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Appendix 8D
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<b>Concessionaire Compliance with Labor Law</b>
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The following provides preliminary guidance on concessionaire compliance with labor law. Consult with the local OGC if specific questions arise concerning labor law.

<b>Roles and Responsibilities in Ensuring Compliance with Labor Law</b>
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The state and Federal Departments of Labor have the authority and expertise to enforce labor laws and to determine their applicability in a specific context. The FS administers special-use permits. Clause I. F of FS-2700-4h requires holders to comply with all local, state, and Federal laws, regulations, and ordinances -including labor laws - that apply to the permit area. Therefore, concessionaires are required to assume responsibility for compliance with applicable Federal, state, and local labor laws, regulations, and ordinances.

While the FS lacks the authority to enforce labor laws (and through clause I.F of FS-2700-4h, explicitly assumes no responsibility for enforcing them), the FS should require and monitor compliance with clause I.F. Therefore, permit administrators need to be generally aware of applicable law, including applicable labor law. Consultation with state or Federal agencies responsible for enforcing labor laws and regulations may be helpful in ensuring compliance with clause I.F. In enforcing clause I.F, require concessionaires to document their approach to ensuring legal employment practices in their AOPs.

Permit administrators may become aware of concerns regarding concessionaire compliance

with labor law during a performance evaluation, or

through a complaint lodged by a member of the public or concessionaire employee. Permit administrators should handle these concerns as they would concerns about compliance with food safety requirements, building codes, tax laws, or civil rights requirements. Permit administrators should notify the holder first to allow the holder the opportunity to investigate the complaint and make any needed corrections. If the situation persists, permit administrators should notify the appropriate enforcement authority, which in the case of labor law compliance is the state and/or Federal Department of Labor. The enforcement authority will make case-specific findings. Federal labor law governs, unless state labor law is more generous to the employee. Thus, at a minimum, Federal labor law standards apply.

<b>Compliance with Fair Labor Standards Act, 29 U.S.C. 201 et seq.</b>
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Key elements of the Fair Labor Standards Act (FLSA) follow.

### Minimum Wage

Requires employers to pay minimum wage to their employees [29 U.S.C. 206].

### Overtime

Requires employers operating concessions on National Forest System lands under contract with the FS to pay employees at least time and a half for each hour worked in excess of a 56-hour week [29 U.S.C. 213(b)(29)].

## On-Call Pay

Requires employers to compensate employees for all hours worked. As a general rule, the term "hours worked" includes:

- All time during which an employee is required to be on duty, or to be on an employer's premises or at a prescribed work place; and
- All time during which an employee is "suffered or permitted" to work, whether or not the employee is required to do so.
- Even if a campground concession permit requires one of the concessionaire's employees to reside on the premises, the employee is not necessarily on call for 24 hours. Hours during which the employee performs specific duties, such as general cleanup, maintenance, or fee collection, are compensable. Hours during which the employee is free to eat, sleep, read, or engage in other personal activities are not compensable. Agreements between the employer and the employee should specify hours the employee is expected to work and when he/she will be compensated.

## Volunteers

The Volunteers in the National Forest Act of May 18, 1972, does not apply to concessionaires operating on National Forest System lands. Generally, a person working at a campground concession (such as a campground host) is more likely to be an employee, rather than a volunteer, and therefore subject to the provisions of the FLSA, if most or all of the following conditions apply:

- The concession is operated as a business, i.e., to generate revenue, even if it is operated by a not-for-profit entity, such as an interpretive association.
- The person is performing services that enhance or support the concessionaire's business, e.g., collecting fees, cleaning toilets and other facilities, and resolving problems with sites.

- The person is receiving some benefit from the concessionaire, either monetary, in-kind (such as free use of a site), or both.

A person who is performing minimal services that do not enhance the business (such as greeting visitors) and who is not receiving a monetary or in-kind benefit from the concessionaire may not be an employee for purposes of the FLSA.

## Compliance with OSHA Regulations

Concessionaires' employees are covered by the standards in the Occupational Safety and Health (OSH) Act that apply to private, rather than Federal, employees.

An authorized state OSH program has jurisdiction over concessionaires' employees, unless the work being performed is at a facility under exclusive Federal jurisdiction (such as a Federal building). If the work is being performed at a facility under exclusive Federal jurisdiction, the employees are subject to Federal standards for private employees. To determine whether work is under exclusive Federal jurisdiction, the Regional Administrator for the Occupational Safety and Health Administration (OSHA) refers to the applicable state plan operational agreement. If the agreement is unclear, the legal staff for the agency with management authority over the Federal facility (USDA's OGC) is consulted.

If no authorized state OSH program exists, the employees are subject to Federal standards for private employees.

Federal standards preempt any state OSH program that is less restrictive than the Federal standards. State OSH programs that are equally or more restrictive are not preempted by the Federal standards.

The permit administrator should coordinate with OSHA personnel to monitor compliance with OSHA requirements.

### **Compliance with Immigration Laws**

Concessionaires must comply with all laws related to employment of citizens of foreign countries. Concessionaires are responsible for ensuring that all their workers are citizens of the United States, or have the proper documentation to work in the United States if they are not United States citizens.

### **Compliance with Workers' Compensation Laws**

Concessionaires are required to comply with state laws related to compensation for workers who are injured on the job. Compliance with state workers' compensation laws includes payment of insurance by the concessionaire.

### **Compliance with Davis-Bacon Act**

The Davis-Bacon Act (DBA) requires payment of specified minimum wages to laborers and mechanics engaged in construction, alteration, or repair under a Government contract for more than \$2,000 (40 U.S.C. 276a). The Department of Labor publishes prevailing wages for types of construction, alteration, or repair work for each locality. If no prevailing wages have been published for a particular locality, the Department of Labor will make a determination of the prevailing wages for that locality.

Generally, the DBA applies only where the Government is a party to the construction, alteration, or repair contract. For example, the DBA applies to FS contracts for construction, alteration, or repair of Government improvements at campground concessions, funded with appropriated money or money from a collection agreement.

The FS cannot, however, in an attempt to avoid the DBA, have the permit holder use FS funds to perform that work or contract it out, and claim that the DBA does not apply. Since the work is for Government benefit and is Government-funded, the DBA applies. For example, if the permit holder is using Granger-Thye offset funds to construct, alter, or repair Federally owned improvements at a campground concession or to contract out the work, the DBA probably applies.

If there is any question as to the applicability of the statute, the local Department of Labor office should be consulted.