

Minimum Wage Opinion Letter 02-03-05 - Seasonal Business Overtime Waiver

February 3, 2005

Your letter to Commissioner Robert Prezioso has been forwarded to me for a response. You have asked for this Office's written opinion as to whether your client, the ***, is eligible for the seasonal business overtime waiver pursuant to M.G.L. c. 151, §1A. [1]

As I understand it, the *** is open to its members from June 14, 2005 through October 10, 2005, for a total of 119 days. During this time period, the *** operates a restaurant and bar, offers sailing and tennis programs, and waterfront slips and lines for boats with launch service in the harbor. ***'s staff consists of approximately 65 employees who work during the 119-day period, some of whom arrive in early June for training. *** also employs five to six employees during the off-season who work in the main office and maintain the facilities. Outside of the 119-day summer/early fall period, ***'s operations are closed - no facilities are open to members, the restaurant/bar is closed, and no activities or programs are offered.

The Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, §1A, provides for the payment of overtime compensation (time and one-half the employee's regular rate of pay) for work in excess of 40 hours in a given workweek in an "occupation" as defined by M.G.L. c. 151, §2. Section 2 defines "occupation," in pertinent part, as "an industry, trade or business or branch thereof or class of work therein, whether operated for profit or otherwise, and any other class of work in which persons are gainfully employed . . ." However, M.G.L. c. 151, §1A(9) specifically exempts persons employed "in a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of one hundred and twenty days in any year, and determined by the commissioner to be seasonal in nature."

Given that the *** is open only during a discrete season and, during the off-season, the facilities are closed, no programs are offered, and the *** retains only a few employees to maintain the facility, the Commissioner has made the determination that *** operates a business that is seasonal in nature. Therefore, the remaining issue is whether ***'s business is "carried on" for a period of 120 days or less, given that some employees arrive early for training and a few remain on staff throughout the year.

The phrase "carried on" is not defined in the statute, and this Office is unaware of any Massachusetts case law that provides direction as to the meaning of this phrase in this context. Therefore, it is left to this Office to give a reasonable interpretation of the statute, and, as we have done in other cases, we will look to federal wage and hour law for guidance. See Goodrow v. Lane Bryant, Inc., 423 Mass. 165, 170 (2000).

While federal law does not have an identical exemption to M.G.L. c. 151, §1A(9), Section 13(a)(3) of the Fair Labor Standards Act (FLSA) exempts certain recreational and amusement establishments from the Act's minimum wage and overtime pay requirements if they do not operate for more than seven months in a calendar year, or their average receipts meet a specified standard. See 29 U.S.C. §213(a)(3). [2] Under federal law, employees engaged in work connected with the operation of the recreational establishment may come within the exemption even though the establishment employs persons in the off-season to maintain facilities. See Department of Labor Wage and Hour Opinion, February 18, 1975. See also DOL Field Operations Handbook 25j01(b). The determining factor is whether the recreational establishment is open for business for more than seven months, i.e. the focus of the exemption is on the length of the seasonal operation, and not on the length of time an employee performs his/her work. Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 596 (11th Cir. 1995) ("fact that Plaintiff was employed in the off-season months relative to field preparation and maintenance of the baseball fields does not alter the Court's finding that Defendant's operation does not last longer than seven months"). See also Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1331 n.4 (1st Cir. 1977) ("[t]he §13(a)(3) exemption turns on the nature of the employer's business, not on the nature of the employee's work"). Once an establishment qualifies for the exemption, employees who perform work that is a routine, normal incident to the operation of the exempt establishment would come within the exemption for the entire

year. See Department of Labor Wage and Hour Opinion, May 23, 2000 (summer camp year-round office workers are covered by the exemption; however, workers engaged in construction of new facilities are not covered as they are performing activities which are not of the same character as those activities for which the establishment was created.)

Given that state and federal laws governing this area were likely adopted for similar purposes - to recognize the unique nature of seasonal enterprises that operate for short business seasons, but often entail longer work days - this Office will adopt a similar interpretation of M.G.L. c. 151, §9. We will interpret the phrase "carried on" to mean open for business (for 120 days or less) and, once a business has been granted a seasonal overtime waiver, that waiver will cover those employees who, throughout the year, perform work that is a routine, normal incident to the seasonal operation. In the case of ***, the application is on file and the Commissioner will grant the waiver request upon receipt of the application fee.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Deputy General Counsel

[1] As you know, most employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder. For information about applicable federal wage and hour laws, you should contact the U.S. Department of Labor.

[2] Massachusetts overtime law has both a "seasonal business" exemption, M.G.L. c. 151, §1A(9), and an "amusement park" exemption, M.G.L. c. 151, §1A(20), both of which limit the number of days during which a business can operate in a given year in order to fall within the exemption.

=Names have been omitted