



Summertime and (Pre-Mosquitos) the Living Is Easy

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Spring is here and that means summer is not far behind! Summer is a time for, among other things, festivals, block parties, and firework displays, and it's also the time when many municipalities hire additional help for municipal recreational areas and facilities. This comment touches on a number of legal issues that tend to arise more frequently during this season of outdoor activity.

Temporary Street Closures

With warmer weather, municipalities face an increase in the number of requests to temporarily close portions of streets for parades, festivals, or similar events. We are often asked whether municipalities have authority to grant such requests. The answer is yes. State law allows municipalities, by order, ordinance, or resolution, to “regulate community events or celebrations, processions or assemblages on the highways, including reasonable regulations on the use of radios or other electric sound amplification devices. . . .”¹ This authority is subject to Wis. Stat. § 84.07(4), which requires municipalities to make arrangements with the state Department of Transportation (DOT) for making a detour before obstructing any street over which a state trunk highway is marked.

Thus, a municipality may adopt an ordinance or resolution authorizing the temporary obstruction of streets for the purpose of holding a festival, block party, or similar community event as long as

arrangements are made with the DOT for a detour if a state trunk highway is involved.

Temporary Beer and Wine Licenses and Temporary Operator Licenses

Summer also brings increased requests for temporary Class B licenses allowing the sale of alcohol at picnics and similar gatherings. These licenses are commonly referred to as “picnic” licenses² and that is how they will be referred to here. There are two types of Class B picnic licenses – beer and wine. These temporary licenses are only available to certain types of organizations which include the following:

- (1) “bona fide clubs”
- (2) Chambers of commerce;
- (3) county or local fair associations or agricultural societies;
- (4) churches, lodges, or societies that have been in existence for at least six months; and
- (5) posts of veterans’ organizations.³

An individual, partnership, or business corporation is not eligible for a temporary picnic license.⁴ Thus, the operator of a tavern would not be eligible for a temporary picnic license unless applying as a member or an officer of a bona fide club, lodge, or society.

The picnic beer license authorizes the sale of fermented malt beverages (i.e.,

beer as well as wine coolers with a fermented malt beverage base) while the picnic wine license authorizes the sale of wine. There is no picnic license that allows the sale of intoxicating liquor other than wine. A licensee must hold both licenses to sell beer and wine at the same event. The fee for a temporary picnic license is determined locally but may not exceed \$10. No additional fee may be charged for a picnic wine license if the applicant is applying for a picnic beer license for the same event.⁵

Municipal governing bodies may delegate the authority to issue temporary picnic beer and wine licenses to a municipal official (typically the clerk) or another body.⁶ There is no limit on the number of temporary picnic beer licenses that an organization may obtain in a calendar or licensing year but the number of picnic wine licenses that may be issued to an eligible organization is limited to two such licenses in any 12-month period.⁷

Underage persons can be permitted to be on the premises for which a picnic beer license is issued if the municipal governing body or official authorized to issue the license authorizes the licensee to permit underage persons on the premises.⁸

For picnic beer licenses lasting less than four days, the statutes provide that, the governing body shall establish the time by which an application must be filed with the clerk prior to

1. Wis. Stat. § 349.185.

2. This comment does not cover the details for multiple license events otherwise known as wine and beer walks which are authorized under §125.51(10).

3. Wis. Stat. §§ 125.26(6) and 125.51(10).

4. *Id.*

5. Wis. Stat. § 125.51(10).

6. Wis. Stat. §§ 125.26(1) and 125.51(1)(a).

7. Wis. Stat. § 125.51(10). A larger number of licenses may be issued for a wine walk event as authorized under § 125.51(10)(b) but not detailed in this legal comment.

8. Wis. Stat. §§ 125.07(3)a)12 and 125.26(6).

granting of the license.⁹ For picnic wine license applications, the statutes are silent and we interpret that to mean the general 15-day waiting period under sec. 125.04(3)(f)1 applies. This interpretation is confirmed by the back of the Department of Revenue (DOR) application form for picnic beer and wine licenses (Form AT-315) which indicates that the waiting period for the picnic wine license is 15 days. Although it would seem logical to treat both picnic licenses similarly with regard to the time applications have to be on file prior to issuance, the necessary language was not inserted when the alcohol laws were reorganized and the language authorizing picnic wine licenses was removed from the provision concerning picnic beer licenses and placed with provisions concerning intoxicating liquors.

