

## **FLSA-900**

May 26, 1987

This is in response to your letter of May 8 concerning the application of the Fair Labor Standards Act (FLSA) to the manner in which restaurant employees such as waiters, waitresses, hosts, and hostesses share their tips or gratuities from customers. Specifically, you are concerned that the Wage and Hour Division maybe too strict in its adherence to the enforcement guidelines as they apply to such tip pooling.

As you are aware, the FLSA requirement that tipped employees retain all tips does not preclude a valid, tip-pooling arrangement among employees who customarily and regularly receive tips. The legislative history of tip pooling under FLSA, particularly as stated on page 43 of Senate Report 93-690, indicates that waiters, bellhops, waitresses, countermen, busboys, and service bartenders are among those who may participate in a tip pool. In addition, although hosts or hostesses are not listed in the Senate Report as employees who customarily and regularly receive tips, if it is demonstrated that hosts and hostesses in similar establishments in the area have received and are now receiving tips, either directly or from a tip pool, they may also be regarded as tipped employees who are eligible to participate in a tip pool. On the other hand, an employer will lose the benefit of the exception from the tip retention requirement if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips, such as janitors, dishwashers, or chiefs. In establishments where an employee performs a variety of different jobs or duties, the employee's status as one who "customarily and regularly receives tips" will be determined on the basis of the employee's activities over the entire workweek.

It should be noted that only those tips that are in excess of tips used for tip credit under section 3(m) of FLSA are available for a tip pool as described above. Furthermore, employees cannot be required to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, the Wage and Hour Division will not question contributions to a tip pool which do not exceed 15 percent of the employee's tips. If this requirement is met, the tip pool does not need to be a voluntary arrangement consented to by the particular employees. Of course, there is nothing to prevent tipped employees from deciding, free from coercion and without any formal arrangement, to give any amount of their tips to a person or a certain group as they may choose.

While neither FLSA nor the legislative history mentions the 15 percent limitation described above, the Wage and Hour Division has adopted it on the basis of its experience in administering the law as it applies to tipped employees. However, the investigative policies and procedures which have been established as guidance for the Wage and Hour enforcement staff in this regard make it clear that the application of the percentage limitation for tip pooling is determined by the facts in any particular situation. In addition, an employer or any interested party may request an opinion concerning the application of FLSA to a specific tip-pooling arrangement by writing to the

Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

We trust that the above is responsive to your inquiry. If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Susan R. Meisinger  
Deputy Under Secretary