



UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
Washington, DC 20210



December 15, 2016

FIELD ASSISTANCE BULLETIN NO. 2016-4

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
DISTRICT DIRECTORS

FROM: Dr. David Weil  
Administrator

SUBJECT: Enforcement of Field Operations Handbook Provisions 30d  
and 32j18 (2016)

This Field Assistance Bulletin provides guidance regarding the Wage and Hour Division's (WHD) enforcement of certain tip credit provisions in Field Operations Handbook (FOH) sections 30d and 32j18, rev. 737, 12/01/2016. These revisions incorporate the 1996 statutory amendments to section 3(m) of the Fair Labor Standards Act (FLSA) and the 2011 revisions to the tip credit regulations, as well as provide guidance on an employer's ability to utilize a tip credit in states that have minimum wages in excess of the FLSA minimum wage and permit tip credits in excess of the FLSA 3(m) tip credit.

#### Tip Credit Calculation

As explained in the 2011 Clean up final rule, 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)

### Deductions

As discussed above, the 1996 amendments to section 3(m) capped the wage paid to a tipped employee being paid pursuant to the tip credit at the FLSA minimum wage. Therefore, where an employer has claimed an FLSA 3(m) tip credit, under the FLSA it has paid the employee only the FLSA minimum wage regardless of the amount of tips received by the employee in excess of the tip credit amount. Tips the employee receives in excess of the amount of the FLSA 3(m) tip credit are not considered “wages.” Since the employee has only received the minimum wage (through the direct or cash wage plus tip credit), any deductions by the employer for non-section 3(m) items, such as uniform costs, breakages, cash register shortages, and walkouts would result in a violation of the employer’s minimum wage obligation because it would reduce the wage to less than the FLSA section 6(a)(1) wage. See 76 Fed. Reg. 18832, 18839 (Apr. 5, 2011), FOH 30d00(e)(4). Because non-3(m) deductions cannot be made in a workweek of 40 hours or less when an employer claims an FLSA 3(m) tip credit, employers are also prohibited from taking such deductions in overtime workweeks, even when the regular rate is higher than the section 6(a)(1) wage (e.g., when a higher state minimum wage is the regular rate). See FOH 32j18(c)(1).

The change in the tip credit formulation introduced through the 1996 amendments to section 3(m) renders incorrect statements in the 1988 FOH that an employer could pay a direct wage in excess of the minimum required under the FLSA and still claim “the full tip credit amount.” See FOH 30d07(c) and 30d08(b), Rev. 563, 12/9/88. Specifically, the 1996 statutory amendment precludes an employer from making non-3(m) deductions when employees are paid with the tip credit. In light of this statutory change, Opinion Letter FLSA2006-21 (June 9, 2006) is withdrawn to the extent that the calculations provided in the letter relied on outdated guidance in the 1988 FOH and showed a tip credit that exceeded the difference between the direct wage paid and the FLSA minimum wage and permitted non-3(m) deductions equaling the same.<sup>1</sup>

### States with Higher Minimum Wages

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

---

<sup>1</sup> FLSA2006-21 incorrectly stated that an employer may pay a tipped employee \$1 more than the minimum required cash wage of \$2.13 per hour and still claim the full tip credit of \$5.12 per hour for a total wage rate of \$8.25 per hour. The employer could then make a non-3(m) deduction of \$1 per hour.

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.

As explained in FOH 32j18, in an overtime workweek where a tipped employee's regular rate is determined based on a state minimum wage that exceeds the FLSA minimum wage, and the state permits a higher tip credit than the FLSA 3(m) tip credit, the employer may claim an additional overtime tip credit toward satisfying its overtime pay obligation under the FLSA. This additional overtime tip credit is equal to the difference between the FLSA 3(m) tip credit and the state tip credit. 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) for sample calculations.

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