

February 23, 1983

This is in reply to your letters of August 13 and December 19, 1982, regarding credit card tips. You ask on behalf of one of your clients, whether as employer may, under the Fair Labor Standards Act (FLSA), recover credit card tips which were advanced to employees, either by payroll deduction or directly from tipped employees, because a credit card charge was uncollectable. We regret the delay in responding.

For the purpose of our response you ask us to assume that an employee works as a waitress all the hours that she works for your client in a workweek. The employee is a "tipped employee" within the meaning of Section 3(t) of the FLSA. The employee retains all cash tips received, except that approximately 10% of the tips are given to a busboy who cleans the tables. Some customers pay for their meals with credit cards and designate thereon an amount as tips to be paid to the waitress, which your client immediately advances to the waitress. If the credit card charge is not collected from the credit card company, your client deducts the tip amount from the employee's next paycheck or asks the employee to reimburse him/her the tip amount in cash. Where the waitress must reimburse the employer for an uncollected credit card tip, she, in turn, collects from the busboy the 10% which she had advanced to him. Your client does not deduct any interest or administrative costs incurred with the uncollected credit card tip advances.

Section 3(m) of the FLSA provides that in determining the wage of a tipped employee the amount paid such employee by his/her 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 40 per cent of the applicable minimum wage except that the amount of the increase on account of tips may not exceed the value of tips actually received by the employee. In addition, the FLSA requires that (1) such employee be informed by the employer of the tip credit provision, and (2) all tips received by such employee be retained by the employee, except that it (section 3 (m)) shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Where tips are charged on a credit card, it is our position that tips due the employee must be paid over to the employee not later than the next regular pay day and may not be held by the employer while he/she is waiting to be reimbursed by the credit card company. However, where a credit card charge is uncollectible, we would not require an employer to pay an employee the amount of tips specified on such credit card slip. Therefore, it is our opinion that an employer may recover from a tipped employee tips which have been paid to the employee when the credit card charge is uncollectable. We wish to point out that regardless of how the overpaid tips are recovered from a tipped employee, whether by payroll deduction or by out-of-pocket reimbursement by the employee to the employer, the recovery of tips should be accurately documented to prevent & subsequent allegation that such tips were improperly recouped by the employer.

In your first letter there is an example illustrating the disbursement of \$10.00 in uncollected credit card tips, \$9.00 are retained by the waitress and \$1.00 is given to the

busboy via a tip pool. In your second letter you ask if the employer could recover the entire \$10.00 of uncollected credit card tips from the waitress and she, in turn, would collect the \$1.00 from the busboy.

As you may be aware, we will not question contributions of tips by a tipped employee to a tip pool which do not exceed 15% of the tipped employee's tips as long as the amount of tip retained by the employee equals the tip credit claimed by the employer. Of course, if the amount of uncollected credit card tips to be recovered from the tipped employee would reduce the tips otherwise retained by the tipped employees for that workweek below the amount necessary to bring the tipped employee's wages up to the Federal Minimum wage when added to the cash wages paid by the employer, the employer would be prohibited from recovering the amount of uncollected credit card tips which results in the tipped employee receiving less than the minimum wage.

As explained above, before uncollected credit card tips could be recovered from tipped employees, it must first be determined whether the tip recovery, in total or in part, will reduce the employee's wage below the minimum wage. We do not believe it appropriate for a waitress to be the party responsible for determining whether the tips to be recovered would result in a busboy being paid less than the minimum wage. Accordingly, any part of uncollected credit card tips which was allocated into a tip pool must be recovered by the employer from the party who received the tips.

We trust the above is responsive to your inquiry.

Sincerely,

William H. Otter
Administrator