

## MAJOR THEFT IN THE MAJOR LEAGUES: APPLICATION OF THE FLSA SEASONAL EMPLOYER EXEMPTION TO PROFESSIONAL SPORTS

*Kristin Spallanzani\**

### I. INTRODUCTION

The average annual salary of a professional athlete in the United States is roughly \$2,562,000.<sup>1</sup> While few would argue that athletes and CEOs working in the major leagues are not earning a fair wage, the opposite is true for lower-level employees working in these same professional sports organizations. In most circumstances, the Fair Labor Standards Act (FLSA or “the Act”)<sup>2</sup> protects workers who earn less than a fair wage, but that may not be the case for low-level employees of major league sports teams. The Act sets out minimum wage and maximum hour rules by which nearly all employers must abide.<sup>3</sup> The FLSA also provides for certain exemptions, relieving some employers from the duty to abide by the minimum wage and maximum hour requirements.<sup>4</sup> One exemption is for “seasonal amusement or recreational establishments.”<sup>5</sup> When compared to some of the other exemptions, the seasonal exemption has received little attention from the courts.<sup>6</sup> This lack of well-developed standards leaves both employers and employees confused and without guidance in the face of litigation. Despite the lack of clear guidance, professional sports

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\* J.D. Candidate, 2016, Seton Hall University School of Law; B.A., 2013, Fordham University. Special thanks to Dean Charles Sullivan and Daniela Pepe for their invaluable guidance throughout the writing of this Comment.

<sup>1</sup> See Nick Schwartz, *The Average Career Earnings of Athletes across America's Major Sports Will Shock You*, USA TODAY SPORTS (Oct. 24, 2013, 10:07 AM), <http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls> (listing the average annual salaries for athletes in America's five major leagues).

<sup>2</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19 (2006).

<sup>3</sup> *Id.* at §§ 206–07.

<sup>4</sup> *Id.* at § 213.

<sup>5</sup> *Id.* at § 213(a)(3).

<sup>6</sup> See, e.g., WESTLAW, <http://www.westlaw.com> (last visited Feb. 25, 2015). A Westlaw search for cases involving the § 213(a)(3) exemption returns 92 results, while a search for the § 213(a)(1) exemption returns 1140 results.

teams claim to qualify for this exemption.<sup>7</sup> Many teams have defended wage and hour lawsuits filed by low-level workers by asserting entitlement to the exemption.<sup>8</sup>

Courts, however, are split on whether the exemption even applies to professional sports. Those courts that find the exemption applicable are split on how the exemption should apply and have not even reached a consensus as to which factors should be dispositive.<sup>9</sup>

This issue regarding exemption has recently surfaced in litigation involving National Football League (“NFL”) cheerleaders. In 2014, cheerleaders from five different NFL teams sued their employers, alleging that they were not paid fairly for the amount of time they devoted to the team.<sup>10</sup> Though at least one of these cases has settled for a substantial sum,<sup>11</sup> thus suggesting that one team doubted whether it was exempted, there is still no clear answer as to whether professional teams are entitled to the seasonal employer exemption.

This Comment argues that major league professional sports organizations should not be entitled to claim this exemption. The language of the statute and legislative intent direct this conclusion. Part II provides a brief overview of the FLSA, focusing on its exemptions. It also examines the legislative history and the statutory

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<sup>7</sup> See, e.g., *Bridewell v. Cincinnati Reds*, 68 F.3d 136 (6th Cir. 1995); *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995); *Liger v. New Orleans Hornets NBA Ltd. P’ship*, 565 F. Supp. 2d 680 (E.D. La. 2008); *Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176 (E.D. Mich. 1997).

<sup>8</sup> See *Bridewell*, 68 F.3d at 136; *Jeffrey*, 64 F.3d at 590; *Liger*, 565 F. Supp. 2d at 680; *Adams*, 961 F. Supp. at 176.

<sup>9</sup> See *Bridewell*, 68 F.3d at 136; *Jeffrey*, 64 F.3d at 590; *Liger*, 565 F. Supp. 2d at 680; *Adams*, 961 F. Supp. at 176.

<sup>10</sup> See John Breech, *Bengals Cheerleader Files Lawsuit Against Team*, CBSSPORTS (Feb. 13, 2014, 4:29 PM), <http://www.cbssports.com/nfl/eye-on-football/24441947/bengals-cheerleader-files-suit-against-the-team>; Bob Egelko, *Feds End Raiderette Wage Probe with No Action*, SFGATE (Mar. 20, 2014, 7:10 AM), <http://www.sfgate.com/raiders/article/Feds-end-Raiderette-wage-probe-with-no-action-5332287.php>; Darih Gregorian, *Ex-member of the NY Jets’ Flight Crew Cheerleading Squad Files Suit Over Low Wages*, NEW YORK DAILY NEWS (May 6, 2014, 8:13 PM), <http://www.nydailynews.com/sports/football/jets/ex-member-jets-flight-crew-files-suit-wages-article-1.1781717>; Josh Sanchez, *Tampa Bay Buccaneers Become Latest Team to Be Sued by Former Cheerleader*, SPORTS ILLUSTRATED (June 14, 2014), <http://www.si.com/nfl/audibles/2014/05/20/tampa-bay-buccaneers-cheerleader-lawsuit>; Carolyn Thompson, *5 Former Buffalo Bills Cheerleaders Sue Over Pay*, AP (Apr. 22, 2014, 11:01 PM), <http://bigstory.ap.org/article/5-former-buffalo-bills-cheerleaders-sue-over-pay#overlay-context=article/teen-stowaway-shows-holes-vast-airport-security>.

<sup>11</sup> See John Breech, *Cheerleaders Reach \$1.25 Million Settlement in Lawsuit Against Raiders*, CBSSPORTS (Sept. 4, 2014 7:00 PM), <http://www.cbssports.com/nfl/eye-on-football/24694782/cheerleaders-reach-125-million-settlement-in-lawsuit-against-raiders>.

2015]

COMMENT

283

elements of the seasonal employer exemption. Part III considers various judicial interpretations of the exemption in the context of professional sports. Part IV discusses lawsuits that cheerleaders and other workers have recently brought against their respective employers. Part V argues that the Act should not exempt major league professional sports organizations. Part VI concludes.

## II. HISTORY OF THE FAIR LABOR STANDARDS ACT AND THE SECTION 213 EXEMPTIONS

### A. *Legislative History of the Fair Labor Standards Act*

Congress enacted the Fair Labor Standards Act of 1938<sup>12</sup> as a remedial and humanitarian measure to protect workers from unfair employment practices.<sup>13</sup> The main goals of the Act were economic recovery and elimination of “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>14</sup> Various courts have emphasized that the FLSA is a “remedial [statute], written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy.”<sup>15</sup>

The Act sets out a comprehensive scheme for providing minimum wages and overtime pay for many workers. It accomplishes this by establishing rules that employers, as defined by the Act, must follow. The FLSA defines an employer as:

[A]ny person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.<sup>16</sup>

Section 206 of the FLSA provides that every covered employer shall pay every worker “engaged in commerce or in the production of goods for commerce” a minimum wage.<sup>17</sup> The Act defines commerce as “trade, commerce, transportation, transmission, or communication

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<sup>12</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 (2006).

<sup>13</sup> See Lawrence E. Henke, *Is the Fair Labor Standards Act Really Fair? Government Abuse or Financial Necessity: An Analysis of the Fair Labor Standards Act 1974 Amendment—the § 207(k) Exemption*, 52 SMU L. REV. 1847, 1851 (1999).

<sup>14</sup> § 202(a).

<sup>15</sup> *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 454 (S.D.N.Y. 2014) (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984)).

