

## FLSA-897

April 16, 1981

Thank you for your letter requesting an opinion, on behalf of your client, as to whether his or her proposed employee compensation plan complies with the Fair Labor Standards Act (FLSA).

Your client operates a restaurant in a resort area. For six months of the year business is minimal, however, during the tourist season, business and the number of employees increases by more than 400 percent. During the slow season, tipped employees shall be paid the applicable minimum wage and overtime rates, and your client shall utilize the tip credit provisions of the FLSA. All tips received shall be the property of the employees. Conversely, during the tourist season, employees shall be compensated on a commission basis. Your client shall impose a 12 percent service charge on all customer checks and the service checks shall be the sole property of your client. The waiters shall receive a 10 percent commission on the gross amount of checks, including the service charge. In weeks in which total commissions do not equal or exceed \$5.02 per hour worked, your client will make up the difference between the commissions received and \$5.02 per hour. In all weeks, greater than one-half of the employees' compensation will be commission earnings. You ask if the commission compensation payment is a valid form of compensation under the FLSA. You also ask if your client may change the above compensation plans every six months.

Additional information was furnished a member of my staff on March 17, 1981. He was advised that during your client's low sales period (slow season) employees will be paid \$2.01 per hour in cash by the employer provided they receive on the average \$1.34 an hour in tips. During the other six months you stated that your client wishes to take advantage of the overtime compensation exemption provided by section 7(i) of the FLSA. In this regard you were advised that the hourly pay rate would not be less than \$5.03 per hour (more than one and one-half times the applicable minimum wage) and more than 50 percent of an employee's wages must be from commission earnings.

Section 7(i) of the FLSA provides an exemption from its overtime pay requirements for any employee of a retail or service establishment if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him and (2) more than half of his or her compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed a draw or guarantee.

A service charge for services rendered by waiters or waitresses may qualify as a commission under section 7(i) where it is levied on a customer by a hotel, motel, or restaurant which is a retail or service establishment. Such a service charge is keyed to sales bearing a direct relationship to the goods or services sold by the establishment, and it is a specific percentage of the customer's bill. Tips are not commissions for purposes of section 7(i)

Section 7(i) was enacted to relieve an employer from the obligations of paying overtime compensation under section 7(a) to certain employees of a retail or service establishment paid wholly or in greater part on the basis of commissions. Section 7(i) contemplates a situation where the employee is regularly or permanently employed on a commission basis. We are inclined to view employees under section 7(i) for substantially the same six months (which we presume are also consecutive months) every year as being regularly employed on a commission payment.

We wish to point out that an employer's use of section 7(i) may occur simultaneously with the commencement of the representative period. However, if at the conclusion of that representative period the commissions earned do not exceed 50 percent of an employee's earnings the employer would have to pay overtime compensation for hours worked in excess of 40 hours in any workweek during that period in accordance with the principles discussed in section 778.117 through 778.122 of 29 CFR Part 778, copy enclosed.

We are of the opinion, provided the requirements of section 7(i) discussed above are met, that your client's proposed employee compensation program complies with the FLSA.

Sincerely,

Henry T. White, Jr.  
Deputy Administrator

Enclosure