

FLSA-853

June 17, 1988

This is in response to your letter of February 8 on behalf of the ***, Washington, D.C., concerning certain deductions for tipped employees under section 3(m) of the Fair Labor Standards Act (FLSA). The employer you describe does not take the allowable tip credit, but pays the full minimum wage. You ask whether the Fair Labor Standards Act (FLSA) prohibits the employer from requiring the tipped employees to use their tips to pay for shortages, breakages and prescribed uniforms.

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 not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 3(m) of FLSA provides that in determining the wage of a tipped employee the amount paid such employee by his or her employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 40 percent of the applicable minimum wage. However, the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The employee must be informed of this tip credit provision and the employee must be allowed to keep all tips received, although the pooling of tips among employees who customarily and regularly receive tips is not prohibited.

If an employer does not choose to take tip credit against the applicable minimum wage the employer is required to both pay the full minimum wage and allow the employees to keep all tips. As pointed out in section 531.52 of Regulations, 29 CFR Part 531, copy enclosed, "(a) tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him." This section of the Regulations was expressly approved in Senate Report 93-690 on page 42. Therefore, an employer accepting the repayments you describe from employee tips would not be in compliance with FLSA.

However, we wish to point out that deductions from an employee's wages for cash shortages, breakages and prescribed uniforms which do not reduce the employee's pay below the required minimum wage or cut into required overtime compensation do not violate the monetary provisions of FLSA. For example, assume that a tipped employee receives \$3.50 per hour, plus tips, and works 40 hours in a week. In this instance the employer can make deductions of \$6, the amount the employee is paid in excess of minimum wage ($\$3.50 - \$3.35 = .15$; $.15 \times 40 \text{ hours} = \6).

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator