

CHAPTER 30

RECORDS, MINIMUM WAGE, AND PAYMENT OF WAGES

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Chapter 30

RECORDS, MINIMUM WAGE, AND PAYMENT OF WAGES

30a RECORDS

30a00 Statutory basis.

Certain of the laws enforced by WH provide for R/K regulations. Section 11(c) of FLSA requires the S/L to issue regulations (Reg 516) prescribing R/K requirements.

30a01 Microfilms and data processing tapes.

- (a) The preservation of microfilms for the periods required by Reg 516 will satisfy the requirements relating to preservation of records, provided that adequate projection or other viewing equipment is available for inspecting the microfilms, and provided the employer is prepared to make any extensions, recomputations, or transcriptions which may be requested regarding the information contained on the microfilms. The employer should insure that the microfilms are clear reproductions of the original records, are identifiable as to dates or pay periods, and are chronologically arranged before the original records are destroyed.
- (b) Situations may be encountered where the original basic source document on which time records are maintained is an automatic word or data processing memory. The preservation of this data base for the periods required will satisfy Reg 516, provided the employer is able to convert the data, or any part of it, into a form which is suitable for inspection.

30a02 Recording working time.

- (a) In recording working time, insubstantial or insignificant periods of time outside the scheduled working hours may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to pay for any part, however small, of the employee's fixed or regular working time.
- (b) It has been found that in some industries, particularly where time clocks are used, there has been the practice of recording the employee's starting and stopping time to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. For enforcement purposes, this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in the failure to compensate the employees properly for all hours they have actually worked.

- (c) If a record is kept with respect to each employee employed on a weekly or monthly basis in an establishment or department thereof operating on a fixed schedule, indicating the exact schedule of hours per day and hours per week which that employee is normally expected to work, and if the payroll (or other) records maintained by the employer indicate for each worker or for each group of workers that such scheduled hours were, in fact, adhered to, this will be considered compliance with Reg 516. When fewer or more hours than those fixed by the schedule are worked, the employer must supplement this record by showing the exact number of hours worked on the day and week involved.
- (d) The records must also contain a statement made each pay period that, except where otherwise recorded, the employees worked neither more nor less than the scheduled hours. This policy is applicable only where hours of work are actually fixed and it is unusual for the employee(s) to work either more or less than the scheduled hours.

30a03 "Long-punching" of hours.

- (a) Where time records show elapsed time greater than the hours actually worked because of reasons such as employees choosing to enter their work places before actual starting time or to remain after their actual quitting time, the CO shall determine whether any time is actually worked in these intervals. If an employee came in early for personal convenience and did no work prior to the scheduled beginning time, a recording of the fact that the employee worked, for example, 8 hours that day is all that is required.
- (b) The CO may suggest to the employer, but not require, that the punch-time be kept as close to the work-time as possible to avoid any question that work was performed during such intervals.

30a04 "Boosted hours".

COs may find in the payroll records a single figure (either daily or weekly) which represents the total hours actually worked plus one-half of the OT hours, in lieu of separate entries for straight-time and OT hours of work. This is particularly so where machine posting methods are used. For example, if an employee works 50 hours in the workweek and is entitled to OT pay after 40 hours, the "boosted hour" posting will be 55 hours. The recordkeeping requirements are met in the case of hourly rate employees by an entry showing "boosted hours", provided the payroll or other records contain sufficient information so that it is possible, with a reasonable amount of recomputation, to ascertain weekly straight-time earnings and weekly compensation for OT. Such information includes:

- (1) actual hours worked,
- (2) regular hourly rate of pay,
- (3) additions to or deductions from wages, and
- (4) total wages paid.

30a05 Items available by extension, recomputation, or transcription.

- (a) No R/K violation shall be charged where the employer is maintaining records in such detail as to be able to ascertain the information in the required individual items in the various sections of the Reg either upon direct review or through extension, recomputation, or transcription, and the employer is preserving the data for the periods specified. The use of symbols (such as checkmarks to indicate a regular day's work) in lieu of showing the hours worked as numerals is acceptable, provided there is a key to the symbols which will permit a determination of the time actually recorded as hours worked.
- (b) The CO may require an employer to make extensions, recomputations, or transcriptions of records as provided in Reg 516.8 if determination of the employer's compliance status through direct review of the records is impracticable. Great care must be exercised to avoid making unreasonable demands under the regulations.

30a06 Posting requirements.

The R/K regulations under FLSA, MSPA, and the government contracts programs require the posting of a poster at the establishment or jobsite which summarizes the laws' basic requirements. If such a poster is not in place, the CO shall charge a recordkeeping violation and instruct the employer to correct the situation.

30a07 Photographically reproduced posters.

- (a) An ARA may approve a request from an employer to post posters photographically reproduced in a reasonable and moderate size, provided there is no attempt to evade the posting requirements and the reproductions are of such size and so placed as to be read easily by the employees.
- (b) If there is doubt as to whether a particular photographic reproduction of a particular poster meets the foregoing requirements, the ARA shall submit the reproduction to the NO for advice.

30a08 Modification of FLSA poster.

Any employer of employees to whom section 7 of FLSA does not apply because of a total establishment exemption from that section may alter or modify the FLSA poster so as to show that the OT provisions do not apply to employees in the establishment. This may be done by appending a note to that effect or by superimposing such a notation by a stamp or other means across that part of the poster which pertains to the statutory OT requirements.

For example, in the case of railroad employees, the notation may be worded as follows:

"OVERTIME PROVISION NOT APPLICABLE TO RAILROAD EMPLOYEES"(Sec 13(b)(2).)"

30a09 Joint employers of an employee

In cases where two or more employers are joint employers of an employee, the employer who actually pays the employee the monies intended as compensation for hours of employment is considered responsible for the keeping of records required by the Reg. and is treated as the one who has the primary duty of compliance as to such hours of employment. Where each employer makes direct payment to the employee, the employer being investigated may be deemed to be the one having the primary duty of compliance.

30b MINIMUM WAGE

30b00 FLSA MW.

- (a) The FLSA MW rate is \$3.35 per hour, effective 1/1/81.

30b01 Monthly salary equivalents.

- (a) Since the number of regularly scheduled work hours may be greater in long months than in short months, the strict allocation of a regular monthly salary to the hours worked within each month may result in a technical MW violation in the longer months. However, for enforcement purposes, a regular monthly salary of \$580.67 shall be considered as equivalent to a weekly wage of \$134.00 and accepted as compliance with the \$3.35 MW requirement if it is compensation for 40 hours of work or less in the w/w. If the employer rounds out this amount to not more than \$585.00 per month, this will not affect the regular rate (i.e., \$3.35) for OT purposes.
- (b) Where an employee is paid a salary for a period in excess of a w/w (for example, on a monthly or semi-monthly basis) and works an alternating schedule of fixed w/w's, and an equal allocation of the salary would result in payment of less than the MW for the long w/w's, there will be compliance with the MW provisions of FLSA provided:
- (1) the salary is sufficient to meet the MW requirements for all hours worked during the pay period; and
 - (2) there is an agreement or understanding between the parties that a larger portion of the salary is to be allocated to the longer w/w's. The employer shall be advised that the firm's records should properly reflect the allocation of the salary on a w/w basis.

30b02 Minimum rate of pay for non-OT weeks.

In non-OT w/w's or in w/w's in which the OT provisions do not apply, an employee subject to section 6 of FLSA is considered to be paid in compliance if the overall earnings for the w/w equal or exceed the amount due at the applicable MW. This is true regardless of whether the employee is paid on the basis of a single hourly rate, different hourly rates, commissions, certain bonuses, or some combination of these methods. In other words, if the employee's total earnings for the w/w (including certain bonuses such as a production bonus - see FOH 30b07) divided by compensable hours equals or exceeds the applicable MW, the employee has been paid in compliance with Sec 6. These principles will also apply where an employee is not compensated for time which is compensable under FLSA. For example, if an employee subject to the \$3.35 MW during a w/w is paid for 32 hours at \$5.50 per hour and is paid at a lesser rate or nothing at all for 8 or fewer additional hours worked, this individual is considered to have been paid in compliance with Sec 6. The WH position regarding proper payment in w/w's where OT is due is set out in 32j02.

