

STATE PARK BOARD:  
UNEMPLOYMENT COMPENSATION:  
CONCESSION OPERATORS IN  
THE PARK:

The fact that employers operate  
concessions in state parks does  
not release them for liability for  
unemployment compensation tax.

January 23, 1940

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Honorable I. T. Bode, Director  
State Park Board  
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein  
you request an opinion based on the following statement:

"We have inquiries from our concession  
operators in parks regarding the pay-  
ment of unemployment compensation,  
both Federal and State. This inquiry  
applies to concession employees as  
distinguished from persons on State  
payroll.

"It will be recalled that the con-  
cessions are handled on a percentage  
basis, a percentage of the gross col-  
lections to be returned to the State  
as lease or rent on the concession  
property. In many instances the park  
superintendent also acts as conces-  
sionaire. In some other instances  
the concession operator is not the  
park superintendent."

Under the Missouri Unemployment Compensation Act,  
Laws of Missouri 1937, page 576, the term "employer"  
is defined as follows:

"(1) Any employing unit which for  
some portion of a day, but not neces-  
sarily simultaneously, in each of  
twenty different weeks, whether or  
not such weeks are or were consecutive,  
within either the current or the pre-  
ceding calendar year, has or had in

employment, eight or more individuals irrespective of whether the same individuals are or were employed in each such day; "

The word "employer" means that part as shown in number (1).

It is because of the fact that the concession is operated on state property that the operator might think he is exempt from the provisions of the Unemployment Compensation Act. In our research on this question, we think it has been answered by the United States Supreme Court in the case of Buckstaff Bath House Co. vs. McKinley et al. This opinion was rendered in October, 1939, and has not yet been reported but is listed in the Advanced Sheets of the United States Supreme Court Reporter as number 201. In that case the plaintiff operated a bathhouse on government property under a lease from the Secretary of the Interior. By the terms of this lease, the plaintiff was subject to certain control of the Department of Interior, which in the main related to the number of bath tubs it was to use, the charge to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein. In that case the court held that the plaintiff was liable for the payment of the Social Security Tax of the State of Arkansas. Concerning the plaintiff's liability the court said:

"There can be no question but that petitioner is liable for the tax levied by Section 901 of the Social Security Act, unless it is exempted by that portion of Section 907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the

United States does not make it an instrumentality of the latter. Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit'. See Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See Broad River Power Co. v. Query, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See Federal Compress & Warehouse Co. v. McLean, supra. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See James v. Dravo Contracting Co., 302 U. S. 134, 149. \* \* \* \* \*

We think the question which you have presented is analogous to the question which is before the Supreme Court in the Buckstaff Bath House Company case, and we think the question is answered by that case which holds that the employer is liable for the tax.

#### CONCLUSION.

From the foregoing it is the opinion of this department that private parties who operate concessions in state

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parks, if they employ the number of employees to bring them within the provisions of the Missouri Unemployment Compensation Act, that they are liable for the payment of the Unemployment Compensation Tax and subject to the provisions of said act.

Respectfully submitted

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APPROVED:

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W. J. BURKE  
(Acting) Attorney General

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