<sup>16</sup> § 203(d).

<sup>17</sup> § 206(a).

among the several States or from any State to any place outside thereof.”<sup>18</sup> The current minimum wage under the FLSA is \$7.25 per hour.<sup>19</sup> Many states, however, maintain their own minimum wage laws, which require employers to pay workers more than the federal minimum.<sup>20</sup> Section 207 of the Act provides another protection for employees in the form of overtime pay.<sup>21</sup> Section 207 stipulates that employees who work in excess of forty hours per week must be compensated at a rate not less than one and one-half times the regular rate of compensation.<sup>22</sup> FLSA suits are often focused on employers’ failure to pay overtime rather than compliance with the base pay requirement.

There are a variety of enforcement mechanisms available when an employer fails to comply with the FLSA. Section 211 of the Act vests in the United States Department of Labor (“DOL”) the authority to investigate any workplace subject to the Act to determine whether the Act applies to an employer and/or whether there are violations of its provisions.<sup>23</sup> The DOL is authorized to “gather data concerning wages, hours, and other conditions and practices of employment.”<sup>24</sup> The DOL’s Wage and Hour Division selects employers for investigation by way of an employee complaint or through random selection.<sup>25</sup> During an investigation, a DOL representative first examines the employer’s records to determine if any exemptions apply.<sup>26</sup> If the DOL determines that an exemption applies to that employer, it takes no further action. This determination, however, is afforded no deference from the courts in any subsequent private suit. The Supreme Court has indicated that “rulings, interpretations, and opinions” of the Administrator of the Wage and Hour Division are not controlling upon the courts.<sup>27</sup> Thus,

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<sup>18</sup> § 203(b). For a discussion of interstate commerce in the context of the FLSA, see FREDERICK T. GOLDBER & DAVID R. GOLDBER, LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 5:8 (3d ed. 2014).

<sup>19</sup> § 206(a)(1)(C).

<sup>20</sup> See, e.g., ARIZ. REV. STAT. ANN. § 23-363 (2015) (minimum wage of \$7.90 per hour); CAL. LAB. CODE § 1182.12 (West 2014) (minimum wage of \$9.00 per hour); FLA. STAT. § 448.110 (West 2013) (minimum wage of \$7.93 per hour); MASS. GEN. LAWS ANN. ch. 151, § 1 (West 2015) (minimum wage of \$9.00 per hour); N.J. STAT. ANN. § 34:11-56a4 (West 2014) (minimum wage of \$8.38 per hour); N.Y. LAB. LAW § 652 (McKinney 2014) (minimum wage of \$8.75 per hour).

<sup>21</sup> § 207(a)(1).

<sup>22</sup> *Id.*

<sup>23</sup> § 211(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Fact Sheet #44: Visits to Employers*, U.S. DEP’T OF LABOR, WAGE AND HOUR DIV. (2015), <http://www.dol.gov/whd/regs/compliance/whdfs44.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> See *infra* text accompanying notes 45–48.

an employee may still pursue a private action under the FLSA if he or she believes the employer is not exempt.<sup>28</sup>

If, during its initial review, the DOL determines that no exemptions apply, the representative examines payroll, inspects time records, and interviews employees.<sup>29</sup> Following an investigation, if the DOL determines that a minimum wage or maximum hour violation has occurred, the employer may be subject to pay back wages.<sup>30</sup> The DOL tries to resolve compliance issues administratively, by supervising payment of back wages or other compensation.<sup>31</sup> Where the employer does not agree, the Secretary of Labor may file suit against an employer on behalf of employees for back wages and/or liquidated damages.<sup>32</sup>

Notwithstanding these procedures, an employee has the right to file a private lawsuit against his employer without filing a complaint with the DOL or awaiting the results of an investigation.<sup>33</sup> If an employee files a private lawsuit, the Secretary of Labor will not pursue its own lawsuit for the same back wages or damages.<sup>34</sup> In a private suit, an employer may raise an exemption as an affirmative defense, but must establish through clear and affirmative evidence that it meets every requirement of the exemption.<sup>35</sup> If there is reasonable doubt about exemption, an employee should be designated non-exempt.<sup>36</sup> Due to the high cost of private litigation, employees often avoid this route; going through the DOL saves the employee litigation costs.

*B. Legislative History of the Section 213(a) Exemptions*

The FLSA exempts many categories of employees from minimum wage and maximum hour requirements. As Congress expanded the scope of the Act to include more categories of workers not originally protected under the Act, it also *excluded* from coverage many categories of employees.<sup>37</sup> One court reasoned that exemptions were necessary because, “the goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of

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<sup>28</sup> See *Fact Sheet #44*, *supra* note 25.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Fact Sheet #44*, *supra* note 25.

<sup>35</sup> See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974); *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007).

<sup>36</sup> See *Adams v. United States*, 78 Fed. Cl. 536, 538 (Fed. Cl. 2007).

<sup>37</sup> See *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1256 (6th Cir. 1987).

protection.”<sup>38</sup> Section 213(a) of the FLSA lists eleven categories of employees not covered by the Act’s minimum wage and maximum hour requirements.<sup>39</sup> Examples of exempt workers include executive and administrative employees,<sup>40</sup> seamen,<sup>41</sup> and agricultural employees.<sup>42</sup> FLSA exemptions are to be narrowly construed against the employer asserting them, and they only apply to “those establishments *plainly and unmistakably* within their terms and spirit.”<sup>43</sup>

The Section 213(a)(3) exemption examined in this Comment exempts employers at seasonal amusement or recreational establishments, and states that the minimum wage and maximum hour provisions of the Act do not apply to:

[A]ny 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 33 1/3 per centum of its average receipts for the other six months of such year . . . .<sup>44</sup>

In order to determine whether the statute applies, an employer should consider the statute itself, legislative history, case law, and the accompanying materials promulgated by the agency responsible for its administration, including: regulations, interpretations, opinion letters, fact sheets, and field operations handbooks. Each of these sources, however, is afforded varying weight by the courts. When Congress has delegated rulemaking responsibilities to agencies, courts should defer to those rules.<sup>45</sup> Accordingly, official agency regulations are given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>46</sup> The courts have differed, however, on how much deference to afford to less official interpretations, opinion letters, fact sheets, field operations handbooks, etc. Courts and scholars alike have recognized that these sources are not controlling, and the amount of deference afforded to

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<sup>38</sup> *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997).

<sup>39</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a) (2006).

<sup>40</sup> § 213(a)(1).

<sup>41</sup> § 213(a)(6).

<sup>42</sup> § 213(a)(12).

<sup>43</sup> *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (emphasis added).

<sup>44</sup> § 213(a)(3).

<sup>45</sup> *See Chevron, U.S.A., Inc. v. Nat’l Res. Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

<sup>46</sup> *Id.*

2015]

COMMENT

287

them exists on a continuum.<sup>47</sup> The standard for interpretations of expert agencies, such as the Wage and Hour Division of the Department of Labor, is “respect proportional to its power to persuade.”<sup>48</sup>

The legislative history of this exemption is limited. Congress enacted the original version of the provision in the Fair Labor Standards Amendments of 1961.<sup>49</sup> At that time, the provision exempted employees of certain types of retail establishments, including hotels, motels, movie theaters, and seasonal amusement or recreational parks.<sup>50</sup> In describing the provision, the Senate Committee Report noted that this exemption was meant for establishments “operated by concessionaires at amusement parks and beaches and are in operation for [six] months or less a year.”<sup>51</sup> In 1966, Congress enacted another set of amendments to the FLSA, resulting in coverage for even more employees.<sup>52</sup> In that amendment, Congress revised the amusement and recreational establishment exemption and removed it from the retail and service exemption. The language of the new exemption included two methods of testing seasonality, the same two that are still in force today.<sup>53</sup>

### *C. Elements of the Section 213(a)(3) Exemption*

In order to qualify for the exemption, an employer must satisfy several elements. First, the employer must show that its business is an “amusement or recreational establishment.”<sup>54</sup> There are two parts to this element: 1) the business must exist for amusement or recreational purposes, and 2) it must be an establishment.