30b03 Regular rate of pay for OT weeks.

- (a) The principles in FOH 32j02 shall be followed in determining compensation due employees in OT w/w's.

30b04 Time of payment.

Payment of both MW and OT compensation due an employee must ordinarily be made at the regular payday for the w/w or, when the pay period covers more than a single week, at the regular payday for the period in which the particular w/w ends. However, when it is not possible, prior to preparing the payroll, to ascertain the number of OT hours worked by an employee in the last w/w of the pay period, the requirements of FLSA/PCA/SCA/CWHSSA will be satisfied if the employer pays the OT compensation as soon after the regular payday as is practicable. Such a payment should not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for the payment of the amounts due, but, in any event, not later than the next payday after such computation can be made.

30b05 Employee compensated on a commission basis.

- (a) Many employers, especially in retail enterprises, compensate certain employees wholly or in part on a commission basis. The methods of computation and payment involving commissions vary widely (see IB 779.413) and the determination of MW/OT compliance must be made on the facts of each case. The general principles (except in circumstances where Sec 7(i) is applicable) are as follows:
- (b) If an employee paid wholly or in part on a commission basis is subject to OT, the principles set out in IB 778.117 - 778.122 shall be followed.
- (c) If an employee paid on a commission basis is exempt from OT, such as salespersons referred to in Sec 13(b)(10) of FLSA, the following shall be used in determining whether the employee is paid in compliance with MW requirements:
- (1) There is no requirement that wages be paid weekly, as long as some regular pay period (such as biweekly or monthly) is established by the employer. The only requirement is that employees receive "prompt payment" of the MW covering all hours worked during the pay period.
 - (2) A "settlement period" does not have to coincide with the regular pay period. However, in the absence of strong evidence to the contrary, it must be assumed that an employer intended that a settlement period for commissions represents the pay period for the affected employees. Where a pay (settlement) period exceeds one month, the facts should be developed and the issue submitted to the NO (Attn: AA/OPO) since the bona fides of the pay (settlement) period raise serious questions as to the validity of the pay arrangement.

- (3) Periodic draws against commission earnings within the pay (settlement) period need not equal the MW. Employers may credit these draw or guarantee payments against their MW obligation when settling out the amount due employees at the end of the pay (settlement) period. The following examples illustrate this principle. Assume a 4-week month and that a commission salesperson exempt from OT works 50 hours a week ($50 \times \$3.35 = \167.50):
- a. The employer has established payment of a weekly draw against commissions and a monthly pay (settlement) period. The salesperson draws \$125 a week against earned commissions. By the pay (settlement) date, the commission salesperson has earned \$950 in commissions. The employer pays the salesperson \$450 ($\$950 - \500 previously paid by weekly draw). This commission salesperson has been paid in compliance with the monetary requirements of FLSA by being paid at least the MW for all hours of work during the pay (settlement) period.
 - b. The circumstances are the same as in a. above, but the employer only pays the salesperson \$170 at the end of the pay (settlement) period in order to bring the individual up to the MW and carries the balance of \$280 over, to be paid on the next pay (settlement) period, thus crediting it toward the MW obligation for that subsequent pay (settlement) period. This salesperson has also been paid in compliance with FLSA. Commissions earned but not paid on the next pay (settlement) date which are in excess of the amount required to satisfy MW requirements may be carried forward and applied to the MW on subsequent pay (settlement) dates.
 - c. The circumstances are the same as in a. above, except that the salesperson has earned only \$500 in commissions and is paid an additional \$170 at the end of the pay (settlement) period to meet the total MW ($\$3.35 \times 200 = \670) due for the hours worked during that month or pay period. At the end of the following month, the salesperson has earned \$1,000 in commissions. The employer deducts from this amount the \$170 that was paid the previous month to bring the employee up to the MW. The employer pays the salesperson \$670 ($\3.35×200) and carries the remaining \$160 into the next month. This salesperson has also been paid in compliance with FLSA. If the employer pays an additional amount (\$170 the first month) to satisfy the MW, this amount may be recovered from excess commissions earned but not paid in subsequent pay (settlement) periods. Similarly, commissions earned but not paid in a given pay (settlement) period which are in excess of the amount required to satisfy MW requirements may be carried forward and applied to the MW on subsequent pay (settlement) dates.

