Coates' Canons Blog: Are Employees of Seasonal Recreational Establishments Exempt from Overtime?

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Many local governments hire additional employees for the late spring through early fall months. This period sees the opening of municipal and county pools and summer camps, increased activity at parks, golf courses, tennis courts, as well as beaches for communities on the coast or on one of North Carolina's many lakes, and the need for seasonal workers. Which of these employees will be exempt from overtime under the FLSA's exemption for employees working at a seasonal amusement or recreational establishment?

The Fair Labor Standards Act (FLSA) requires employers to pay employees time-and-one-half their regular rate of pay for all hours over 40 that employees work in a given week, unless an employee is exempt under the FLSA's salary basis test and one of either the executive, administrative or professional duties tests. (On the duties tests, see here**,** here, here, here and here). The FLSA also provides for a limited number of other exemptions from overtime for employees who are nonexempt under the duties tests. I have discussed two of them in previous posts: the 207(k) scheduling exemption for law enforcement officers and firefighters (see here) and the fluctuating workweek (see here). This post addresses another exception to the overtime rule: the exemption for employees of a seasonal amusement or recreational establishment.

The Exemption for Employees of Seasonal Recreational Establishments

Some seasonal employees are not entitled to overtime pay even if we would normally think of their work as being nonexempt. Section 213(a)(3) of the Fair Labor Standards Act provides that the overtime rule shall not apply to:

> any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, 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 331/3 per centum of its average receipts for the other six months of such year . . . .

The Meaning of "Establishment"

For a position to qualify for the seasonal employee exemption, its duties must be performed at a facility that it is a distinct, physical place of operations that is separate from the main administrative location of the organization. See 29 CFR § 779.23. As the U.S. Department of Labor explains in an opinion letter,

> A city or town's entire municipal government, for example, cannot qualify as an amusement or recreational establishment. Likewise, parks department employees who are employed by a central, non-recreational agency facility do not qualify for the exemption, even if they are employed only seasonally.

The letter lisst a number of examples of public-sector facilities that may qualify as separate establishments:

- beaches
- golf courses

- swimming pools
- boardwalks
- stadiums
- summer camps
- ice-skating rinks and
- zoos.

Other venues that may qualify as separate establishments may include nature centers, tennis courts, fairgrounds and museums.

The Meaning of "Seasonal"

To be a "seasonal" establishment, the facility must be one that *operated for no more than seven months in any calendar year.* Public employers who consult the U.S. Department of Labor regulation implementing this section of the FLSA – 29 CFR § 779.385 – may notice that there is another way that a facility may qualify as seasonal, namely, if "during the preceding calendar year, its average receipts for any 6 months of the year were not more than 33? percentum of its average receipts for the other 6 months of such year." The average receipts provision *does not apply to government establishments whose operating costs are met wholly* ***or primarily*** *from general tax revenues*. See U.S. Department of Labor Wage and Hour Division Opinion Letter 2009-5 (January 14, 2009).

Year-Round Employees Spending Part Year at the Seasonal Establishment

Year-round employees who spend part of the year working at a seasonal recreational establishment and the other part of the year working for the city or county's year-round operations are exempt for overtime for those duties performed at the seasonal establishment, but must be paid overtime during that part of the year that they are working at the main facility.

Employees Who Take a Second Job at the Seasonal Establishment

Some year-round employees may take a second job at city or county's seasonal recreational establishment. *Under these circumstances, the exemption from overtime for employees at a seasonal establishment will not apply*. Why not? Because the FLSA regulations require all hours worked by a nonexempt employee for the same employer count toward assessing the employee's right to overtime in a given workweek. This is true even where the employee is working two, unrelated jobs.

Conclusion

Governments who operate truly separate and seasonal establishments – pools, beaches, camps, recreational facilities and the like – may employ seasonal workers without paying them overtime for hours worked over 40 in a week.

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