

FLSA-478

September 5, 1978

This is in further reply to your letter dated March 24, 1978, requesting an opinion under the Fair Labor Standards Act on the present tip pooling practices of your Dinner House Division.

You state the tip pool is funded by the waiters and waitresses contributing an amount equal to 2% of their total sales, exclusive of sales taxes, in lieu of actual tips. At the end of each pay week the hours worked by the other dining room service personnel (busboys, etc.) are totaled and divided into the accumulated tip pool funds, thus arriving at the average tips per hour which are redistributed as a tip credit.

For enforcement purposes, the Wage and Hour Division does not question contributions to a pool not exceeding 15% of an employee's tips (unless there is evidence that this percentage is designed to circumvent the tip credit provisions of the FLSA). Where a percentage of total sales is used for funding a tip pool, instead of a percentage of tips system, the Wage and Hour Division would not question it either, provided that the amount contributed by any employee does not exceed 15% of the tips actually received by that employee. If, for example, an employee's tips average 14.5% of sales, and the employee contributes 2% of his total sales to the pool, his contribution will be less than 15% of his total tips. Thus, where the bill is \$20.00 the employee would receive a \$2.90 tip and contribute 40 cents to the tip pool. The 40 cent contribution is 13.79% of the tip received. As these calculations reveal, use of a percentage of sales approach might not meet the Wage and Hour Division 15% standards in establishments where tips are low.

Of course, we assume that no more than 50% of the minimum wage (currently \$1.32 ½ an hour) is taken as a tip credit for any tipped employee. In no event can the tip credit exceed tips actually received. A tipped employee is an employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips.

We would also point out that only employees who customarily and regularly receive tips, i.e., waiters, bellhops, waitresses, counter men who serve customers, busboys and service bartenders, may be included in a valid tip pool. The inclusion of employees who do not customarily and regularly receive tips, i.e., janitors, dishwashers, chefs and laundry room attendants, would invalidate a tip pool.

Sincerely,

Xavier M. Vela
Administrator