FLSA-212

November 22, 1978

This is in reply to your letter dated August 29, 1978, requesting an opinion pursuant to Section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. Section 259).

You ask us to consider a company that operates a concession (e.g., parking, hat check, etc.) in an establishment such as a hotel or restaurant. In some cases, the establishment pays the concessionaire a monthly fee, which is like a subsidy in that it does not cover all of the concessionaire's expenses. In other cases, there is no fee. In still other cases, the concessionaire must pay the establishment a monthly rental for the concession. The concession's customers are not charged any fee for the services provided by the concession. The employees of the concessionaire receive tips from such customers, however, and these are immediately turned over by the employee to the concessionaire.

Therefore, the concessionaire's operating income may be limited to the turned over tips only or it may be a combination of tips and the above referenced monthly fee (subsidy). In either case the employees' wages are paid from these sources, and the total payment from these sources equals or exceeds the minimum wage required by the Fair Labor Standards Act. The employer does not avail himself of a tip credit.

You ask whether under the above circumstance the concessionaire's handling of tips complies with the requirements of the Fair Labor Standards Act. You indicate your familiarity with Wage-Hour-Administrator Opinion Letters Nos. 1362 (2-18-75) and 1375 (4-30-75) which discuss tips. It is your belief that these opinion letters do not apply in the situation you have presented for our consideration because the concessionaire is providing a free service to its customers and the concessionaire's only, or primary, source of income is the tips given to the concessionaire's employees by its customers.

We disagree with your conclusion that the manner of handling tips as described above complies with the Fair Labor Standards Act. As you are aware, the tip credit provisions of section 3(m) of the Act, as amended in 1974, state:

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. (The 50 percent limitation is reduced to 45 percent effective January 1, 1979, and to 40 percent effective January 1, 1980.)

Thus, under the 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. 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.

It is our position that where an employer acquires the tips of a "tipped employee" in contravention of section 3(m) the employer is required to restore the full amount of the tips thus acquired. Such employer may, however, claim the tip credit, after such tips are fully restored, for up to 50% of the minimum wage, provided the tips actually received equal or exceed the value of the tip credit claimed by the employer. The tip retention requirement of section 3(m) applies regardless of whether the employer elects to take credit for tips received.

You indicate the State's labor code prohibits an employer from collecting tips received by its employees or crediting them toward wages, except where "no charge is made to a patron for services rendered to the patron by an employee on behalf of his employer if both of the following conditions are met: (a) the employee is receiving a wage or salary not less than the higher of the state or Federal minimum wage, regardless of whether such employee is subject to either such minimum wage law, and (b) the employee's wage or salary is guaranteed and paid in full irrespective of the amount of tips received by the employee. It is apparent from the foregoing that the tip provisions of the FLSA are more protective of employee rights, and they therefore govern, regardless of the provisions of the States' labor code.

We regret that an earlier response to your letter was not possible.

Sincerely,

Herbert Cohen
Acting Deputy Administrator
Wage and Hour Division

Xavier M. Vela
Administrator

Enclosure