A matter related to temporary picnic licenses is the issuance of temporary operator's licenses. A municipality may grant temporary operator's licenses to qualified persons employed by or donating their services to nonprofit corporations.¹⁰ A person may hold no more than two temporary operator's licenses per year. The license is valid for any period from one to 14 days, and the period must be indicated on the license.

A frequent question in this area is whether an applicant for a temporary operator's license must complete the responsible beverage server training course that applicants for an ordinary operator's license must complete. The answer is no. The responsible beverage server training course requirement does not apply to applicants for temporary operator's licenses. The training course requirement only applies to applicants

for regular operator's licenses. Wisconsin Stat. § 125.17(6), provides that "no municipal governing body may issue an operator's license unless the applicant has successfully completed a responsible beverage server training course." However, operator's licenses are different from temporary operator's licenses since, as noted earlier, the latter may only be issued to persons employed by or donating their services to nonprofit corporations, are only valid from one to 14 days, and persons are limited to only two such licenses per year.

Temporary Amendment of Licensed Premises

Sometimes municipalities receive requests from retail liquor licensees to serve outside their licensed premises during a special event or during a particular time period. For example, a

9. Wis. Stat. § 125.04(3)(f)3.

10. Wis. Stat. § 125.17(4).

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bar may request that it be allowed to sell from an outside area that is part of the business but not included in the description of the licensed premises during a festival, or a bar with a volleyball area or outdoor porch may request that it be allowed to sell and serve alcohol in that area during a particular time period. Since most businesses are ineligible for a temporary picnic license (see above discussion), the only way they can be authorized to sell outside the area described in the license is if the license is temporarily amended to include the area in question as part of the described premises during the particular time period. The request must go to the governing body and, if the request is approved, the clerk must amend the license to reflect the change.

Fireworks Permits

Municipalities are authorized to enact ordinances prohibiting or regulating the sale, possession or use, as defined by ordinance, of fireworks.¹¹ An ordinance may not be less restrictive in its coverage, prohibition or regulation than Wis. Stat. § 167.10, but may be more restrictive. However, a municipality cannot prohibit a person from possessing fireworks in that municipality while the person is transporting the fireworks to a municipality where possession of the fireworks is authorized by permit or ordinance.¹²

State law prohibits any person from possessing or using fireworks without a user's permit from the mayor or village president or that person's designee.¹³ State law also prohibits any person from

selling, or possessing with intent to sell, fireworks without a permit. The permit requirement does not apply to a city or village, but municipal fire and law enforcement officials must be notified of the proposed use of fireworks at least two days in advance. The permit requirement also does not apply to sales to persons who are not Wisconsin residents.

Municipalities can issue a fireworks permit under Wis. Stat. § 167.10, to the following:

- (1) a public authority;
- (2) a fair association;
- (3) an amusement park;
- (4) a park board;
- (5) a civic organization;
- (6) any individual or group of individuals.¹⁴ A permit issued to a

11. Wis. Stat. § 167.10(5).

12. *Id.*

13. Wis. Stat. § 167.10(3)(a).

14. The law used to only allow permits to be issued to groups but the fireworks industry successfully lobbied for a change allowing issuance to individuals or groups of individuals.



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group of individuals confers the privileges under the permit to each member of the group.¹⁵

(7) an agricultural producer for protecting crops from predatory birds or animals.

A permit issued under § 167.10, must include the permit holder's name and address, the date on and after which fireworks may be purchased, the kind and quantity of fireworks which may be purchased, the date and location of permitted use, and other special conditions prescribed by ordinance. A copy of the permit must be given to the municipal fire or law enforcement official at least two days before the date of authorized use, and no permit may be issued to a minor.

The municipal official issuing the permit may require an indemnity bond or liability insurance policy for the payment of all claims that may arise by reason of injuries to person or property from the handling, use, or discharge of fireworks under the permit. The bond or policy, if required, shall be taken in the name of the municipality where the fireworks are to be used, and any person injured thereby may bring an action on the bond or policy in the person's own name to recover the damage the person has sustained, but the aggregate liability of the surety or insurer to all persons shall not exceed the amount of the bond or policy. The bond or policy, if required, together with a copy of the permit shall be filed in the municipal clerk's office.¹⁶

Section 167.10(7) provides that no municipal employee or official is civilly liable for damage to any person or property caused by fireworks for the sole reason that the municipality issued a permit in accordance with § 167.10(3) and (5).

