife system?

Answer: The answer to this issue is "Yes." As you are aware, the section 13(a)(3) exemption is an "establishment" exemption, and under the Act, an establishment refers to a "distinct physical place of business". Accordingly, if a company operated one "establishment" (Concession) in a national park under contract, and operated another "establishment" (a golf course) outside the park, the separate golf course establishment outside the park would, provided it was frequented by the general public and met the seasonality test, qualify for the section 13(a)(3) exemption.

Issue No. 2 Does an amusement or recreational establishment in a national park or forest or national wildlife refuge system have to meet the seasonality test of section 13(a)(3) to qualify for the limited overtime exemption provided by section 13(b)(29)?

Answer: The answer to this issue is "Yes." While, as you indicate, section 13(b)(29) does not expressly require that the seasonality test of section 13(a)(3) be met, it is our position that based on the legislative intent, since this exemption was intended to apply to employees of establishments which previously met the tests of section 13(a)(3), the seasonality test requirement is implicit and would be a condition of exemption under section 13(b)(29). In other words, section 13(b)(29) applies only to those concessioners which, but for the 1977 Amendments, would have been exempt under section 13(a)(3).

Issue No. 3 Is the limited overtime exemption provided by section 13(b)(29) for amusement or recreational establishments located in national parks or forests or in the national wildlife system applicable to such establishments as restaurants, gift shops, hotels, grocery stores, gas stations, etc.?

Answer: The answer to this issue is "Yes." Retail establishments, such as restaurants, grocery stores, gift shops, etc. located in national parks, and for which the section 13(a)(3)

exemption was available prior to the 1977 Amendments, continue to be treated as amusement or recreational establishments for purpose of amended section 13(a)(3) and new section 13(b)(29). Thus, in the case of your specific examples, employees of the restaurant and the gift shop located in the national park who were formerly exempt under section 13(a)(3), would be entitled to overtime after 56 hours under the Fair Labor Standards Act. Such a retail establishment located in a national forest or the national wildlife system would not have qualified for the section 13(a)(3) exemption prior to the 1977 Amendments, and hence would not be entitled to the section 13(b)(29) exemption.

Issue No. 4 Is the limited overtime exemption of section 13(b)(29) applicable to central office or central warehouse functions for a concessioner in a national park or national forest or national wildlife refuge system?

Answer: The answer to this issue is "No." Employees performing central office or warehouse functions who could not previously qualify for the section 13(a)(3) exemption would not qualify for the new section 13(b)(29) establishment exemption, since they would not be employed by a single establishment, but rather would be performing work for a number of establishments.

While the provisions of the Act, as amended in section 13(b)(29), require overtime pay for hours worked in excess of 56, we would be remiss if we did not point out that, regardless of the application of the requirements of the Fair Labor Standards Act, laborers or mechanics employed by a contractor or subcontractor on contracts with the Federal Government which are subject to the Contract Work Hours and Safety Standards Act (copy enclosed) would have to be paid at least time and one-half their regular rate of pay for hours worked in excess of 8 in a day or 40 in a workweek.

We trust that the above is of assistance to you in this matter.

Sincerely,

Xavier M. Vela
Administrator

Enclosure