

FLSA-623

June 3, 1977

This is in reply to your letter of July 12, 1976, regarding the treatment under the Fair Labor Standards Act of the tip pooling plan at the restaurant ***, operated by ***.

The restaurant features buffet-style serving of food in which the customers serve themselves from buffet tables located in the dining room. The cooks and salad preparation persons prepare the food in the kitchen and then place it on the buffet serving tables. The cooks and salad people spend some of their work time at the buffet tables wiping spills, replenishing items, seeing that products are warm and stirring food. Their contact with customers is limited to answering any questions which might be asked regarding the food. The waiters and waitresses greet the customers, serve beverages at the tables, remove soiled dishes and reset the table. A mandatory tip pooling plan requires that the waiters and waitresses share 25% of the tips they receive from the customers with the cooks and salad preparation employees. No part of the tips are retained by the employer. The cash wage paid by the employer to cooks and salad makers equals or exceeds the applicable minimum wage and the tips received from the pool are in addition to such wages. On slow days the waiters are assured of earning the minimum wage before any portion is deducted for the cooks and salad makers. You indicate that on an annual basis this practice reduces the share of tips for salad makers and cooks to something between 15 and 25 percent.

The requirement in section 3(m) of the Act that an employee must retain all tips does not preclude tip splitting or pooling arrangements among employees who customarily and regularly receive tips, such as waiters, bellhops, waitresses, countermen, busboys and service bartenders. (It is not required that the particular busboys and others who share in tips must themselves receive tips from customers). On the other hand, the legislative history makes clear that tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pools, such as janitors, dishwashers, chefs and laundry room attendants. (See the enclosed copy of pp. 42-43 of Senate Report No. 93-690, February 22, 1974.)

On the basis of the facts as summarized above, we believe that the cooks and salad preparation personnel here are essentially chefs. They prepare food in the kitchen as any chef ordinarily would. That they have any contact with customers at all is due to the fact that food is served buffet-style. They do not even serve food to the patrons; rather, their basic duty outside the kitchen is to keep the buffet tables clean and replenish food as needed. They do not replace waitresses, as a counterman does in serving food directly to customers at the counter. Accordingly, we believe that their sharing in the tip pool is not in compliance with the Act.

We regret the delay in our response.

Sincerely,

Warren D. Landis
Acting Administrator

Enclosure