As for the first part, the DOL regulation for this exemption

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<sup>47</sup> See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

<sup>48</sup> *Id.* at 1109 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>49</sup> Pub. L. No. 87-30, 75 Stat. 71 (1961).

<sup>50</sup> See *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1256–57 (6th Cir. 1987) (citing S. Rep. No. 145, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News at 1620, 1647–48).

<sup>51</sup> S. Rep. No. 145, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News at 1620, 1647–48.

<sup>52</sup> Pub. L. No. 89-601, 80 Stat. 830–45 (1966).

<sup>53</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3) (2006) (explaining that an establishment is deemed seasonal “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 33 1/3 per centum of its average receipts for the other six months of such year”).

<sup>54</sup> § 213(a)(3).

defines “amusement or recreational establishment” as an establishment “frequented by the public for its amusement or recreation.”<sup>55</sup> Aside from this definition, the history on this requirement is limited to a House Committee Report on a proposed 1965 amendment to the FLSA, which stated that the amusement or recreational establishment exemption meant to cover “such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sport events, parimutel racing, sport boating or fishing, or other similar or related activities.”<sup>56</sup> The amendment did not pass in 1965, but during floor debates on the amendment the following year, a representative stated that the amendment “retain[ed] the existing exemption for amusement or recreational establishments, such as amusement parks, sports events, parimutel racing, sport boating or fishing and similar activities.”<sup>57</sup>

The first element also has an “establishment” requirement. The word “establishment” in the phrase “amusement or recreational establishment” has a technical meaning. The DOL regulations define “establishment” for the purposes of several provisions in the Act, including the 213(a)(3) exemption.<sup>58</sup> The term refers to “a distinct physical place of business” as opposed to “an entire business or enterprise,” which may include several separate places of business.<sup>59</sup> For the Section 213(a)(3) exemption, the establishment is the unit for applying the seasonality tests. For example, each location of an amusement park chain, like Six Flags, is a separate establishment, part of the larger Six Flags enterprise. For purposes of this exemption then, seasonality is based on the individual Six Flags location, not the entire Six Flags enterprise.

The second element of the statute is seasonality. While the appropriate application of this exemption is not immediately clear from the text or the legislative history, it has generally been considered a way for “recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the [FLSA].”<sup>60</sup> In *Brock v. Louvers and Dampers, Inc.*, the Sixth Circuit seemed to support this theory: “The logical purpose of the provision is to exempt . . . amusement and recreational enterprises . . . which by

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<sup>55</sup> 29 C.F.R. § 779.385 (2015).

<sup>56</sup> See *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 455 (S.D.N.Y. 2014) (quoting H.R.Rep. No. 89-871 (1965)).

<sup>57</sup> *Chen*, 6 F. Supp. 3d at 455 n.3 (quoting 112 Cong. Rec. 11,293 (1966)).

<sup>58</sup> See 29 C.F.R. § 779.23.

<sup>59</sup> *Id.*

<sup>60</sup> *Chen*, 6 F. Supp. 3d at 455 (quoting *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285, 288 (10th Cir. 1973)).

2015]

COMMENT

289

their nature, have very sharp peak and slack seasons . . . . Their particular character may require longer hours in a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards.”<sup>61</sup> It is possible that Congress had these objectives in mind when it established two relatively strict seasonality tests in Section 213(a)(3) as part of an effort to exempt only truly seasonal businesses. In order to qualify for the exemption, the employer must satisfy one of the two tests.

The first test indicates that an establishment is seasonal if “it does not operate for more than seven months in any calendar year.”<sup>62</sup> The Field Operations Handbook, the DOL’s operations manual that provides investigators with guidance on FLSA interpretation, provides that whether an establishment “operates” during a particular month is a question of fact.<sup>63</sup> If an establishment engages only in maintenance activities during the “dead season,” it is not deemed operational, for purposes of the exemption.<sup>64</sup> It is important to keep in mind, however, that the Field Operations Handbook is not controlling authority.<sup>65</sup>

Alternatively, under the second test, an establishment is deemed seasonal if “during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.”<sup>66</sup> The six months do not have to be consecutive.<sup>67</sup> The DOL has said that this test compares the six individual months in which the receipts were lowest with the six months showing the highest average receipts.<sup>68</sup> The DOL “Fact Sheet” for the exemption identifies “receipts” as fees from admissions.<sup>69</sup>

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<sup>61</sup> Brock v. Louvers and Dampers, Inc., 817 F.2d 1255, 1259 (6th Cir. 1987).

<sup>62</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3)(A) (2006).

<sup>63</sup> See *Field Operations Handbook - Other Exemptions*, U.S. DEP’T OF LABOR (1994), [http://www.dol.gov/whd/FOH/FOH\\_Ch25.pdf](http://www.dol.gov/whd/FOH/FOH_Ch25.pdf).

<sup>64</sup> See *id.*

<sup>65</sup> See *supra* text accompanying notes 45–48.

<sup>66</sup> § 213(a)(3)(B).

<sup>67</sup> *Fact Sheet #18: Section 13(a)(3) Exemption for Seasonal Amusement or Recreational Establishments Under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR, WAGE AND HOUR DIV. (2008), <http://www.dol.gov/whd/regs/compliance/whdfs18.htm>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

## III. INTERPRETATIONS OF SECTION 213(A)(3)

Judicial interpretations of this exemption are even more limited than the legislative guidance. Only on a handful of occasions have courts litigated the question of whether or not the Section 213(a)(3) exemption applies to professional sports organizations. The few courts that have heard this issue were not unanimous in their decisions.<sup>70</sup> Some courts, including the Sixth Circuit, have held that professional sports teams are not entitled to the exemption.<sup>71</sup> *Bridewell v. Cincinnati Reds* is one of the leading precedents on this issue.<sup>72</sup> The plaintiffs in *Bridewell* were maintenance workers for the Cincinnati Reds, a Major League Baseball (“MLB”) team in Ohio.<sup>73</sup> These employees argued that their employer failed to pay them overtime wages as required by Section 207 of the FLSA.<sup>74</sup> In response, the team claimed it was exempt from the overtime payment requirement because it did not operate for more than seven months in a calendar year, satisfying the first seasonality test of Section 213(a)(3)(A).<sup>75</sup> Neither the Sixth Circuit nor the lower court considered the possibility that the Reds could qualify under the receipts method in Section 213(a)(3)(B).<sup>76</sup>

The Sixth Circuit held that the Reds organization operated for more than seven months per year by virtue of its 120 year-round workers.<sup>77</sup> The *Bridewell* court emphasized a clear distinction between the elements of the exemption: amusement or recreational establishment as one, and seasonal operation as another.<sup>78</sup> Thus, according to the *Bridewell* court, the elements cannot be combined into a question of whether the entity amuses for more than seven months.<sup>79</sup> Here, it did not matter that the team did not play for more than seven months; it was enough that the team was an amusement establishment and that 120 employees worked year-round.

The Eastern District of Louisiana seems to agree that professional

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<sup>70</sup> See, e.g., *Bridewell v. Cincinnati Reds*, 68 F.3d 136 (6th Cir. 1995); *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995); *Liger v. New Orleans Hornets NBA Ltd. P’ship.*, 565 F. Supp. 2d 680 (E.D. La. 2008); *Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176 (E.D. Mich. 1997).

