

AUG 29 1997

Dear

This is in response to your letter concerning application of the Fair Labor Standards Act (FLSA) to employees of a semi-private club facility that includes a dining room and banquet facilities. You seek an opinion on the proper calculation of a server's overtime pay.

With respect to dining room service, a 15% "discretionary" gratuity is added to each sale. The customer's register receipt informs the customer of this charge, but the customer is not otherwise informed that this charge is added or that the customer may reduce the charge if there is a problem with the service. All gratuities are paid to servers, busspersons and bartenders in the weekly paycheck. Where tips are not shared, the gratuity paid to the server is based on the server's sales for the day. With respect to banquet service, there is an 18% mandatory gratuity added to every sale. Tips for banquets, buffets, and brunches are shared with busspersons and bartenders. Tips are shared equally for banquets and are shared up to a maximum of 15% for buffets and brunches. The employer does not retain any portion of the service charges.

Where an employer imposes a service charge on each sale, such charges do not have the character of tips, which are always purely discretionary with the customer. 29 CFR 531.55(a). While you characterize the dining room service charge as discretionary, it is in effect mandatory since the customer is not aware that he may reduce or eliminate the charge. Under such circumstances, it is our position that payments to employees from the service charges collected by the employer are direct compensation under the direct control of the employer and must be included in the regular rate of all recipients for overtime purposes. Moreover, the tip credit rules do not apply under the circumstances described in your letter.

You also inquire concerning the applicability of the exemption under section 7(i) of the FLSA to servers, particularly bartenders and bussers who share in the service charges. Under section 7(i) of the FLSA, an employee of a retail or service establishment who is paid in full or in part on a commission basis may qualify for exemption from the overtime pay requirements of section 7(a) in a workweek

if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage (currently \$4.75 an hour), and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A service charge levied on a customer by an establishment such as a hotel or restaurant for services by waiters or waitresses may qualify as a commission under section 7(i) since such charge bears a direct relationship to the sale of goods or services by the establishment. Tips received by such employees from the customers are not commissions for the purposes of section 7(i).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team