CCPA-78

October 18, 1982

Thank you for your letter of September 8, 1982, requesting an opinion on behalf of one of your clients, as to whether the method by which he is recovering the cost of food from employee wages violates Title III of the Consumer Credit Protection Act (CCPA).

You state that your client became concerned that some theft of food inventory was occurring at his restaurant. He requested his employees to submit, voluntarily, to a polygraph examination. Upon their submission to the examination, thirteen employees admitted to different sorts of theft committed against the company during their employment. Each admitting employee signed a statement which said that the employee had taken or eaten restaurant-owned property without compensating the restaurant for the property taken. You state that each employee estimated the actual amount of property which was taken and included that estimate on the signed statement they presented to your client. Your client gave each employee a choice, either to repay a sufficient amount or have their employment terminated. You state no charges were filed against the employees. Your client reduced the admitted amount by one-half and allowed periodic repayment of the amount. The employees and he agreed to a certain amount per pay period to lighten the impact on each employee as much as possible. The payroll deductions were made for approximately four months, following a one-month notice period. After the four months of deductions the employees underwent another polygraph examination. All employees did exceptionally well. At that time, your client, believing the employees had learned their lesson, suspended the payroll deductions. You contend that these deductions were voluntary wage assignments and as such were not restricted by the CCPA.

We agree that the wage deductions are not restricted by the CCPA because they have not been effectuated by a garnishment order. However, the Fair Labor Standards Act (FLSA) requires an employer to pay all covered and nonexempt employees not less than the minimum wage for each hour of work (currently $3.35 an hour) and not less than one and one-half times the regular rate of pay for hours worked in excess of 40 hours in a workweek.

In our enforcement of the Act we would not assert a violation of the Act's monetary requirements where there is a recoupment of a debt which in fact resulted from theft or misappropriation of an employer's funds. Since the basis for repayment or withholding 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, we would not be inclined to accept this as satisfying the burden of proving the commission of a crime 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 extralegal 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.

In your client's situation, you state that several employees admitted, following a voluntary submission to polygraph examination, that they had committed acts of theft. Each such employee then estimated the amount of the theft and chose to repay a sufficient amount rather than have their employment terminated.

In Mayhue's Super Liquor Stores, Inc., v. Hodgson , 5th Cir. 1972, 464 F. 2d 1196 20 WH Cases 808 (Cert. denied 409 U.S. 1108, 93 S. Ct. 408, 20 WH Cases 1054) the Court stated:

The "voluntary-involuntary" dichotomy is meaningless for two reasons. First, if the intent of the parties were to make repayment purely voluntary on the part of the employee, an agreement would not be necessary. The agreement would be pointless. Yet the employer requires the execution of the agreement as a condition of employment. Second, the provision in the agreement that the "shortages are considered a valid debt owed to the employer" obviously controls the matter and expresses the intent of the parties. It overrides any argument that the repayments are voluntary on the part of the employee.

The Court further stated:

This amounts to nothing more than an agreement to waive the minimum wage requirements of the Fair Labor Standards Act. Such an agreement is invalid.

Accordingly, it is our opinion that an employee's agreement to repay for food shortages in lieu of possible discharge, is not valid to the extent such repayments reduce an employee's wages below the Federal minimum wage (currently $3.35 an hour) or cut into the required overtime compensation.

With regard to the closing paragraph on the Fact Summary you submitted, we have been advised by our Columbia Area Office staff that your client asked how the Federal Wage Garnishment law would apply to deductions from employee wages. Accordingly, your client was advised of the wage garnishment restrictions. No details of the factual situation were discussed by your client.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator