

FLSA-856

November 23, 1983

This is in reply to your letter of September 15 requesting an opinion regarding the legality of your client's pay practices under section 3(m) of the Fair Labor Standards Act (FLSA).

You state your client operates a specialty restaurant, with table service provided by waiters and waitresses. These service personnel are paid the Federal minimum wage of \$3.35, i.e. \$2.01 per hour in cash wages with your client claiming the maximum 40% tip credit. The tipped employees average \$5.00 an hour in tips and therefore make approximately \$7.00 per hour. There is a tip pool of 2% of gross sales which goes to the bus personnel and bartenders. The tip pool contribution comes to about 30 cents an hour for each tipped employee.

You state the tipped employees act as their own bank, starting each day with a cash bank of \$20 to \$30, which the tipped employees fund. The tipped employee alone is responsible for the change bank; your client neither audits nor controls it. These tipped employees are responsible for insuring that customers pay their bills. If a customer leaves without paying, the check is lost, or if the employee accepts an invalid credit card, the employee is responsible for the loss. Lost guest checks are charged back to the employee at the rate of \$25.00 each. At the end of the shift, the employee must turn in to management the amount of sales reflected by the guest checks and the register. Personal checks, incomplete charge vouchers, I.O.U.s, and foreign money are not acceptable. You state the employees are aware of these limitations. Any shortages resulting from the above are made up by the employee from either tips or personal assets. Your client will monitor this function to assure that the tipped employees receive not less than the minimum wage.

You ask whether your client, under the conditions described above, is entitled to claim a tip credit under FLSA section 3(m) even though the employee may have to occasionally reimburse your client for shortages if the reimbursement does not bring the employee's wage below the minimum wage.

Nonexempt employees of a retail enterprise which may include more than one business establishment, having an annual dollar volume of sales or business done of at least \$362,500, must be paid not less than \$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 in a workweek. Under this law, however, tips received by tipped employees may be counted by an employer in an amount up to 40% of the applicable minimum wage. A "tipped employee" is defined as any employee engaged in an occupation in which he/she customarily and regularly receives not less than \$30 a month in tips. Currently, an employer need not pay more than \$2.01 an hour in cash to tipped employees provided that the tips received when divided by the hours of work equal at least \$1.34 an hour. The requirement that an employee retain all tips does not preclude tip splitting or pooling arrangements among employees

who customarily and regularly receive tips such as waiters, waitresses, bellhops, countermen, busboys, and service bartenders.

Deductions by employers from cash wages paid to employees to cover cash shortages, from whatever source, are improper to the extent that such deductions reduce the wages paid below the minimum wage or cut into the required overtime compensation. As illustrated above, the tip credit provision of FLSA permits employers to claim a tip credit against the applicable minimum wage in an amount not to exceed 40% of such minimum wage. With the exception of tip pool contributions, employees must retain the tips they receive. Therefore, since the tipped employees described in your letter are paid only the minimum wage (\$2.01 an hour in cash plus \$1.34 an hour in tips) your client may not deduct from the cash wages paid or require tips to be turned over to him/her to cover cash shortages. In this regard you may wish to review Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F. 2d 1196 (Cert. den. 409 U.S. 1109, 93 S.Ct. 908) and Brennan v. Veterans Cleaning Service, Inc. 482 F. 2d 1362.

We believe your client's policy regarding the cash bank funding should be altered. As we understand it, the cash bank is used so that the tipped employees are able to make change when the customers pay their bills. In addition, it appears that the tipped employees do not turn in their accumulated cash receipts they have received from customers until the end of their work shift. Your client should, therefore, reimburse the tipped employees on a daily basis whenever the cash bank funds are below the initial cash bank funding level. Further, the tipped employees should be able to take their individual cash bank funds with them at the end of their work shift. Otherwise, it would not be proper to require the tipped employees who are paid only the minimum wage to supply the initial cash bank funds. If these adjustments are made, it would not be inappropriate for the tipped employees to make the initial funding of the cash bank. These adjustments to the cash bank policy would preclude the possibility that tipped employees are turning over part of the tips they received from the customers to your client. As explained above, that is not lawful under the FLSA.

We trust the above is responsive to your inquiry.

Sincerely,

James L. Valin
Administrator Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator