

FLSA-208

September 12, 1978

This is in reply to your letter concerning the exemption status of the *** summer resort operation in ***.

Your letter states that the firm's operations in *** are seasonal--all of the activities are open for business either from Memorial Day through Labor Day or from May 1 through September 30. The activities in *** consist of the following: a zoo, a doll house, a museum, a riding stable, a miniature golf course, a theater, a 9-room "restored" hotel, a chuck wagon, a teddy bear "barn", an ice cream parlor, two souvenir shops, a restored general store, a leather shop, a novelty shop, a campground with playground and trout pond, and The *** Motel located on the By-Pass Highway.

The exemption to which you refer is found in section 13(a)(3) of the Fair Labor Standards Act. That section exempts from the minimum wage and overtime compensation provisions of the Act any employee who is employed by an establishment of amusement or recreational character, provided that the establishment does not operate for more than seven months in any calendar year or provided that the establishment's average receipts for any six months of the preceding calendar year were not more than one third of its average receipts for the other six months of the same year. (Certain other types of establishments are exempt, but they are not relevant here.)

Under this exemption, each establishment must be looked at separately. The maps, leaflets and other materials you have supplied indicated that each of the activities as described above is a separate establishment. Based on your statements indicating that no establishment is open for business for more than five months, the first alternative seasonality test in the exemption is met.

Not all of the establishments have an amusement or recreational character for purposes of the exemption. Specifically, hotels, motels and eating places do not have an amusement or recreational character. Nor do the gas stations, the leather shop, or the souvenir and novelty shops or the general store. The fact that these stores are heavily patronized by tourists does not make them recreational or amusement establishments any more than restaurants, retail stores, and similar establishments at a seaside resort would be considered exempt.

In our opinion, the only establishments here which have an amusement or recreational character are the zoo, the doll house, the museum, the riding stable, the miniature golf course, the musical theater and the audio-visual theater, and the teddy bear barn. If the nine-room restored hotel museum is used primarily as a museum and not as a hotel with paying guests, it too would be of an amusement or recreational character.

If employees are exclusively employed "by" one of the exempt establishments or "by" two or more of the exempt establishments, then they would be exempt, but if any are employed either in whole or in part in any workweek by one of the nonexempt establishments, the exemption does not apply for that workweek. Also, employees employed generally by the enterprise, e.g., maintenance personnel or reservation personnel, and not by an establishment, are not exempt.

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

Sincerely,

Xavier M. Vela

Administrator

Enclosure