FLSA-564

January 15, 1975

This is in reply to your letter of July 2, 1974, regarding a proposed pay plan for dining room waiters in a restaurant. We regret that the flood of work generated by the 1974 amendments to the Fair Labor Standards Act caused a delay in this reply.

Under that plan customers will be required to pay a 12% service charge, added to their bills for food and drink. The customer will be apprised of the service charge by a notification on the rent, which will also state "no tipping is required". It is expected that customers may, despite the "no tipping" injunction, leave cash gratuities in addition to the service charge. The employer will not require an accounting from the waiters for any cash tips they may receive. The employer will pay to each waiter an amount equal to the service charges added to the bills presented to his customers, and also will pay an additional amount for all hours worked in excess of the statutory weekly standard, which amount will be computed at one and one-half times the hourly rate calculated by dividing total service charges by total hours worked.

It is our opinion that if such service charges to customers are compulsory they are not tip income to the waiters, but are gross receipts to the employer. The proposed plan to use compulsory service charges, imposed on customers as a method of paying wages to waiters, is not improper provided, of course, there is compliance with the minimum wage and overtime pay provisions of the Fair Labor Standards Act.

You ask what will be the effect on your use of the compulsory service charge to compensate the waiters if, in addition to service charge income, the waiters receive tips from customers. In our opinion, such tip income does not affect your proposed pay plan, if the following conditions are met:

1) the compensation to the waiters which is paid by the employer from the compulsory service charge satisfies the minimum wage requirement, and

2) all of the tips from customers are retained by the waiters, either individually or through a pooling arrangement, in accordance with section 3(m), and

3) all of the payments made to the waiters from compulsory service charges regardless of how they are earmarked, identified, or allocated, are included in the regular rate of pay for purposes of overtime payment required under the Act.

You also ask whether "taking a certain percent of the existing service charge and utilizing that money for payment of the applicable minimum wage to our waiters" and then turning over to them, in separate payments, the difference between the service charges collected and the amount allocated to minimum wage payment, represents compliance with the Act. To illustrate your question, you give the example of a waiter who "sold $1,000 worth of food and beverage with a service charge of 15% imposed upon those sales",

who would have "generated $150 during that week", of which $80 was utilized to pay the minimum wage, and the remaining $70, less any statutory deductions applicable to the entire $150, was also returned to him.

We fail to see any difference between this plan and the plan discussed above, since in both plans all the service charges generated by a waiter will be turned over to him. It is immaterial that the employer separates the source of the wage payments into two categories. In a nonovertime workweek, compliance with the Act requires that wages paid be not less than the minimum wage. In an overtime workweek, compliance with the Act requires that all wages paid be included in the regular rate.

We are presently in the process of making such revisions of the interpretations contained in sections 531.50 through 531.60 of Regulations, Part 531, as may be necessary to bring them into conformity with the 1974 amendments to the Act. We regret any inconvenience the delay in our response may have caused.

Sincerely,

Betty Southard Murphy
Administrator
Wage and Hour Division