

FLSA-613

December 6, 1976

This is in reply to your letter dated August 3, 1976, concerning the application of section 18(a) of the Fair Labor Standards Act.

You cite a situation wherein State law establishes a minimum wage of not less than \$1.60 per hour and a tip credit not to exceed 15 percent of such minimum wage, or 24 cents per hour. The concurrently applicable Federal minimum wage is \$1.90 per hour and the tip credit is limited to not more than 50 percent of such minimum wage, or 95 cents per hour. The employer in the case you cite compensated the employee in compliance with State law. It is your opinion that the results conform entirely with section 18(a) of the Act in that the employee received a greater cash wage. You illustrate your point as follows:

| | State | Federal |
|-----------------------|------------|------------|
| Minimum Wage | \$1.60 | \$1.90 |
| Tip Credit Percentage | <u>15%</u> | <u>50%</u> |
| Tip Credit | \$0.24 | \$0.95 |
| Minimum Wage | \$1.60 | \$1.90 |
| Less: Tip Credit | <u>.24</u> | <u>.95</u> |
| Cash Wage | \$1.36 | \$0.95 |

We agree with your view each law must be applied separately, and the law which yields the higher cash wage to the employee is the one to be followed. Thus, the employer must pay the employee at least \$1.36 in cash, in accordance with the State law. The difference between the Fair Labor Standards Act minimum wage of \$1.90 and the \$1.36 in cash required by State law may consist of tip credit. This tip credit of 54¢ may be taken, of course, only if the employee receives at least that amount in tips and otherwise qualifies as a tipped employee within the meaning of section 3(t) of the Act.

Sincerely,

Ronald J. James
Administrator