

## FLSA-641

December 18, 1979

This is in reply to your communication of November 19, 1979, concerning deductions from wages of employees for cash shortages.

It has been the long standing position of the Department of Labor that deductions from an employee's wages for cash shortages, which reduce the employee's pay below the applicable minimum wage, currently \$2.90 an hour, or reduce the amount of overtime compensation required by the Fair Labor Standards Act, are not permitted. This position was upheld in the case of Mayhue's Super Liquor Stores, Inc. v. Hodgson, 5th Cir. 1972, 464 F. 2d 1196, 20 WH Cases 808 (Cert. denied 409 U.S. 1109, 93 S. Ct. 408 20 WH Cases 1054). The Court, however, observed that the treatment of cash register shortages under the Act should be distinguished from situations where the employee took money for the employee's own use or misappropriated it. In the latter situation the court indicated that: As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages .... In such a case there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum. Accordingly, in our enforcement of the Act we would not assert a violation of its monetary requirements where there is repayment of a debt which in fact resulted from theft or misappropriation of the employer's funds.

However, since the basis for repayment or withholding payment of wages to effect repayment in such a matter is an alleged criminal act, the case must first be proven beyond a reasonable doubt. Where there is only an accusation or a presumption, we would not be inclined to accept this as satisfying the burden of proving the commission of a crime by the employee beyond a reasonable doubt. Nor would the burden of proof be met by any proceeding such as a private investigation by the employer. Such an extra-legal proceeding, which does not afford the accused the protection available in a court of law, does not appear to be a proper forum in which to meet the burden of proof.

It is our opinion that for purposes of the Fair Labor Standards Act, only an adjudication by a court of law would suffice in meeting the burden of proof. Absent such an adjudication, all covered and nonexempt employees must be paid at least the applicable minimum wage for all hours worked and all overtime compensation required by the Act.

Finally, it should be noted that there is no provision in the law which would prevent disciplinary actions such as termination of employment for cash shortages. A decision to terminate an employee because of cash shortages attributed to the employee is a managerial one.

Sincerely,

C. Lamar Johnson  
Deputy Administrator

Enclosure