



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-22. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* [29 C.F.R. §§ 790.17\(d\), 790.19](#); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Wage and Hour Opinion Letter FLSA2009-22 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-22

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your inquiry regarding whether, under the Fair Labor Standards Act (FLSA),* an employer in a state with a minimum wage lower than the federal minimum wage and that prohibits the use of a tip credit, may take a tip credit under the FLSA for the additional amount above the state minimum wage. It is our opinion that the FLSA does not prohibit an employer in such states from taking a tip credit for the amount above the state minimum wage.

You represent an association whose members operate Restaurants in the State of Minnesota. Minnesota law provides that “No employer may directly or indirectly credit, or utilize gratuities towards payment of the minimum wage set by this Section or by federal law.” Minn. Stat. § 177.24. You ask whether this statutory provision affects the validity of the Wage and Hour Division’s (WHD) position that in a situation in which a state law requires a minimum wage less than the federal minimum wage and forbids a tip credit, the employer may take a tip credit in the amount of the difference between state and federal law. See [FOH § 30d06\(c\)](#).

For purposes of FLSA compliance, WHD continues to follow its position, as set forth in FOH § 30d06(c), that where a state law requires a minimum wage less than the federal minimum wage and forbids a tip credit, the employer may nevertheless take a tip credit in the amount of the difference between state and federal law. Therefore, application of a tip credit in the amount of the difference between the Minnesota and federal minimum wage would not be a violation of the FLSA. Although the Minnesota statute purports to prohibit taking a credit for gratuities “towards the payment of the minimum wage set . . . by federal law,” that provision in fact has no effect for purposes of assessing compliance with federal law. We otherwise express no opinion, however, regarding the validity or application of Minn. Stat. § 177.24 as a matter of state law.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**