

FLSA-857

September 16, 1987

This is in further reply to your letters requesting an opinion as to whether a pay plan of your client, *** company of *** Inc., would be in compliance with the provisions or the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of not less than \$3.35 an hour and overtime pay of not less than one and one-half times their regular rate of pay for all hours worked over 40 in a workweek.

You state that your client wishes to initiate the following policy with regard to taxicab drivers who receive tips:

If the ratio of wages (paid to the employee drivers) to fares (money taken in by drivers from passengers) exceeds 40 percent, then the employer will take a 10 percent tip credit not to exceed \$1.34 per hour.

In order to penalize drivers whose fares are insufficient, your client wishes to take tip credit against the minimum wage or \$3.35, not to exceed \$1.34 an hour when a driver's ratio of wages paid to fares received by the driver exceeds 40 percent. In a telephone conversation *** between of the *** Company and a member of my staff, *** indicated that each week this percentage will be calculated and where the ratio exceeds 40 percent the company will deduct from the minimum wage or \$3.35 paid each driver an amount equal to 10 percent of the fares turned into the cab company by the driver up to a maximum amount of \$1.34 per hour. *** stated that the drivers are tipped employees, are permitted to retain all their tips, and are informed of this policy prior to performing any work.

In a subsequent letter you provided the following example. If one of your drivers worked 30 hours in a week and took in gross fares of \$200.00, the ratio of his wages to fares would be 50 percent because \$3.35 (minimum wage) times 30 hours is \$100.50 which is 50 percent of his total fares (\$200.00). Because this driver had a ratio that week in excess of 40 percent, your proposed policy would apply to this driver, and you would take a 10 percent tip credit against his total fares (10 percent of \$200.00 is \$20.00) so that his net pay would be \$80.50 (\$100.50 minus \$20). This equals \$2.68 paid per hour and a tip credit of \$.67 per hour.

As explained in the enclosed WH Publication 1433, tips actually received by tipped employees may be counted as wages for purposes of FLSA in an amount up to 40 percent of the applicable minimum wage. A "tipped employee" is defined as any employee engaged in an occupation in which he or she customarily and regularly receives not less than \$30.00 a month in tips.

To utilize tips received by tipped employees as part of wages FLSA requires that the employer inform the tipped employee about the tip credit allowance and that the employees must be allowed to retain all tips (individually or through a tip-pooling arrangement) regardless of whether the employer elects to take a tip credit for tips received, and that the tipped employee receive at least the minimum wage in a combination of wages and the tips.

Therefore, based on the information you and *** have given, and provided the fares turned into the *** by the drivers exclude the tips paid to the drivers by the passengers, it is our opinion that the above pay plan proposed by your client would be in compliance with the monetary provisions of FLSA. This opinion is also conditioned on the premise that the drivers receive at least the minimum wage in a combination of wages and tips.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure