

**FLSA2018-23**

August 28, 2018

Dear **Name***:

This letter responds to your request for an opinion letter concerning the motion picture theater exemption in Section 13(b)(27) of the Fair Labor Standards Act (FLSA). Specifically, you inquire whether this exemption applies to the food service operations of motion picture theaters. As discussed below, this exemption applies to the businesses described in your letter because each of them is a single establishment primarily engaged in the business of showing motion pictures. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

You have stated in your letter and in follow-up communications with WHD staff that your client owns motion picture theaters that provide in-theater dining. Some of your client's locations additionally have a full-service restaurant on-site. Movies are shown at all times during the hours of operations at each location. In almost all instances, restaurant patrons must purchase a movie ticket to eat at the on-site restaurant. The food service operations are not separately incorporated and do not operate in any way as separate entities. They do not, for example, have separate entrances, operate under different names, file separate taxes, maintain separate bank accounts, place orders separately, pay invoices separately, or use separate bank accounts. You have stated that the primary revenue source for each of your client's establishments is the sale of movie tickets.

At each location, staff use a single kitchen to prepare food for both the in-theater and full-service dining (if any). The same servers and food runners serve both the in-theater and full-service dining areas. Food service staff also work as theater ushers and vice versa, and all employees are cross-trained to work in any position at each location. Your client uses the same payroll for both its theater staff and food service staff, and it does not separately keep their time and payroll records. Additionally, the same general manager supervises all employees (although different locations might have assistant managers or team supervisors).

GENERAL LEGAL PRINCIPLES

The FLSA exempts from its overtime requirements "any employee employed by an establishment which is a motion picture theater." 29 U.S.C. § 213(b)(27). Although the FLSA does not expressly define what constitutes "a motion picture theater," regulations specify that the establishment must be "a commercially operated theater primarily engaged in the exhibition of motion pictures." 29 C.F.R. § 779.384. The regulation does not expressly define the meaning of

“primarily engaged” (other than specifying that it does not depend on the establishment’s annual sales). WHD has stated, however, that establishments meet this requirement when they devote at least 50 percent of their available presentation time to presenting motion pictures. *See* Field Operations Handbook 21i01. When determining whether an establishment qualifies for the exemption, it is the “nature of the employer’s business, not the work performed by a particular employee,” that determines whether establishment-based exemptions apply. WHD Opinion Letter, 2003 WL 23374597, at *3 (Mar. 17, 2003); *see also* *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 777–79 (D. Md. 2008).

The FLSA does not define the term “establishment,” but both WHD and courts have interpreted the term to mean a “distinct physical place of business” rather than “an entire business or enterprise,” which may have multiple physical locations. *See, e.g.*, 29 C.F.R. § 779.23; *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496–97 (1945); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156-57 (11th Cir. 2008). When an enterprise has multiple establishments, some of those establishments may qualify for an establishment-based exemption, such as the motion picture theater exemption, while others may not. *See* 29 C.F.R. § 779.303.

The regulations explain when two or more “portions of a business [] located on the same premises may constitute more than one establishment for purposes of exemptions.” 29 C.F.R. § 779.305.¹ They state that business units on the same premises may constitute separate establishments—provided they are “physically separated,” are “functionally operated as [] separate unit[s] having separate records, and separate bookkeeping,” and have “no interchange of employees between the units.” *See id.*² Unless each of these three conditions is satisfied, the business units will be treated as a single establishment. *See id.*; *see also* *Gilreath v. Daniel Funeral Homes*, 421 F.2d 504, 510 (8th Cir. 1970) (holding that because 29 C.F.R. § 779.305 links these requirements in the conjunctive, each element must be met for business units sharing a location to constitute separate establishments). Thus, by way of example, “food service activities of such retail or service establishments as drug stores, department stores, or bowling alleys” are generally “not... a separate establishment.” 29 C.F.R. § 779.305; *see also* WHD Opinion Letter, 1999 WL 1002420, at *1 (June 16, 1999) (finding that a restaurant located in a theater facility, which was only open when the theater was open, was part of the same establishment).

¹ Although 29 C.F.R. § 779.305 expressly applies to the retail and service exemptions, courts have held that “its three-requirement definition of an establishment may be borrowed to define establishment for purposes of other exemptions.” *Alvarez Perez*, 515 F.3d at 1158; *see also* *Chao v. Double JJ Resort Ranch*, 375 F.3d 393, 398–99 (6th Cir. 2004) (remanding to district court to apply three-part test to determine if certain recreational services on a large resort might qualify as separate establishments).

² *See also* *Marshall v. New Hampshire Jockey Club*, 562 F.2d 1323, 1330–1332 (1st Cir. 1977) (holding that a flat racing business and a harness racing business were separate establishments, despite both using the same track and having common ownership, because each was separately operated and did not share employees); *Acme Car & Truck Rentals, Inc. v. James Hooper*, 331 F.2d 442, 445 (5th Cir. 1964) (holding that short-term and long-term automobile rental units were a single establishment, despite being separately incorporated and maintaining separate corporate and tax records, because they were not completely physically separate and shared employees); [WHD Opinion Letter FLSA-811](#) (Nov. 30, 1984) (finding that an amusement park and a restaurant were one establishment because the operations were not separate and the same employees would work at both units).

OPINION

The information you have provided establishes that your client's food services operations are functionally integrated with its theater operations. Indeed, they are incorporated as a single unit, file taxes and maintain business records as a single unit, order goods and pay invoices as a single unit, and use the same bank accounts to pay business expenses. They provide services to the public under a single business name, and their employees function as employees of a single unit. This lack of functional separation shows that the theater and food service operations operate as a single establishment under 29 C.F.R. § 779.305.

In addition, you have represented that the same employees perform work for both parts of the business. The same employees that provide food services, for example, also work as ushers and cashiers. Thus, even if the theaters and food service operations were not functionally integrated, they would still constitute a single establishment under 29 C.F.R. § 779.305 because of the "interchange of employees between the units."

The information you have provided further confirms that each of your client's locations is primarily engaged in showing motion pictures. Each location shows motion pictures consistently throughout its hours of operation—well in excess of the 50 percent threshold necessary to qualify as a "motion picture theater" under Section 13(b)(27).

Given the above considerations, the motion picture theater exemption in Section 13(b)(27) applies to your client's establishments as they currently operate. We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**