<sup>71</sup> See *Bridewell*, 68 F.3d at 139; *Liger*, 565 F. Supp. 2d at 684.

<sup>72</sup> *Bridewell*, 68 F.3d at 136.

<sup>73</sup> *Id.* at 137.

<sup>74</sup> *Id.* at 138.

<sup>75</sup> *Id.*

<sup>76</sup> *Bridewell*, 68 F.3d at 136.; *Bridewell v. Cincinnati Reds*, No. C-1-93-203, 1994 WL 866091 (S.D. Ohio Mar. 24, 1994), *rev’d*, 68 F.3d 136 (6th Cir. 1995).

<sup>77</sup> *Bridewell*, 68 F.3d at 136.

<sup>78</sup> *Id.* at 138.

<sup>79</sup> *Id.*

sports organizations lacked exempt status. In *Liger v. New Orleans Hornets*, where the plaintiffs were former employees of a National Basketball Association (“NBA”) team seeking unpaid overtime compensation, the Eastern District of Louisiana held that the team was not exempt from FLSA requirements.<sup>80</sup> The Hornets organization defended on the same grounds as the Reds: it was a seasonal employer exempt from the rules of the FLSA.<sup>81</sup> The court disagreed with the employees’ arguments for two main reasons: 1) the Hornets played for at least eight months per year, and 2) the team employed over 100 employees in year-round positions.<sup>82</sup> In *Liger*, the court declined to apply an Eleventh Circuit decision, *Jeffrey v. Sarasota White Sox*, which allowed a minor league baseball team to claim the exemption even though some employees worked year-round.<sup>83</sup> The *Liger* court distinguished the facts before it from *Jeffrey*, concluding that it was “not convinced that the operative scale of a minor league baseball team is analogous to that of a NBA franchise.”<sup>84</sup> Instead, the *Liger* court relied on *Bridewell*.

The *Liger* court also found that the Hornets failed the seasonality test by the average receipts standard.<sup>85</sup> Although the court did not state which receipts to include in the calculation, the court drew a distinction between “income” and “receipts,” and clarified that Congress intended “receipts” to refer to “money which is actually received at the time it is received.”<sup>86</sup> The court quoted language from a concurring opinion in *Bridewell*’s sister case<sup>87</sup>:

[I]t is quite logical that Congress chose not to exempt an organization like the Reds from paying an employee . . . an additional \$2.75 per hour above her regular rate of \$5.50 per hour for overtime hours, because the Reds clearly benefit financially by receiving significant amounts of revenue in the off-season.<sup>88</sup>

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<sup>80</sup> *Liger v. New Orleans Hornets NBA Ltd. P’ship.*, 565 F. Supp. 2d 680, 683 (E.D. La. 2008).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 683–84.

<sup>83</sup> See *infra* notes 91–95 and accompanying text (addressing *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995)).

<sup>84</sup> *Liger*, 565 F. Supp. 2d at 684.

<sup>85</sup> *Id.* at 685.

<sup>86</sup> *Id.*

<sup>87</sup> After a series of appeals, the Sixth Circuit heard the *Bridewell* case a second time, examining a slightly different issue. The court ultimately affirmed its prior decision that the Reds were not exempt from the Act. *Bridewell v. Cincinnati Reds*, 155 F.3d 828, 832 (6th Cir. 1998).

<sup>88</sup> *Bridewell*, 155 F.3d at 832 (Cole, Jr., J., concurring).

In so holding, the *Liger* court suggested that an employer that enjoys the benefit of receiving substantial amounts of revenue during the off-season is not entitled to the exemption.<sup>89</sup>

Other courts have found that at least some professional sports teams are not required to abide by FLSA rules.<sup>90</sup> The Eleventh Circuit held that a professional baseball team was exempt from the FLSA in *Jeffrey*,<sup>91</sup> just one month before the *Bridewell* decision.<sup>92</sup> The main difference between these two cases is that the team in *Bridewell* involved the major leagues while the team in *Jeffrey* involved the minor leagues. The plaintiff in *Jeffrey*, a groundskeeper for the Sarasota White Sox, alleged that the team did not pay him overtime.<sup>93</sup> The court found the team exempt from the FLSA's overtime provisions since the team's average receipts for the six off-season months were less than one-third of its receipts for the other six months and because the team operated only for five months per year.<sup>94</sup> The court noted that while the plaintiff worked during the off-season months, this fact was not dispositive because the establishment's operation, and not the individual's, determines seasonality.<sup>95</sup>

Two years later, in *Adams v. Detroit Tigers*, the Eastern District of Michigan adopted a similar view as the *Jeffrey* court.<sup>96</sup> In *Adams*, batboys for the Detroit Tigers, an MLB team, brought suit alleging that they did not receive the overtime pay that the FLSA required.<sup>97</sup> The court identified the team as a seasonal employer and thus entitled to the exemption because its average receipts for six months were less than one-third of the average for the other six months.<sup>98</sup>

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<sup>89</sup> *Liger*, 565 F. Supp. 2d at 685–86 (quoting *Bridewell*, 155 F.3d at 832) (Cole, Jr., J., concurring)).

<sup>90</sup> See *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995); *Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176, 177 (E.D. Mich. 1997).

<sup>91</sup> *Jeffrey*, 64 F.3d at 597.

<sup>92</sup> *Bridewell*, 68 F.3d at 139.

<sup>93</sup> *Jeffrey*, 64 F.3d at 592.

<sup>94</sup> *Id.* at 596.

<sup>95</sup> *Id.*

<sup>96</sup> *Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176, 181 (E.D. Mich. 1997).

<sup>97</sup> *Id.* at 177–78.

<sup>98</sup> *Id.* at 180.

## IV. CURRENT DISPUTES

In 2014, five sets of cheerleaders from different NFL teams filed lawsuits against their respective teams.<sup>99</sup> Generally, these plaintiffs alleged that the NFL paid them less than the \$7.25 FLSA minimum wage and/or less than their respective state minimum wages.<sup>100</sup> Many expect NFL teams to defend against the federal claims by claiming entitlement to the seasonal establishment exemption.<sup>101</sup> This raises the question, once again, of whether these NFL organizations are truly seasonal employers that qualify for the exemption. It appears that the courts will soon have to revisit this issue for the first time since 2008.

In January 2014, two former cheerleaders for the Oakland Raiders brought the first of the flurry of actions against NFL teams in California state court.<sup>102</sup> The cheerleaders alleged in the complaint that over the course of a season, their pay equaled less than \$5.00 per hour,<sup>103</sup> far less than the California \$9.00 per hour minimum wage and the federal \$7.25 per hour minimum wage. In light of these allegations, the DOL conducted an investigation of the team's wage and hour practices in April 2014 and determined that the Raiders qualified for the seasonal establishment exemption of the FLSA.<sup>104</sup> The DOL's determination, however, had no effect on the cheerleaders' lawsuit under state law; in September 2014, the Raiders settled the case for \$1.25 million.<sup>105</sup> The terms of the agreement also provided that the Raiders would raise the cheerleaders' pay to \$9.00 per hour, plus overtime, adding about \$2,000.00 per season to each cheerleader's total compensation.<sup>106</sup> Former cheerleaders for the team, dating back to 2010, also received back pay as a result of the settlement.<sup>107</sup> While this settlement spells victory for the Raiders cheerleaders, it does not close the other pending cases against NFL teams, nor does it resolve whether or not major league sports organizations are entitled to the exemption. The DOL's determination that the Raiders qualified for the seasonal

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<sup>99</sup> See Breech, *supra* note 10; Egelko, *supra* note 10; Gregorian, *supra* note 10; Sanchez, *supra* note 10; Thompson, *supra* note 10.

<sup>100</sup> See Breech, *supra* note 10; Egelko, *supra* note 10; Gregorian, *supra* note 10; Sanchez, *supra* note 10; Thompson, *supra* note 10.

<sup>101</sup> See Nathaniel Grow, *Pro Sports Teams and the Fair Labor Standards Act*, SPORTS LAW BLOG (May 29, 2014, 1:00 PM), <http://sports-law.blogspot.com/2014/05/pro-sports-teams-and-fair-labor.html>.

<sup>102</sup> See Egelko, *supra* note 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Breech, *supra* note 11.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

employer exemption is not dispositive for future cases because it is not controlling authority as to other pending cases.<sup>108</sup> Moreover, because this case was a California Supreme Court case, and because California does not have a similar seasonal worker exemption,<sup>109</sup> this outcome will likely not have any impact on future FLSA litigation.

Current and former cheerleaders from four other NFL teams filed lawsuits in 2014. Five former Buffalo “Jills” filed suit in state court alleging that, over the course of the entire season, the NFL paid them well under New York minimum wage.<sup>110</sup> One cheerleader claims that she was paid just \$420 for an entire season, while another alleges she was only paid \$105 for the same season.<sup>111</sup> The cheerleaders also took issue with having paid out-of-pocket for uniforms, travel, and other expenses.<sup>112</sup> While not controlling authority, the Wage and Hour Division stated the following in an official opinion letter: “If an employer requires a prospective employee to purchase a uniform before starting work, the employer must reimburse the employee no later than the next regular payday to the extent that the uniform costs cut into statutory minimum wage or overtime premium pay.”<sup>113</sup> This rule extends to tools and equipment purchased for use on the job, but the opinion letter does not mention travel expenses, and there is no similar court opinion involving travel expenses.<sup>114</sup> In light of this lawsuit, the team suspended the “Jills” during the 2014-2015 football season.<sup>115</sup>

A former member of the New York Jets “Flight Crew” also filed a state court complaint against her team in May 2014.<sup>116</sup> The NFL cheerleader alleged that the organization paid her only \$150 per game and \$100 per special appearance.<sup>117</sup> The suit alleges that this equates to just \$3.77 per hour, and only \$1.50 per hour after out-of-pocket

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<sup>108</sup> See *supra* text accompanying notes 45–48.

<sup>109</sup> *Exemptions from the Overtime Laws*, STATE OF CAL. DEP’T OF INDUS. RELATIONS, [http://www.dir.ca.gov/dlse/faq\\_overtimeexemptions.htm](http://www.dir.ca.gov/dlse/faq_overtimeexemptions.htm) (last visited Feb. 19, 2015) (listing twenty-five categories of employees exempt from overtime pay requirements with no mention of a seasonal employer exemption).

<sup>110</sup> See Thompson, *supra* note 10.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> WAGE AND HOUR DIVISION, FLSA 2001-7, U.S. DEP’T OF LABOR, [http://www.dol.gov/whd/opinion/FLSA/2001/2001\\_02\\_16\\_7\\_FLSA.htm](http://www.dol.gov/whd/opinion/FLSA/2001/2001_02_16_7_FLSA.htm).

<sup>114</sup> *Id.*

<sup>115</sup> *Buffalo Bills Cheerleaders Suspend Operations*, USATODAY (Apr. 25, 2014, 11:01 AM), <http://www.usatoday.com/story/sports/nfl/2014/04/24/buffalo-bills-cheerleaders-suspend-operations/8116067/>.

<sup>116</sup> See Gregorian, *supra* note 10.

<sup>117</sup> See *id.*

expenses, which included uniform and travel costs.<sup>118</sup> The cheerleader also claimed that the NFL did not pay her for attending rehearsals three times per week.<sup>119</sup>

Cincinnati Bengals cheerleaders filed a federal FLSA lawsuit in February 2014 based on allegations that the NFL paid them \$855 for an entire season in which they worked 300 hours at games and practices.<sup>120</sup> Thus, their hourly rate was just \$2.85 per hour,<sup>121</sup> far below the \$7.25 per hour FLSA minimum.<sup>122</sup> The cheerleaders also alleged that they were not paid at all for certain mandatory appearances.<sup>123</sup>

Cheerleaders for the Tampa Bay Buccaneers filed the fifth lawsuit of this kind in May 2014 in federal court.<sup>124</sup> The cheerleaders allege that the Buccaneers pay them \$100 per game and do not compensate them for attending four practices per week and forty hours of public appearances each year.<sup>125</sup> According to the cheerleaders, this results in a wage of less than two dollars per hour.<sup>126</sup>

Various MLB teams have also been the targets of wage and hour lawsuits at the hands of low-level workers.<sup>127</sup> In the last two years, the Miami Marlins, San Francisco Giants, and Oakland Athletics each settled lawsuits with and paid back wages to clubhouse workers claiming illegal underpayment.<sup>128</sup> A similar result may soon follow for the Baltimore Orioles baseball club, which is presently the subject of another DOL wage investigation.<sup>129</sup> For the Oakland Athletics, eighty-six clubhouse workers argued they were paid only seventy dollars on game days, regardless of how many hours they worked.<sup>130</sup> They claimed that the number of hours often dropped their pay below the \$7.25 FLSA minimum.<sup>131</sup> The DOL investigated each of these teams, but

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<sup>118</sup> See *supra* text accompanying notes 113 & 114.

<sup>119</sup> See Gregorian, *supra* note 10.

<sup>120</sup> See Breech, *supra* note 10.

<sup>121</sup> See *id.*

<sup>122</sup> See Fair Labor Standards Act (FLSA), 29 U.S.C. § 206(a)(1)(C) (2006).

<sup>123</sup> See Breech, *supra* note 10.

<sup>124</sup> See Sanchez, *supra* note 10.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See Myron Levin, *Oakland Athletics Latest Major League Team to Settle Claim of Wage Violations*, BUSINESS ETHICS: THE MAGAZINE OF CORPORATE RESPONSIBILITY (Sept. 4, 2014), <http://business-ethics.com/2014/09/04/11866-oakland-athletics-latest-major-league-team-to-settle-claim-of-wage-violations/>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

unlike its determination with regard to the Oakland Raiders,<sup>132</sup> the DOL did not find that any of these teams could claim any FLSA exemptions.<sup>133</sup> Thus, what constitutes the proper application of the exemption to professional sports teams remains unclear.

#### V. MAJOR LEAGUE PROFESSIONAL SPORTS ORGANIZATIONS SHOULD NOT BE EXEMPT

So far, the Raiders and three MLB teams settled wage and hour lawsuits brought by low-level workers. At the very least, these settlements indicate the teams' unwillingness to litigate and risk losing in court, and at best indicates some fault on their part. The fact that the Raiders updated their pay practices as a result of this lawsuit also indicates that change is on the horizon.<sup>134</sup> The question, however, remains: are major league sports organizations entitled to the exemption? A thorough analysis of the statute tends to show that they are not.

##### A. *Major League Sports Teams Do Qualify as "Amusement or Recreational Establishments"*

The first element of the statute is the "amusement or recreational establishment" requirement.<sup>135</sup> As this Comment previously discussed, this element contains two parts: "amusement or recreational" and "establishment." Professional sports clearly fall within the definition of "amusement or recreational" provided in the DOL regulation, as they are "frequented by the public for its amusement."<sup>136</sup> Many courts have treated the first part of this element as a given.<sup>137</sup>

The second part of this element is the "establishment" requirement. Section 213(a)(3) exempts employees of "amusement or

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<sup>132</sup> See Egelko, *supra* note 10.

