



September 2, 2005

FLSA2005-31

Dear **Name***,

This is in response to your letter requesting an opinion regarding whether gratuities imposed upon customers may be used towards the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) for chauffeurs employed by your company. It is our opinion that these gratuities do not qualify as tips for that purpose and may not be applied towards the tip credit allowed under 29 U.S.C. § 203(m) (copy enclosed).

Under the proposed compensation scheme, chauffeurs would be paid a cash wage of \$2.13 an hour in addition to a 15% "imposed gratuity" which would be added to every reservation and "transferred through directly to the chauffeur." This imposed gratuity would not be included in the company's gross receipts. Customers would also be informed that they may provide an additional gratuity. You acknowledge that employees must receive \$30.00 a month of this additional gratuity to qualify as tipped employees. The regular rate for purposes of overtime would be calculated by adding the cash wage of \$2.13/hr, the imposed gratuity, and non-imposed tips up to the "tip credit" of \$3.02 and dividing by the hours worked. You ask whether the compensation plan would comply with the FLSA if the company 1) pays the minimum cash wage of \$2.13/hr; 2) meets the minimum overall hourly rate of \$5.15; 3) employees earn a minimum of \$30 in non-imposed tips every month; and 4) overtime is calculated as mentioned above.

The definition of wages in FLSA section 3(m) provides that tipped employees must be paid no less than \$2.13 an hour in cash wages, if they receive an additional amount in tips equal to the difference between the cash wages paid and the applicable minimum wage, currently \$5.15 an hour. This amount, referred to as the tip credit, may not exceed the amount of tips actually received and may not exceed \$3.02 at the current minimum wage. Additionally, under section 3(m) an employee may only be compensated using this method if 1) the employee has been given proper notice that the employer will be utilizing the tip credit and 2) the employee retains all tips received, except as part of a valid tip pooling agreement among employees who customarily and regularly receive tips. FLSA section 3(t) (copy enclosed) defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips."

The proposed compensation scheme includes the 15% "imposed gratuity" in the amount applied to the tip credit used to fulfill the tip portion of the minimum wage obligation under sections 3(m)(1) and (2). However, 29 C.F.R. § 531.52, (copy enclosed), distinguishes between a tip voluntarily paid by a customer and a mandatory charge imposed upon the customer. "Whether a tip is to be given, and its amount, are matters determined solely by the customer." *Id.* For example, "a compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip." See 29 C.F.R. § 531.55(a) (copy enclosed). Furthermore, these charges "which become a part of the employer's gross receipts are not tips for purposes of the Act." *Id.* at § 531.55(b). Although you state that you do not consider the imposed gratuity as a part of the company's gross receipts, because the imposed gratuity is not optional for the customers, amounts received from the imposed gratuity do not meet the definition of tip.¹

¹ The other provisions of § 531.55(b), which have not been amended since 1967 and provide that the employer may use an employee's tips to satisfy the monetary provisions of the FLSA, "were issued pursuant to the Act as it was before the 1974 amendments, and have no effect to the extent that they are in conflict with the amended Act." Opinion Letter dated February 18, 1975 (copy enclosed). As the 1975 letter explained, "[t]he amendments to section 3(m) of the [FLSA] [providing that an employer may not utilize a tip credit unless an employee retains all tips received] would have no meaning or effect unless they prohibit such agreements whereby tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act." Therefore, while service charges are "not prohibited by Section 3(m), that section is inapplicable in such a case, and the employer is obligated to pay the full minimum wage." *Id.* See also § 531.55(a).



Your letter inquires about the compulsory service charge often added to a customer's bill at a restaurant when there is a large party. As Field Operations Handbook (FOH) § 30d03 (copy enclosed) explains, a compulsory service charge is not considered a tip. Thus, the employer must pay the entire minimum wage and overtime requirement unless enough bona fide tips are received to qualify the employee as a tipped employee.

Therefore, we conclude that the "imposed gratuity" is not a tip under the FLSA. Thus, no tip credit is allowed for amounts received as an imposed gratuity and the employer must pay the entire minimum wage and overtime as required by the FLSA. See FOH § 30d03. You state that the chauffeurs may receive other amounts directly from customers, at the customers' option. These amounts do qualify as tips. Thus, if the employees receive at least \$30 per month from such bona fide tips, the employees could be considered tipped employees. In this case, the employer may take a tip credit up to the amount of the tips actually received, not to exceed \$3.02 an hour.

Next, you ask whether your proposed method of calculating the standard wage is consistent with the minimum wage requirements of the FLSA. You state that you will pay the minimum wage of \$5.15 by "adding the entire wages earned at \$2.13/hr, the imposed 15% gratuities collected on behalf of the employee, plus all additional non-imposed gratuities received by employees and dividing that number by the total number of hours worked." As stated above, the imposed 15% gratuity may not be included in calculation of the minimum wage. Instead, the company may choose to pay the chauffeurs \$2.13 in cash wage per hour and use the non-imposed gratuities to calculate the tip credit. For example, if an employee works 20 hours and receives \$100 in tips, this would be an average of \$5 an hour. The company could take a \$3.02 tip credit, which added to the \$2.13 in cash wages paid, would equal the required minimum wage. However, if the employee were to receive only \$30 in tips for the same 20 hours of work, the employee would only average \$1.50 an hour in tips. Therefore, the company would have to pay \$3.65 an hour in cash wages to that employee during that workweek. The tip credit calculation may vary widely from week to week and employee to employee.

Finally, you ask if your proposed method of calculating overtime complies with the FLSA. You state that you would calculate overtime by multiplying total hours worked by the employee's remuneration consisting of \$2.13 per hour, the total amount of 15% imposed gratuities, and additional non-imposed tips. Tip amounts in excess of \$3.02 per hour would not be included in this total remuneration amount. The resulting total remuneration is divided by the total number of hours worked, providing the regular rate. The regular rate then would be divided by 2, providing the overtime premium that must be paid for each overtime hour. See 29 C.F.R. § 531.60 (copy enclosed). Additionally, as we stated in an Opinion Letter dated January 15, 1975 (copy enclosed), "[i]t is our opinion that if such service charges to customers are compulsory they are not tip income..., but are gross receipts to the employer." Therefore, the overtime calculation that you provide is correct.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990).



We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:

FLSA sections 3(m) and 3(t)
29 C.F.R. 531.52, .55, and .60
Opinion Letters dated February 18, 1975 and January 15, 1975
FOH § 30d03

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*