For a more detailed description of local regulation of fireworks, see Licensing and Regulation 389.

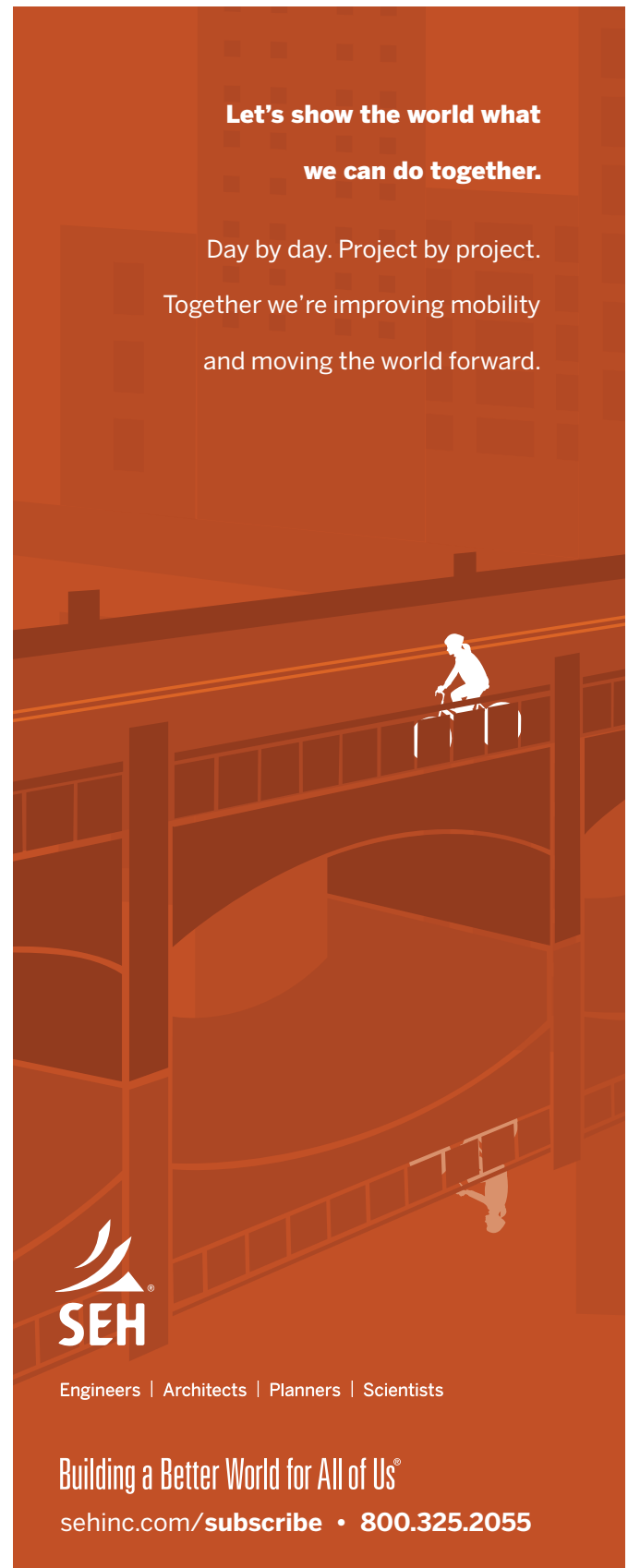
Summertime Recreational Employees

Municipalities often employ additional help during the summer months to operate municipal golf courses, swimming pools, summer camps, beaches, and park concession stands. The federal Fair Labor Standards Act (FLSA) contains specific exemptions from minimum wage and overtime provisions for certain amusement and recreational employees.¹⁷ Although such employees are also generally exempt from state overtime provisions, amusement and recreational employees are not exempt from state minimum wage laws. Moreover, in Employees 312, we opined that Wisconsin Administrative Code § DWD 270.11(1)(c), which establishes an overtime pay requirement for 16- and 17-year-olds, is applicable to publicly-

15. Wis. Stat. § 167.10(c)6.


16. Wis. Stat. § 167.10(3)(e).

17. 29 U.S.C. § 213(a)3.