<sup>133</sup> See Levin, *supra* note 127.

<sup>134</sup> A new California state law passed in June 2015 is another indicator of impending change. The law classifies cheerleaders as employees for purposes of minimum wage, unemployment, and employment discrimination laws. A similar law was introduced in New York in early 2015, but has not yet been passed. See David Fucillo, *California Passes Worker Protection Law for Cheerleaders*, NINERSNATION.COM (July 1, 2015, 10:30 AM), <http://www.ninersnation.com/2015/7/1/8877259/california-passes-worker-protection-law-for-cheerleaders>.

<sup>135</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3) (2006).

<sup>136</sup> 29 C.F.R. § 779.385 (2014).

<sup>137</sup> See, e.g., *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 595 (11th Cir. 1995) ("Sarasota White Sox, Inc. is an amusement and recreational establishment pursuant to 29 U.S.C. § 213."); *Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176, 179 (E.D. Mich. 1997) ("Major-league baseball teams may properly be considered 'recreational' establishments, or establishments designed for 'amusement.'").

recreational *establishment*[s].”<sup>138</sup> As noted earlier, the DOL regulations define “establishment” as “a distinct physical place of business,” as opposed to “an entire business or enterprise” that may include several separate places of business.<sup>139</sup> It makes sense, then, that the appropriate establishment unit is the team itself because these teams do not operate as chains, like many amusement parks. One caveat, however, especially for the MLB, involves minor league teams. Often, these teams are within the umbrella of a major league team. Under this definition of establishment, then, these minor league teams would constitute a separate establishment and would require a separate analysis of statutory exemption.

*B. Major League Professional Sports Teams Do Not Qualify as Seasonal*

Seasonality, the final element of the Section 213(a)(3) exemption, has caused the most controversy. While the 1965 House Committee Report lists “sport events” as a seasonal amusement establishment that would fall within the scope of the exemption,<sup>140</sup> it is unlikely that Congress intended for multi-million dollar, major league sports organizations to qualify for the exemption. The exemption was more likely intended for smaller scale, local, and minor league sport events. As noted above, the court in *Brennan v. Yellowstone Park Lines, Inc.* opined that the purpose of the exemption was to “allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the [FLSA].”<sup>141</sup>

The New Jersey minimum wage law is useful as a comparative tool. The state law uses the exact same language as the federal statute for testing seasonality.<sup>142</sup> Additionally, the statute states: “‘Seasonal amusement occupation’ does not include . . . athletic events, . . . [or] sport activities or centers . . . .”<sup>143</sup> The statute also recognizes a non-exhaustive list of seasonal amusement occupations, including: “amusement rides and amusement device operators, cashiers who sell tickets for the rides and device, and operators of game concessions.”<sup>144</sup> The statute further indicates that the exemption is only from overtime

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<sup>138</sup> § 213(a)(3) (emphasis added).

<sup>139</sup> 29 C.F.R. § 779.23.

<sup>140</sup> See *Chen v. Major League Baseball*, 46 F. Supp. 3d 449, 455 (S.D.N.Y. 2014).

<sup>141</sup> *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285, 288 (10th Cir. 1973).

<sup>142</sup> See N.J. ADMIN. CODE § 12:56-12.1 (2015).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

requirements, and that employees engaged in seasonal amusement occupations are still entitled to receive minimum wage.<sup>145</sup> If Congress' intent is anything like the New Jersey Legislature's intent, then clearly this exemption's focus is on seasonal amusement facilities, and major league sports teams should not be exempt from the FLSA.

To reiterate, the requirements set forth by Section 213(a)(3) provide two alternative vehicles for establishing seasonality: the seven-month method<sup>146</sup> and the receipts method.<sup>147</sup> The seven-month method exempts employers that show that they do not operate for more than seven months per year.<sup>148</sup> The receipts method exempts employers that prove that their gross receipts for half of the year are less than one-third of the gross receipts for the other half of the year.<sup>149</sup> Generally, major league sports teams cannot satisfy either test.

#### 1. Teams Cannot Prove That They Operate for Seven Months or Less Per Year

Currently, there is no clear standard for determining whether an employer operates for more than seven months per year. One logical approach might be to simply examine the length of a team's season; however, this approach can lead to illogical results. In the MLB, the average team plays from opening day in April through October—seven months.<sup>150</sup> Surely, these teams fall within the seven-month threshold. If, however, a team makes the playoffs in any given year, it continues to play for up to another month, sending it over the seven-month limit and into non-exemption territory. Can a team's exemption status really be determined by whether or not it makes the playoffs? This hypothetical also fails to take into account spring training or post-season training schedules. Additionally, the *Bridewell* court indicated that seasonality is not a question of whether the entity provides amusement for more than seven months, but rather whether the entity operates for more than seven months.<sup>151</sup> Clearly, the length of the season is not a good indicator for determining whether a team is operating. The question that must be asked is: what constitutes "operation" for the purposes of this statute?

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<sup>145</sup> *Id.*

<sup>146</sup> See Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3)(A) (2006).

<sup>147</sup> See § 213(a)(3)(B).

<sup>148</sup> § 213(a)(3)(A).

<sup>149</sup> § 213(a)(3)(B).

<sup>150</sup> *Schedule*, MLB.COM, <http://mlb.mlb.com/mlb/schedule/index.jsp?>

tcid=mm\_mlb\_schedule#date=04/05/2015 (last visited Feb. 19, 2015).

<sup>151</sup> *Bridewell v. Cincinnati Reds*, 68 F.3d 136 (6th Cir. 1995).

The DOL's Field Operations Handbook states that solely "maintenance operations or ordering supplies" do not constitute operations that count toward the seven months.<sup>152</sup> This view is not entitled to *Chevron* deference,<sup>153</sup> but some circuits have found the provisions in the Field Operations Handbook persuasive.<sup>154</sup> In at least one case, the Eighth Circuit decided that the DOL's interpretation of its own regulation in the Field Operations Handbook was entitled to deference.<sup>155</sup> This indicates that whether the interpretation is entitled to deference or is merely persuasive is a case-by-case determination, dependent on whether the interpretation reflects the experience and expertise of the DOL or whether it merely paraphrases the statutory language.<sup>156</sup>

A threshold issue to deal with regarding this interpretation is: what does "maintenance" mean? Maintenance activity likely consists of physical upkeep of property and equipment. In *Jeffrey*, the court determined that a groundskeeper engaged in purely maintenance activity.<sup>157</sup> It seems that off-season activities, such as cheerleaders attending promotional events, front office workers selling season tickets, and clubhouse employees working on publicity, would constitute more than maintenance. If a team engages in these activities, then it should not be exempt, even under the DOL interpretation.

In a situation where only maintenance activity takes place during the off-season, it seems possible that even a small number of maintenance employees working during the off-season could qualify a workplace as operational, if the courts are not persuaded by the Field Operations Handbook definition of "operation." Ultimately, the question of what constitutes operation would remain unclear. However, if the courts are persuaded by the Field Operations Handbook, then mere maintenance activity during the dead season would not constitute operation. The court in *Jeffrey* seemed to adopt the latter view. Thus, even though the groundskeeper in *Jeffrey* worked during the off-season, his maintenance work did not qualify his

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<sup>152</sup> *Field Operations Handbook - Other Exemptions*, U.S. DEP'T OF LABOR (1994), [http://www.dol.gov/whd/FOH/FOH\\_Ch25.pdf](http://www.dol.gov/whd/FOH/FOH_Ch25.pdf).

<sup>153</sup> See *supra* text accompanying notes 45–47.

