



February 1, 2023

Lin Gray
Sawtooth Interpretive and Historical Association
P. O. Box 75
Stanley, Idaho 83278

Dear Lin,

Below is my analysis of the issues that we identified from our conversation with you. This letter does not represent an exhaustive treatment of these issues. If you would like us to prepare a formal memorandum with a more thorough treatment and citations to all of the applicable law, we would be happy to do so. For now, we hope that the following analysis is useful in structuring how you compensate those people that are brought on for the summer months.

All of this analysis is designed to answer the question of whether the Sawtooth Interpretive and Historical Association's ("SIHA") compensation structure violates Federal or State wage laws. To that end we analyzed the following questions.

Does the Fair Labor Standards Act ("FLSA") apply to SIHA? If so, how?

- **Are the Summer Interns employees?**
 - Yes. Policies and job descriptions indicate they are treated as such. Duties of these people are inconsistent with the definition of volunteers under the FLSA. Stipends are treated as compensation that is given in exchange for a minimum of 40 hours per week of work. The handbook indicates that if a crew member is unable to work, he or she may take unpaid leave. In addition, paid leave of 1 day per summer season is provided. These facts are consistent with the existence of an employment relationship. For true volunteer status under the FLSA, individuals may not generally work in commercial activities such as operating a gift shop or selling other merchandise. The job descriptions for these positions indicate that selling merchandise is a required activity. In addition, volunteer work for non-profits cannot displace the type of work that employees would be paid to perform. For all of these reasons, these positions are that of employees.
- **Is SIHA an enterprise such that the FLSA applies to all of its employees?**
 - No. For SIHA to be a covered enterprise it must generate revenue in excess of \$500,000 per year. And, non-profits must engage ordinary commercial activities to fall within this category. Although SIHA engages in commercial activities, its income is half of that necessary to trigger enterprise coverage.
- **Are SIHA's interns and its Summer Program Coordinator covered individuals?**
 - Probably not. In order for an individual working for a non-profit to be individually covered by FLSA, they must engage more than just occasionally in

interstate commerce. This can involve speaking on the phone, sending emails, or selling goods to persons out of state; or producing goods to be sold out of state. The information provided suggests that such tasks are not part of the regular job duties of these people. If SIHA does a large volume of online or telephone sales, and if these workers are highly involved in such sales, then they would likely be covered employees.

- **Does the Recreational Establishment Exemption apply?**
 - Yes, but only to the extent that overtime need not be paid for 40-56 hours per week of work. Under the FLSA, Seasonal Amusement or Recreational Establishments are fully exempt from the minimum wage and overtime provisions only if they do not operate pursuant to a federal contract on federal land. SIHA operates on federal land with an agreement with the United States Forest Service (“USFS”). However, private entities operating recreation establishments on federal land under a contract with USFS are exempt from the overtime requirements of FLSA for between 40 and 56 hours of work per week. An establishment need not generate all of its income from recreational activities in order to be classified as a Seasonal Amusement or Recreational Establishment. SIHA’s facilities within the Sawtooth National Recreation Area and the fact that SIHA is catering to visitors would seem to qualify it as a Recreational Establishment and thus limit the overtime that must be paid. However, if any SIHA employee fell into this category, minimum wage requirements would still apply.

Thus, the Federal Minimum Wage does not apply to the positions not engaged in interstate commerce, but overtime of one and a half times the normal rate of pay must be paid for work in excess of 56 hours per week. Regardless of the application of other sections of the FLSA, the interns are indeed employees and payments made to them are wages subject to withholding for Social Security, Medicare and state and federal income taxes.

Does Idaho’s Minimum Wage Law apply?

- Yes, the exemptions are much more limited under Idaho’s minimum wage law than under the FLSA. No such non-profit or recreational exemption applies for minimum wages paid. However, Idaho tracks FLSA overtime exemptions, so overtime need not be paid for work less than 56 hours per week if SIHA qualifies as a Recreational Establishment under FLSA. Even if employees are exempt from overtime and are paid on a monthly basis, they will need to be compensated for work performed in excess of forty hours per week at their normal pay, unless they are statutorily exempt employees.

Is SIHA’s Summer Programs Coordinator a statutorily exempt employee?

