

MITIGATING LEGAL RISK

America Outdoors 2021

Risk Management is (Also)
an *'Inside Job'*

Looking at Minimum Wage,
OT and COVID Employee
Policies



Minimum Wage – 2 Issues

- FLSA – the Fair Labor Standards Act
AND THE
- 4.27.21 Executive Order on Minimum Wage for Federal Contractors 14026

1. What is the FLSA?

- A 1938 Law that:
 - Protects workers against unfair practices
- Specifies minimum wage and when workers are on regular vs. OT pay
- Determines exempt vs. non-exempt employees

2. Minimum Wage

- Nonexempt employees entitled to Fed Minimum Wage (\$7.25) OR
- The State's minimum wage – which ever is higher
- Tip Credit – if employee gets more than 30.00 p/month (must pay \$2.13 and must notify in advance)

3. OT (Over Time)

Pay OT for hours over 40 in a week.

No maximums and doesn't matter if it's a holiday or weekend unless OT worked on those days

Act applies on a workweek basis – workweek is fixed and regularly recurring 168 hours – 7 consecutive 24 hour periods. Doesn't have to conform to CAL.

4. More on OT....

- Can't use merchandise, tools purchases (or other) to reduce minimums to reach OT...
- Averaging of hours over 2 or more weeks not permitted
- MUST keep accurate records as per DOL record keeping regs

5. Applies to Most Businesses 3 tests

- Enterprise Coverage – 2 employees and takes in over 500,000 ★
- Individual Coverage or Named Business Coverage
- Most Rec Businesses will be under the Enterprise Coverage ★
- There are certain exemptions from minimum wage and OT requirements and that brings us to §13(a)(3) of the FLSA .

6. §13(a)(3) of the FLSA Exemption for Seasonal Amusement or Recreation Establishments

- This is the meat of minimum wage and OT.

To Get the Exemption:

- To satisfy the requirements of the exemption the employer must (1) be an establishment; (2) that is “amusement or recreational” in character, or an organized camp, or a religious non-profit educational conference center and 3) meet the seasonality requirements (next slide)

7. The seasonality requirement applies IF one of 2 tests are met:

- A. Don't operate for more than 7 months in CAL year – or -
- B. In preceding year - 6 months of year avg receipts not more than 33.3% of other 6 months

So.....



- You must be an “establishment” that is amusement or recreational in character and be seasonal (per the test) to get the minimum wage and OT exemptions allowed under § 13(a)(3)
- Seems pretty straightforward – but (as many federal things are) it gets complicated.....

8. Defining Amusement or Recreational Establishments

- The Act doesn't define "amusement or recreational establishment." And, application (of the exemption) doesn't depend on employee's duties – it depends on the 'character' of the employer. See, WHD Op. Ltr. FLSA2003-1.

9. 1966 Amendments to the Act and a Supreme Court Case

- Resulted in a focus on employers with “very sharp peak and slack seasons” whose “economic status may make higher wages impractical” or experiences that “offer non-monetary rewards”
- 1966 Amendments kept and repeated the term “establishment”

And....

- An establishment is an “amusement or recreational” establishment if it is (1) “frequented by the public” (2) for its amusement or recreation. See, 29 U.S.C. § 213 (a)(3); 29 C.F.R. § 779.385; WHD Op Ltr. FLSA 2018-26.
- An establishment is frequented by the public if it is generally accessible to the public.
- Applying these standards WHD has historically found that parks, swimming pools, miniature golf, skating rinks, summer camps, playgrounds, campsites, campgrounds, etc. qualify as “amusement or recreational establishments. In contrast, hotels, motels, shops, retail establishments, marinas, condos with docks not available to public are not recreational establishments.
- So – if you do activities like hikes, rafting, backpacking in outdoor areas but your buildings/facilities are merely for storage or office space and are not frequented by the public – your operation is likely “recreational” it will NOT be considered an “establishment.”

If you have no physical location that the public uses – the exemptions won't apply

- If your physical location is entirely divorced from the functions that afford its amusement or recreational character and serve no programmatic role whatsoever – there is no establishment and no exemption.
- If you have physical buildings where trips meet, leave from or return to so that there is a programmatic function, the exemption should apply.

10. Finally...

- Look for FLSA fact sheets on DOL website
- Questions? Go to:
dol.gov/whd
- Call: 866-487-9243 – all questions are free
- Obtain an opinion...

April 27, 2021 Executive Order 14026 on Minimum Wage for Federal Contractors

- In addition to all the above – on 4.27.2021 President Biden, signed an executive order designed to stimulate wages by “...ensuring that Federal contractors pay their workers an hourly wage of at least \$15.00....”
- The Order mandated that agencies that issue contracts and ‘contract like instruments’ including a clause specifying that this minimum wage would apply to all employees employed in the performance of the contract.

Some History -

- On February 12, 2014, President Barack Obama signed Executive Order 13658, “Establishing a Minimum Wage for Contractors.” See 79 FR 9851. Executive Order 13658
- Executive Order 13658 therefore sought to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by raising the hourly minimum wage paid by those contractors to workers performing on or in connection with covered Federal contracts to: (i) \$10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined and announced by the Secretary.
- In May 25, 2018, President Donald J. Trump issued Executive Order 13838, titled “Exemption from Executive Order 13658 for Recreational Services on Federal Lands.” See 83 FR 25341. Section 2 of Executive Order 13838 amended Executive Order 13658 to add language providing that the provisions of Executive Order 13658 “shall not apply to [Federal] contracts or contract-like instruments” entered into “in connection with seasonal recreational services or seasonal recreational equipment rental.

11.24.2021 Federal Register

- Executive Order 13838 additionally stated that seasonal recreational services include “river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.” Id. Executive Order 13838 further specified that this exemption does not apply to “lodging Start Printed Page 67127 and food services associated with seasonal recreational activities.”
- Section 6 of Executive Order 14026 revokes and supersedes certain presidential actions. 86 FR 22836-37. Specifically, section 6 of Executive Order 14026 provides that Executive Order 13838 of May 25, 2018, “Exemption From Executive Order 13658 for Recreational Services on Federal Lands” is revoked as of January 30, 2022. Id. Section 6 of Executive Order 14026 also states that Executive Order 13658 of February 12, 2014, “Establishing a Minimum Wage for Contractors” is “superseded, as of January 30, 2022, to the extent it is inconsistent with this order.”
- New rulemaking expressly declined invitations from CROA and others to delay or phase in the new order.
- Goes into effect 1.30.2022. Recreation Businesses are not – on their face – exempt.

COVID!!!

- And just think - here we go with Omicron.
- It IS lawful for a private business to require proof of vaccination as a condition of working or of getting/receiving service.
- The U.S. Department of Health and Human Services has established that employers—including healthcare providers - may ask an employee about vaccination status without violating HIPAA.
- The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA . 2 basic types of exemptions may apply: medical and religious exemptions.
- An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business.
- FLUID – medical worker mandates struck down by a Federal Court 11.29.2021. NO INSURANCE.

COVID Resources

- <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html> CDC Workplace Vax Program Tool Kit
- <https://www.osha.gov/SLTC/covid-19/> OSHA COVID Resources



THANK YOU!!

Hope you had a
wonderful time at AO
2021!

Happy Holidays!

THE END

THANK YOU



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