

FLSA-605

March 26, 1976

This is in reply to your letter of October 1, 1975, in which you ask if the proposed method of payment satisfies the requirements of section 7(i) of the Fair Labor Standards Act. Under the plan, waiters (and waitresses) employed by a hotel, motel or restaurant will be paid a salary plus a commission based on a charge for service levied on the customer.

As you are aware, section 7(i)(1) applies on a workweek basis whereas the test of 7(i)(2) is applied over a representative period. Based on our review of the information available, it would be our position that the section 7(i) exemption would be applicable to the employees in question provided that they receive, free and clear, for each workweek in which the exemption may apply, in excess of one and one-half times the minimum hourly rate applicable to them (presently \$3.31 an hour), and provided further, that more than one-half their compensation during the representative period (not less than one month) represents commissions. It should be noted that in any situation where the employee's commissions seldom or only infrequently exceed the salary serious doubts would be raised as to the bona fides of the commission arrangement.

In stating that the proposed payment plan appears to meet the requirements of section 7(i), we assume that the commission basis of payment you refer to is a service charge and not tips. We believe that a service charge of which all or part is paid directly to service employees is a "commission" for purposes of section 7(i), because it is keyed to sales in the sense that it bears a direct relationship to the goods and services which an establishment sells. It is a specific percentage of the bill which the customer is required to pay. We do not believe that tips are commissions for purposes of section 7(i). Moreover, tips are creditable as wages only to 50% of the minimum wage.

The above position is, of course, predicated on the employing establishment qualifying as a retail or service establishment within the definition and contemplation of the last sentence in section 13(a)(2) of the Act.

Sincerely,

Ronald J. James
Administrator