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employed 16- and 17-year-olds and such public employees are entitled to overtime irrespective of the amusement and recreational establishment overtime exemptions established by Wis. Admin. Code § DWD 274.04 and the federal FLSA. With that exception in mind, let's turn to the requirements for exemption under federal law.

Federal law exempts any employee who is employed by an establishment which is an amusement or recreational establishment if:

- (1) it does not operate for more than seven months in any calendar year; or
- (2) during the preceding calendar year, the establishment's average receipts for any six months of such year were not more than 33-1/3 percent of its average receipts for the other six months of the year.¹⁸

To qualify for this exemption an employee must be employed by a seasonal recreational "establishment." The term "establishment" means a distinct physical place of business such as a municipal golf course, stadium, swimming pool, zoo, beach or park.¹⁹ An entire municipality is not a seasonal recreational establishment, but rather is a collection of separate establishments.²⁰

A municipal swimming pool, golf course, or other recreational establishment which is open seven months of the year or less would satisfy the first test. Thus, seasonal recreational employees of such a swimming pool, golf course, or beach would be exempt from both the overtime and minimum wage provisions of the federal FLSA. As noted above, however,

it is our opinion that the overtime exemption would not apply to 16- and 17-year-olds given DWD 274.

Municipal swimming pools or similar municipal recreational establishments that operate more than seven months in a calendar year would need to meet the seasonal receipts test to qualify for the recreational establishment exemption from the minimum wage and overtime provisions of the federal FLSA. The seasonal receipts test should be applied cautiously.²¹

With the exception of 16- and 17-year-olds, any municipal employee qualifying for the federal recreational establishment exemption is also exempt from state overtime provisions.²² However, there is no similar exemption for such employees from the state minimum wage law. Thus, municipal summer employees hired to work at a swimming pool or golf course are subject to the state minimum wage law even if they are exempt from the federal FLSA minimum wage provisions.

Currently, the state minimum hourly wage is \$7.25 for non-opportunity employees and \$5.90 for "opportunity employees."²³ Minimum wage for caddies is \$5.90 for 9 holes and \$10.50 for 18 holes.²⁴ Minimum wage for counselors employed in recreational or educational summer camps depends on age and is set by DWD 272.07(3).

In addition to minimum wage, municipalities must also be mindful of restrictions relating to minimum ages for various kinds of employment. While minors 12 and 13 years of age may be employed as caddies on golf

courses if they use caddy carts,²⁵ they cannot be employed to mow the grass with a power-driven mower. Minors who are 16 may operate power-driven mowers.²⁶ Minors over the age of 15 may be employed as lifeguards and swimming instructors and aides if they have successfully completed a bona fide life saving course.²⁷ However, federal law prohibits youth under 16 years of age from being employed as a lifeguard at a natural environment such as an ocean side beach, lake, pond, river, quarry or pier. For additional information on what children can or cannot do, please consult information from the Department of Workforce Development's web site, http://www.dwd.state.wi.us/er/labor_standards_bureau/publication_erd_4758_pweb.htm and the Department of Labor's web site, <https://www.dol.gov/general/topic/youthlabor/agerequirements>.

Conclusion

This comment addresses topics that municipalities face when summer arrives. Hopefully, it will enable municipal officials to avoid potentially sticky situations and spend more time enjoying the opportunities summer presents.

Employees 272R3

Licensing & Regulation 400

Miscellaneous 21

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18. *Id.*
19. BLR, Thompson Publishing, Fair Labor Standards Handbook for States, Local Governments & Schools, § 341 (2010) citing DOL Wage Hour Opinion Letter (August 10, 1976).
20. *Id.*
21. *Id.*, § 343.
22. Wis. Adm. Code DWD § 274.08(2).
23. Wis. Adm. Code DWD § 272.03(1). An "opportunity employee" is an employee who is not yet 20 years old, during the first 90 consecutive days after the employee is initially employed by the employer. Wis. Adm. Code DWD § 272.01(1).
24. Wis. Adm. Code DWD § 272.08.
25. Wis. Adm. Code DWD § 270.10(2)(d).
26. Wis. Adm. Code DWD § 270.13(15)(a) and (b)4.
27. Wis. Adm. Code DWD § 270.12(14); Wis. Stat. § 103.66(1)(b).