FLSA-224

April 30, 1983 (est.)

This is in reply to your letter of March 29, 1983, concerning the status of campground salespersons under the Fair Labor standards Act (FLSA). The salespersons sell campground resort memberships for *** and are paid on a commission basis. You ask if such salespersons may be considered "independent contractors" who are not subject to the provisions of the FLSA.

The FLSA is the Federal law of most general application concerning wages and hour of work. It applies to employees individually engaged in interstate commerce or in the production of goods for interstate commerce and to all employees of certain enterprises. Covered employees must be paid a minimum wage of at least $3.35 an hour and overtime pay of not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt. The general provisions of the Act, including exemptions, are more fully explained in the enclosed Handy Reference Guide.

In the application of the FLSA an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves. The employer-employee relationship under the Act is tested by "economic reality" rather than "technical concepts"; it is not determined by the common law standards relating to master and servant. Rutherford Food Corps v. McComb, 331 U.S. 722; Goldberg v. Whitaker House Cooperatives, Inc., 366 U.S. 28; Walling v. Portland Terminal Co., 330 U.S. 148; Walling v. American Needlecrafts, Inc., 139 F. 2d 60.

The Supreme Court has on a number occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Supreme Court considered significant were: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of individual investment in facilities and equipment; (4) the opportunities for profit and loss; (5) the degree of independent business organization and operation; (6) the nature and degree of control by the principal; and (7) the degree of independent initiative, judgment or foresight exercised by the one who performs the services. See Rutherford Food Corp., supra; and see also United States v. Silk, 331 U.S. 704 Bartels v. Birmingham, 332 U.S. 126; NLRB v. Hearst Publications, 327 U.S. 111.

The question of employment relationship under the Act is discussed in the enclosed WH Publication 1297. Based upon the information you have furnished, the salespersons selling memberships in *** campgrounds would be considered employees and not independent contractors for the purposes of the FLSA. Whether or not such salespersons

are deemed independent contractors under the Internal Revenue Code is not material in determining employment relationship under the FLSA.

An employer who has employees subject to the FLSA is required by section 11 of the law to keep certain records on wages, hours, and other related items as specified in Regulations, 29 CFR Part 516, a copy of which is enclosed.

If, after reading the enclosed material, you have further questions, you may wish to contact our Seattle Area Office, Federal Building, Room 1060, 909 First Avenue, Seattle 98174 (telephone: 442-4482). The staff in that office would be pleased to be of all possible assistance.

Sincerely,

William M. Otter
Administrator

Enclosures