FLSA-626

June 21, 1974

This is in reply to your letters of April 3 and April 10, 1974, requesting an opinion on a proposed pay plan for waiters and waitresses who are in employment which is subject to the pay standards of the Fair Labor Standards Act.

Under the proposed pay plan, the employer would retain all monies generated by tips as reflected on credit charge records. This would be done pursuant to a written and signed agreement between the employer and each of the employees. Each waiter or waitress would be paid at the applicable minimum wage for each and every hour worked in any given workweek. If overtime is worked it would be paid in keeping with the requirements of the law.

Your April 10th letter asks, in addition, as to the propriety of an employer taking all tips, to be turned over by the waiter on a daily or weekly basis, and using such tips to pay the waiters at a rate of compensation that would be equal to the amount of the tips received by them, less the statutory deductions. Should any waiter exceed the overtime standard by working in excess of 40 hours per week, the employer would pay the overtime by taking the gross tips earned by him in a week, divide the gross tips by the number of hours worked and add one-half of this hourly rate to those hours worked in excess of 48.

Section 3(m) of the Act as amended in 1974 contains the following provisions defining the wages of tipped employees:

In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Section 3(t) of the Act contains the following definition:

"Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.
It is our opinion that an employee who is subject to the Act's pay standards and who meets the statutory definition of a tipped employee is subject to the above cited provisions of sections 3(m) and (t) in determining the bare legal minimum wage which he is entitled to receive from his employer. In other words, where such an employee has

retained all tips which he receives from customers, whether in cash or through credit card charges, he must receive in addition to such tips remuneration from his employer of at least 50 percent of the statutory minimum wage for each hour worked in the workweek. Payment of more than 50 percent of the applicable minimum wage will be required when the tips received and the maximum tip credit of 50 percent fail to yield the full minimum wage.

Since the provisions concerning "tipped employees" were adopted in full from the Senate Bill, S. 2747, we must be guided by the clarification of these provisions which is found on pages 42 and 43 of Senate Report No. 93-690. As stated on page 43 of the report, the provision requiring retention of all tips by the employee "is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage." The amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act. The specific language added to section 3(m) reinforces, specifically and clearly, the intent of Congress that an employee who receives $20 a month in tips is a tipped employee, and that the employer and employee cannot agree to remove him from that category.

Under the amended Act, a tip becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer. The tip is given to the employee, not the employer. Thus, where an employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, the employee has in effect waived his rights to the minimum wage. However, an employee, including a tipped employee, cannot waive his rights to be paid the applicable statutory minimum wage or required overtime compensation. See Brooklyn Savings Bank v. O'Neil 324 U.S. 697. Moreover, no part of any tip repayments may be counted towards satisfaction of the statutory minimum since the employee has been paid nothing by the employer. It cannot be said that an employee has been paid by his employer when the money used is the employee's own money.

Where the employee is a tipped employee under the definition in section 3(t) but the terms of either section 3(m)(1) or (2) are not fully met, such an employee is excluded from the application of the tip credit provision and, therefore, must receive payment from the employer of not less than the full statutory minimum wage. Proper payment to the employee where this has been the case would require the return to the employee of the tips which have been given to the employer plus payment of the full statutory minimum wage (and overtime pay where applicable) for all hours worked in the workweek.

Sincerely,

Warren D. Landis
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Wage and Hour Division