- It would depend on the specific compensation received. For an employee to be exempt from overtime requirements, the employee must receive at least \$684 per week in compensation and perform duties that otherwise qualify. The Summer Programs Coordinator receives \$1600-2400 per month with housing valued at \$500-900 per month. Extending \$684 per week to a monthly basis gives a minimum wage for a statutorily

exempt employee of \$2959 per month (based on 173 hours of work per month). If the compensation exceeds this amount, then the Executive Exemption could apply. It would require:

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change in status of other employees must be given particular weight.

The duties of the Summer Programs Coordinator seem to fit within this framework. Thus if compensation was sufficient, this employee would be exempt from overtime.

Does any Executive Order apply to establish minimum wages?

- EO 13658 – This executive order sets minimum wage requirements for contractors and those operating under agreements with the federal government on federal land. This wage increases yearly, and currently is \$12.15 per hour. This order was revoked by EO 13868 with respect to “seasonal recreation services.” EO 14026 set a minimum wage of \$15 per hour going forward for contracts executed after 2022, and revoked EO 13868, putting EO 13658 back into effect for other contracts. In February 2022, the Federal Court of Appeals for the 10th Circuit stayed enforcement of EO 14026 with respect to “contracts or contract like-instruments entered into with the federal government in connection with seasonal recreation services.” It is unclear, and has not been fully litigated, what exactly “seasonal recreation services” are. SIHA can certainly satisfy the seasonality prong, as the vast majority of its revenue is generated in the summer months. As discussed above, a strong argument can be made that SIHA provides recreation services, but how courts will interpret this provision is unclear. If SIHA provides “seasonal recreation services” then FLSA and Idaho state law control for the time being. If SIHA's contract with the federal government does not fit within this framework, then a minimum wage of \$12.15 per hour must be paid.
- EO 14026 – This executive order sets a minimum wage of \$15 per hour for contractors operating on Federal land whose contracts come into effect after 2022. Since SIHA's current agreement was executed prior to the end of 2022, the wage set by this executive order does not apply to SIHA currently.

What must SIHA pay its interns and other employees?

- If EO 13658 applies, a wage of \$12.15 per hour would need to be paid. This comes out to about \$2102 per month based on 173 hours per month or 40 hours per week. To satisfy this requirement, given \$273 per month in housing allowance (based on the value in the USFS agreement and the days worked), the stipend amount would need to be increased to \$1829 per month.

- If the temporary non-enforcement of EO 13658 stands and SIHA provides “recreation services”, A wage of \$7.25 per hour would need to be paid. This comes out to about \$1254 per month based on 173 hours per month or 40 hours per week. Given \$273 per month in housing allowance (based on the value in the USFS agreement and the days worked), the current payment amounts of \$1000 and \$1250 per month would be allowed.
- Regardless of which structure applies, the standard employment taxes must be withheld from these wage payments.

What consequences will SIHA face if it fails to pay its interns as required under state and federal law?

- Failure to compensate employees as required under State and Federal law subjects an employer to payment of the unpaid wages, liquidated damages equal to the amounts of unpaid wages, civil fines, court costs and attorneys’ fees. Thus, even a modest amount of underpayment can result in losses to an employer that greatly exceed the underpayment.

The results of this analysis suggest that, at a minimum, the compensation given to the summer interns must be increased to equal \$7.25 per hour worked to satisfy Idaho’s minimum wage statute. Further, an executive order exists that would raise the required compensation to \$12.15 per hour, even though it is not currently being enforced against those businesses providing recreation services on public land. In addition, any future agreements with the USFS will require wages of at least \$15.00 per hour.

With that in mind, I would suggest that you consult with USFS to confirm that the housing costs reflected in the agreement are accurate given the shortage of housing in Stanley. If the true value of such housing were higher than what the agreement indicates, it would alter the compensation provided to these interns and possibly reduce what SIHA must pay to comply with the law.

It is not clear to me that the intern positions can be modified so that they can be treated as true volunteers. To do so would seem to remove from their responsibilities many of the duties SIHA relies on them for. If they could be modified, the stipend amounts might actually need to be adjusted downward. It is not discussed above, but any stipend in excess of twenty percent of the cost to hire an employee could create an assumption that the individual paid is not a volunteer.

Please let me know if you have any questions about this analysis, if there are additional facts you would like me to consider in this analysis, or if you would like me to proceed further in the generation of a formal memorandum.

Sincerely,

/s/ Doug Plass

Doug Plass