

JAN 27 1997

This is in response to your request for an opinion as to the impact under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., ("FLSA") of a plan proposed by a company you represent relating to income tax withholding from the wages of its tipped employees. Under a procedure authorized by the Internal Revenue Service (known as the Tip Reporting Alternative Commitment (TRAC)), there are two components to your client's plan. The employer will require employees customarily and regularly receiving tip income to provide a written report (by use of a form prepared by the employer) of the amount of tips received by the employee each pay period. You advise that there is no requirement under the Internal Revenue Code that employers require employees to provide such information to their employers. The Code places the reporting burden directly on employees.

On the basis of the information provided to the employer by its employees as to the amount of their tips, the employer will withhold from the wages and pay to the Internal Revenue Service the amount of taxes appropriate for such amount of employee income. You indicate that the employer benefits from instituting such a plan by gaining protection from IRS audit. You also indicate that there is no particular benefit of the plan to the employees except for the withholding of taxes otherwise owed by the employees, based on tips which the IRS considers income to the employees. You have asked if the reporting requirements and withholding procedure proposed for its tipped employees by your client would result in your client losing the ability to take the tip credit for employees who otherwise meet the requirements for application of this portion of Section 3(m) of the Act, or would otherwise result in violation of the FLSA.

With respect to the tip reporting requirements imposed on the employees pursuant to TRAC, we see no impact on the compensation requirements of the FLSA. The fact that the employer requires the employees to report their tips to the employer does not entitle the employer to exercise dominion over those tips. This requirement instituted by the employer, as with many aspects of employment not governed by the Act, does not affect the minimum wage and overtime requirements of the Act. It is subject to whatever agreement is arrived at between an employer and its employees, either individually or through the collective bargaining process.

You also inquired whether deducting from an employee's wages for tax withholding applicable to TRAC-reported tips violates the FLSA or causes an employer to lose the ability to take the Section 3(m) tip credit. The regulations clarify that taxes assessed against an employee that the employer collects and forwards to the appropriate governmental agency may be included as "wages" under Section 3(m). 29 C.F.R. 531.38. Thus, an employer may deduct from an employee's wages for taxes the employee owes on tip income, such as the employee's share of social security and Federal and State income tax. The fact that the employee reported the tip income to the employer pursuant to the TRAC program is irrelevant to the validity of the deduction from wages.

However, your letter also stated that an employee might not retain all tips received where tips become a source from which deductions are made (such as tips paid out through payroll). We view this circumstance differently. The general principle is that tips are the property of the employee to whom they are given. Barcellona v. Tiffany English Pub, Inc., 597 F 2d 464, 466-67 (5th Cir. 1979). Only tips which an employee receives "free of any control by the employer" may be counted in applying the tip credit. 29 C.F.R. 531.52. Where an employer makes an invalid deduction from tips, the employee has not received the minimum wage "free and clear" as required by 29 C.F.R. 531.35. See Tavern Talent and Placements, Inc. 104 LC 34,773 (CCH) (D. Colo, 1988). Thus, we do not believe that an employer may make deductions for tax withholding directly from an employee's tips, as opposed to withholding from the other wages paid by the employer. See also 26 U.S.C. §§ 3102(c) and 6053(b).

We trust that the above information is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator