



Wage and Hour Division
Washington, D.C. 20210



January 17, 2017

FIELD ASSISTANCE BULLETIN No. 2017-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND
DISTRICT DIRECTORS

FROM: Dr. David Weil
Wage and Hour Administrator

SUBJECT: Enforcement of FLSA Tip Credit for Tipped
Employees Employed under an H-2B Application
for Temporary Employment Certification

This Field Assistance Bulletin provides guidance regarding the Wage and Hour Division's (WHD) enforcement of the tip credit under the Fair Labor Standards Act (FLSA) for tipped employees employed under an H-2B Application for Temporary Employment Certification. This Bulletin clarifies that where tipped employees employed under an H-2B Application for Temporary Employment Certification are also covered by the FLSA, the FLSA tip credit provisions apply in determining the employer's compliance with the FLSA's minimum wage and overtime pay obligations.

The H-2B visa program of the Immigration and Nationality Act (INA) allows employers to hire foreign workers to meet a temporary need for nonprofessional, nonagricultural labor or services. The H-2B program requires employers to pay employees a wage that equals or exceeds the highest of the prevailing wage or the federal, state, or local minimum wage. See 20 CFR 655.20(a)(1). Therefore, the required prevailing wage may be higher than the FLSA minimum wage.¹ H-2B employers are also required to comply with all applicable federal, state, and local employment-related laws during the period of employment specified on the H-2B Application for Temporary Employment Certification.

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards covering employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a federal minimum wage of not less than \$7.25 per hour currently. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek. Generally, employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more are covered by the FLSA. In addition, employees may be individually covered by the FLSA if their work regularly involves them in interstate commerce. See Fact Sheet 14: Coverage Under the Fair Labor Standards Act (FLSA). Under the FLSA, tipped employees are those who customarily and regularly receive more than \$30 per month in tips. See Fact Sheet 15: Tipped Employees Under the Fair Labor Standards Act (FLSA).

¹With some variation described in the regulations, the prevailing wage in the H-2B program is the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment Statistics Survey (OES). 20 CFR 655.10.

FLSA Tip Credit Calculation

As explained in the 2011 Clean up final rule (76 FR 18832), FLSA section 3(m), as amended in 1996, defines the tip credit an employer may claim as “the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1).” 29 CFR 531.50(a). Thus, the FLSA 3(m) tip credit is capped at the difference between the section 6(a)(1) wage and the direct or cash wage paid. The direct wage paid may not be less than the cash wage required to be paid a tipped employee on August 20, 1996, which was \$2.13 per hour. Because the FLSA limits the section 3(m) tip credit to the difference between the cash wage paid and the FLSA minimum wage, for purposes of the FLSA, employees who are paid using the 3(m) tip credit are paid the minimum wage for each hour they work in a non-overtime workweek.

To illustrate, assuming the requirements of FLSA section 3(m) are met:

An employer who pays a cash wage paid of \$2.13 per hour may claim an FLSA 3(m) tip credit of \$5.12 per hour (\$7.25 - \$2.13)

An employer who pays a cash wage paid of \$3.63 per hour may claim an FLSA 3(m) tip credit of \$3.62 per hour (\$7.25 - \$3.63)

H-2B Prevailing Wage and FLSA Tip Credit

FLSA overtime principles apply to tipped employees in the same manner as they apply to all covered, nonexempt employees. In an overtime workweek a tipped employee must receive overtime pay under FLSA section 7(a)(1) at the rate of not less than time and one-half of the regular rate of pay. The regular rate of pay is derived by dividing the employee’s total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. See 29 CFR 778.109. Where an employer takes a tip credit, the tip credit amount must be included in determining the regular rate. The regular rate can never be less than the highest applicable minimum wage. See 29 CFR 778.5.

Questions regarding the proper calculation of overtime pay arise in situations where the H-2B prevailing wage requires an employer to pay a higher wage than required by the FLSA. In an overtime workweek where a tipped employee’s regular rate is determined based on the H-2B prevailing wage that exceeds the FLSA section 6(a)(1) minimum wage, the employer may claim an additional overtime tip credit toward satisfying its overtime compensation obligation under the FLSA. This additional overtime tip credit is equal to the difference between the amount of the FLSA 3(m) tip credit and the amount of the H-2B prevailing wage that the employer could satisfy with tips. In such situations the total tip credit that will be counted toward satisfying the employer’s FLSA overtime pay obligation will consist of the FLSA 3(m) tip credit and the additional overtime tip credit. See 32j18(f), and (g) (providing similar calculations where the tipped employee’s regular rate of pay is based on a state minimum wage that exceeds the FLSA minimum wage). The WHD will not permit a total tip credit that exceeds the amount of tips received and retained by the employee.

To illustrate, assume a tipped employee covered by the FLSA is employed under an H-2B Application for Temporary Employment Certification at a prevailing wage of \$10.00 per hour and the employer pays a direct cash wage of \$5.00 per hour and satisfies the rest of its H-2B prevailing wage obligation in tips received and retained by the employee. Assume further that all hours worked are in a tipped occupation and the employer has complied with the requirements for taking a tip credit under FLSA section 3(m). See 29 CFR 531.59(b); FOH 30d00(e). Under FLSA section 3(m), the employer would be entitled to take an FLSA 3(m) tip credit of \$2.25 ($\7.25 FLSA minimum wage - $\$5.00$ cash wage = $\$2.25$). Because the employer could utilize \$5.00 of tips to satisfy the prevailing wage under H-2B, in an overtime workweek the employer would also be entitled to take an additional overtime tip credit of \$2.75 ($\$5.00 - \$2.25 = \2.75) to satisfy the regular rate. The total tip credit (i.e., the sum of the FLSA 3(m) tip credit and the additional overtime tip credit) equals the \$5.00 of tips that the employer utilized to satisfy the H-2B prevailing wage. The additional half-time premium for overtime hours must be paid in cash.

Where the wage an employer pays to a tipped employee employed under an H-2B Application for Temporary Employment Certification exceeds the prevailing wage and that rate is the regular rate for purposes of FLSA overtime compensation, WHD will permit the employer to take an additional overtime tip credit based on the prevailing wage rate. The difference between the higher wage paid and the prevailing wage is not included in the additional overtime tip credit, and must be paid in cash to satisfy the regular rate in an overtime workweek. For example, assume the \$10.00 wage in the example above is the prevailing wage rate but the employer promised the H-2B tipped employee a \$12.00 wage. If the employer paid a \$5.00 cash wage, in an overtime workweek it would still be limited to a total tip credit of \$5.00 and would need to pay the additional \$2.00 in cash ($\12.00 offered wage - $\$10.00$ prevailing wage rate = $\$2.00$). The additional half-time premium for overtime hours must be paid in cash.

Questions about this FAB should be directed to the Division of Enforcement Policy and Procedures, Fair Labor Standards Branch, through regular channels.