<sup>154</sup> See, e.g., *Abel v. Southern Shuttle Servs., Inc.*, 301 F.App'x 856, 859 (11th Cir. 2008); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 802 (4th Cir. 2004); *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001).

<sup>155</sup> See *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 878 (8th Cir. 2011).

<sup>156</sup> See *id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 255–57 (2006)).

<sup>157</sup> *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 596 (11th Cir. 1995).

workplace for the exemption under the seven-month method.<sup>158</sup> If operation is viewed on a sliding scale, the Handbook interpretation establishes a minimum benchmark just beyond maintenance during the off-season; anything less would not be “operating.” The question then becomes: how far past that point on the scale should operation be?

The *Bridewell* and *Liger* courts focused on the number of employees that worked during the offseason, not the type of work taking place during the offseason.<sup>159</sup> These two courts found that having 120 and 100 year-round employees, respectively, prevented teams from utilizing the FLSA exemption.<sup>160</sup> Under this approach, if teams cannot show that they employ an insignificant number of workers year-round, then they cannot prove that they operate for seven months or less, despite the fact that their teams may play only a few months a year.

NFL teams employ roughly 164 workers each;<sup>161</sup> MLB teams employ around 209 people each;<sup>162</sup> NBA teams employ around 221 people each;<sup>163</sup> and National Hockey League (“NHL”) teams in the

<sup>158</sup> *Id.* at 596–97. The court did find, however, that the team was exempt by the receipts method. *Id.*

<sup>159</sup> See *Bridewell v. Cincinnati Reds*, 68 F.3d 136 (6th Cir. 1995); *Liger v. New Orleans Hornets NBA Ltd. P’ship*, 565 F. Supp. 2d 680 (E.D. La. 2008).

<sup>160</sup> *Bridewell*, 68 F.3d at 139; *Liger*, 565 F. Supp. 2d at 684.

<sup>161</sup> See, e.g., *Administration*, THE OAKLAND RAIDERS, <http://www.raiders.com/team/administration.html> (last visited Feb. 19, 2015) (listing 165 total employees on the “Coaches” and “Administration” pages); *Buffalo Bills Staff*, BUFFALO BILLS, <http://www.buffalobills.com/about-us/front-office.html> (last visited Feb. 19, 2015) (listing 174 employees in the staff directory); *Front Office*, TAMPA BAY BUCCANEERS, <http://www.buccaneers.com/team-and-stats/staff.html> (last visited Feb. 19, 2015) (listing fifty-five employees in the staff directory); *Staff Directory*, NEW YORK JETS MEDIA GUIDE, <http://www.newyorkjets.com/ms/media-guide/2012/html/Staff-Directory-1.html> (last visited Feb. 19, 2015) (listing 109 year-round employees in the staff directory).

<sup>162</sup> See, e.g., *Front Office*, BALTIMORE ORIOLES, [http://baltimore.orioles.mlb.com/team/front\\_office.jsp?c\\_id=bal](http://baltimore.orioles.mlb.com/team/front_office.jsp?c_id=bal) (last visited Feb. 19, 2015) (listing 164 employees in the staff directory); *Front Office Directory*, CHICAGO CUBS, [http://chicago.cubs.mlb.com/team/front\\_office.jsp?c\\_id=chc](http://chicago.cubs.mlb.com/team/front_office.jsp?c_id=chc) (last visited Feb. 19, 2015) (listing 246 employees in the staff directory); *Front Office Directory*, LOS ANGELES DODGERS, [http://losangeles.dodgers.mlb.com/team/front\\_office.jsp?c\\_id=la](http://losangeles.dodgers.mlb.com/team/front_office.jsp?c_id=la) (last visited Feb. 19, 2015) (listing 213 employees in the staff directory).

<sup>163</sup> See, e.g., *Club Directory*, LOS ANGELES CLIPPERS, <http://www.nba.com/clippers/club-directory> (last visited Feb. 19, 2015) (listing 113 employees in the staff directory); *Front Office*, NEW YORK KNICKS, <http://www.nba.com/knicks/front-office> (last visited Feb. 19, 2015) (listing 236 employees in the staff directory); *Pacers Sports & Entertainment*, INDIANA PACERS, <http://www.bankerslifefieldhouse.com/wp-content/uploads/2015/01/PSEOfficeRoster010215.pdf> (last visited Feb. 19, 2015) (listing 283 employees in the staff directory).

United States employ, on average, 145 employees each.<sup>164</sup> These numbers represent only those employees listed on each team's website. Thus, the actual number may be higher if the teams employed additional, unlisted workers. The Staff Directory for the New York Jets lists 111 people.<sup>165</sup> Two are specifically noted as "seasonal," implying that the rest are year-round workers.<sup>166</sup> Though the Staff Director lists the director of the "Flight Crew," it fails to list the actual members of the cheerleading squad. The Staff Directory number also does not include the fifty-three players on the football team's roster; this is true for every team across each of the Big Four professional sports leagues. Even though some positions on these lists may not be year-round, when athletes are included, most teams far exceed the 120 *Bridewell* number. It is important to keep in mind that this exemption is granted based on the employer's records, not on an individual employee's records.<sup>167</sup> Thus, seasonality is based on the employer's schedule, not the individual employee's schedule. Accordingly, if the method for calculating seasonality looks to the total number of employees and team members or cheerleaders engage in activity for the organization during the off-season, they must be included in these numbers.

Though these facts tend to show that most teams surpass the 120-employee number deemed significant in *Bridewell*, this standard could get confusing with teams that employ slightly fewer than 120 people. One way to set a cut-off would be to examine how many employees work year-round at the undisputed seasonal establishments at which the exemption was more likely aimed. The danger, however, with setting a hard and fast cut-off is that employers can simply sidestep this by intentionally keeping the number of employees below the cutoff so as to qualify for the exemption. To avoid such unintended consequences, it is safer to leave the standard somewhat ambiguous.

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<sup>164</sup> See, e.g., *Club Directory*, BOSTON BRUINS, <http://bruins.nhl.com/club/page.htm?id=100354> (last visited Feb. 19, 2015) (listing 116 employees in the staff directory); *Front Office*, CHICAGO BLACKHAWKS, <http://blackhawks.nhl.com/club/page.htm?id=47745> (last visited Feb. 19, 2015) (listing 158 employees in the staff directory); *Staff Listing*, NEW JERSEY DEVILS, <http://devils.nhl.com/club/page.htm?id=74238> (last visited Feb. 19, 2015) (listing 177 employees in the staff directory).

<sup>165</sup> *Staff Directory*, NEW YORK JETS MEDIA GUIDE, <http://www.newyorkjets.com/ms/media-guide/2012/html/Staff-Directory-1.html> (last visited Feb. 19, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> See *Fact Sheet #18*, *supra* note 67.

## 2. Teams Cannot Prove That Their Gross Receipts for Six Months Are Less Than One-Third of the Receipts for the Other Six Months

Since most major league teams are unlikely to prove entitlement to the exemption using the seven-month method because of the number of year-round employees, the other potential way to qualify is by the receipts method. As noted earlier in this Comment, a team qualifies for the exemption under the receipts method if its average receipts from any six months of the year, which do not have to be consecutive, do not exceed one-third of its average receipts for the other six months.<sup>168</sup> For example, if the receipts for the highest earning six months averaged \$900,000, the employer would only qualify for the exemption if the receipts for the lowest earning six months averaged \$300,000 or less. Major league teams cannot prove entitlement this way because of off-season revenue from season ticket sales. Because teams sell tickets during the regular and off-season, the discrepancy between the highest-earning six months and the lowest-earning six months is not likely to be great enough to qualify a team for the exemption.

As noted above, the DOL Fact Sheet says that in the context of this exemption, “receipts” refers to “fees from admission.”<sup>169</sup> In this context, receipts mean money received from ticket sales. Teams usually make a portion of their revenue selling tickets during the regular season. Season ticket sales, however, occur during the off-season and constitute a large portion of total ticket sales. For example, NFL season ticket payments are due during the off-season months—February through July.<sup>170</sup> Therefore, it would be very difficult for a team to show that its receipts from the most expensive ticket sales during the lowest-earning six months are less than one-third of the receipts from ticket sales during the highest-earning six months. Additionally, courts have said that “receipts” refers to money *when it is actually received*, so teams cannot rely on an accrual method of accounting to record off-season ticket sale revenue as in-season

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<sup>168</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3)(B) (2006).

<sup>169</sup> *Fact Sheet #18*, *supra* note 67.

<sup>170</sup> See, e.g., *PSLs & Tickets*, BALT. RAVENS, <http://www.baltimoreravens.com/Gameday/tickets/ppls-season-tickets/> (last visited Feb. 19, 2015) (indicating that 2014 season tickets must be paid in full by June 2<sup>nd</sup>); *Season Ticket Holder Information*, N.Y. GIANTS, <http://www.giants.com/tickets-and-stadium/season-tix.html> (last visited Feb. 19, 2015) (showing that season ticket holders purchase tickets at any time between May 1<sup>st</sup> and July 1<sup>st</sup>, depending on the types of tickets they hold); *Ticket Policies*, TENN. TITANS, <http://www.titansonline.com/tickets/ticket-policies.html> (last visited Feb. 19, 2015) (explaining that season tickets must be paid in full by May 1<sup>st</sup>).

income.<sup>171</sup>

Many of the courts that have evaluated major league teams' receipts have found those teams not eligible for the exemption,<sup>172</sup> providing further evidence for the proposition that the receipt method does not work for major league teams. Although it is certainly *possible* that a team could satisfy this seasonality test, the evidence tends to show that, under this interpretation, most teams do not.

It is still unclear what types of receipts count toward gross receipts. Though the DOL Fact Sheet says that receipts are "fees from admission,"<sup>173</sup> courts have not applied this uniformly. The *Jeffrey* court calculated the defendant's gross receipts by adding "ticket sales, concession and parking revenues, promotional sponsorships, publication sales, advertising and other miscellaneous items."<sup>174</sup> The *Liger* court engaged in a two-page discussion on the proper application of the receipts method, but failed to specify which types of receipts count.<sup>175</sup>

In any event, the definition of receipts in the DOL Fact Sheet deserves little deference.<sup>176</sup> In determining what weight to give to a DOL Fact Sheet concerning an exemption for professional employees, the court in *Ramos v. Lee County School Board* determined that it was proper to use *certain portions* of the Fact Sheet as a reference tool.<sup>177</sup> Ultimately, however, the court found that while some weight should be given to any executive agency's interpretation of its own statute,<sup>178</sup> the Fact Sheet is not binding on private courts and, "on a spectrum of controlling authority, fact sheets would fall on the low end."<sup>179</sup> Thus, the Fact Sheet's definition of receipts as "fees from admission" is not

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<sup>171</sup> See *Bridewell v. Cincinnati Reds*, 155 F.3d 828, 830 (6th Cir. 1998); *Liger v. New Orleans Hornets NBA Ltd. P'ship*, 565 F. Supp. 2d 680, 684–85 (E.D. La. 2008).

<sup>172</sup> See *Bridewell v. Cincinnati Reds*, 68 F.3d 136, 137 (6th Cir. 1995) (failing to address the receipts method as a potential qualifier for an MLB team); *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 591 (11th Cir. 1995) (finding that for certain years, the baseball club did not qualify for the exemption under the receipts method); *Liger*, 565 F. Supp. 2d at 686 (holding that an NBA team did not satisfy the receipts method seasonality test). *But see Adams v. Detroit Tigers, Inc.*, 961 F. Supp. 176, 180 (E.D. Mich. 1997) (finding that an MLB team qualified for the exemption under the receipts method).

<sup>173</sup> *Fact Sheet #18*, *supra* note 67.

<sup>174</sup> *Jeffrey*, 64 F.3d at 595.

<sup>175</sup> *Liger*, 565 F. Supp. 2d at 684–86.

<sup>176</sup> See *supra* text accompanying notes 47 & 48.

<sup>177</sup> See *Ramos v. Lee Cnty. Sch. Bd.*, No. 2:04CV308FTM-33SPC, 2005 WL 2405832, at \*4 (M.D. Fla. Sept. 29, 2005).

<sup>178</sup> See *id.* at \*4 n.12 (citing *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

<sup>179</sup> *Id.* at \*4 n.12.

controlling, and courts could decide to expand receipts to include revenue from other sources, as in *Jeffrey*.<sup>180</sup>

If the calculation of gross receipts includes more than just ticket sales, it would be even more difficult for a major league professional sports team to satisfy the receipts test. The regular season receipts would not only include ticket sales, but also concession and merchandise sales. These teams also conduct a lot of business on the off-season, so off-season receipts would include, for example, season ticket sales, television and radio broadcast agreements, sponsorship deals, and merchandise sales.<sup>181</sup> For example, each NFL team receives more than \$200 million each year under current broadcasting agreements.<sup>182</sup> It is highly unlikely that any team in the NFL, or any other league, would be able to prove that it generated significantly less revenue during any six months than it did during the other six months if the receipts include more than just ticket sales.<sup>183</sup>

## VI. CONCLUSION

Major league professional sports teams do not “plainly and unmistakably” fall within the spirit of the seasonal employer exemption. In a typical case, no team in any of the Big Four American sports leagues will be able to prove seasonality. These teams cannot show that they operate for seven months or less per year by virtue of the size of their operations, and they cannot show that they do not receive a financial benefit during the off-season. Even though the DOL determined that one team qualified for the exemption, that opinion should not be afforded deference. This issue deserves a second look.

The seasonal employer exemption was initially intended to cut a break to purely seasonal small businesses, like amusement parks and beach clubs, which could not afford to comply with the minimum wage

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<sup>180</sup> *Jeffrey*, 64 F.3d at 595.

<sup>181</sup> See Grow, *supra* note 101.

<sup>182</sup> See Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, FORBES (Dec. 13, 2011, 6:13 PM), <http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/>.

<sup>183</sup> See Craig Calcaterra, *The Red Sox Cleaned Up in Offseason Merchandise Sales*, NBCSPORTS (Mar. 27, 2014, 12:11 PM), <http://hardballtalk.nbcsports.com/2014/03/27/the-red-sox-cleaned-up-in-offseason-merchandise-sales/> (revealing that MLB teams make a lot of money from off-season merchandise sales); Roberto A. Ferdman, *With the NBA's New Broadcasting Deal, the Players Now Have All the Power*, WASH. POST (Oct. 6, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/06/with-the-nbas-new-broadcasting-deal-the-players-now-have-all-the-power/> (explaining that NBA teams will receive a significant sum as a result of a 2014 broadcasting agreement).

2015]

*COMMENT*

305

and maximum hour requirements. To grant this exemption to multi-million dollar professional sports organizations would be to take advantage of the provision. Further, exempting these teams from minimum wage and maximum hour requirements is not in harmony with the FLSA's spirit to protect employees. Thousands of workers will be left without recourse if these teams are allowed to claim the exemption. The Supreme Court has said that this exemption must be construed narrowly, and if there is reasonable doubt about whether an exemption applies, the employer should be deemed non-exempt. This Comment demonstrates that there is at least reasonable doubt surrounding this exemption's application to major league professional sports organizations.