- d. A salesperson is paid four weekly draws of \$150 each for a total of \$600 for the monthly pay (settlement) period. At the end of the month, the salesperson's commission earnings total \$1,000. The employer deducts the \$600 in draws from this amount and pays the remainder (or excess) of \$400 to the salesperson. The following month, the salesperson is paid \$600 in draws and earns no commissions. To meet the MW obligation for the salesperson, the employer applies \$70 from the \$400 excess earned and paid the previous month. This practice is not in compliance with the requirements of FLSA. Any part of a commission that is actually paid to the employee may not be carried forward as a credit into subsequent pay (settlement) periods.
- e. Assume the same 50-hour week and that the employer has definitely established a weekly pay period and has a monthly settlement period. The salesperson draws \$150 a week against earned commissions. This salesperson has not been paid in compliance with FLSA since this individual is not receiving the MW for all hours worked in the pay period (50 x \$3.35 = \$167.50).

(Note: In example "e", the pay period is one week; in example "a", the pay period is one month.)

30b06 Payment of MW to seamen on American vessels.

- (a) Section 6(a)(4) of FLSA permits an employer to calculate wages for seamen on the basis of a period longer than a w/w. For example, wages for such employees may be calculated over a longer period, such as for the entire voyage, on a monthly basis, or, in appropriate cases, on a yearly basis. In those cases where wages are calculated on other than a weekly basis, it is the responsibility of the employer to demonstrate that a pay period of such duration is in accordance with the established custom of the industry. In addition, the employee must receive wages at not less than a rate which will provide, for the period covered by the wage payments, wages equal to the MW for all hours during such period when the employee is on duty. Thus, if a seaman is paid a monthly salary, the total hours worked in the month, divided into the salary, must yield at least the MW, regardless of the varying number of hours worked during the weeks in the month. The same principle would apply if the wages were computed on the basis of an entire voyage or on a yearly basis.
- (b) It is the custom of some employers in the maritime industry to pay by the month or by the voyage but, for the convenience of the employees, to make two or more partial payments rather than a single payment covering the period involved. For example, monthly compensation may be disbursed in two partial payments (semi-monthly), or partial payments may be made weekly on the basis of 1/52nd of the annual pay derived by multiplying 12 times the monthly salary. Such arrangements do not affect the principles stated in (a) above.

30b07 Crediting a bonus or other payments to a MW deficiency.

- (a) A bonus or other payment which would not be considered a part of the regular rate may not be offset against the MW due under FLSA. However, where such payments would be considered a part of the regular rate, they are included with other wages for purposes of determining compliance with the MW provisions of FLSA. (See IB 778.208 - 209.)
- (b) Situations may be encountered where the wages paid on the regular payday are not sufficient to satisfy the MW, but the employee at some subsequent date is paid additional wages (for example, a production bonus) for those w/w's included in the bonus payment period. When the additional wages are added to the wages paid on the regular payday, the results are either that the employee has received not less than the MW for each hour worked during that week or that the amount of the MW deficiency has been reduced. In such situations, a monetary violation of the MW provisions exists since payment of not less than the MW required by FLSA must be made on the regular payday for each w/w (see FOH 30b04). However, where the additional wages for a particular w/w have actually been paid prior to the investigation, and they are sufficient to bring the employee's wages up to the MW for each hour worked during that week, no MW violation shall be reported for that w/w. If such additional wages paid prior to the investigation are not sufficient to bring the employee's earnings up to the MW for each hour worked during that week, the amount of the remaining MW deficiency shall be computed and reported. The employer shall be advised that no less than the MW must be paid on each regular payday and the employer's assurance of future compliance shall be obtained.

30b08 Certain subsistence allowances not to be considered wages.

- (a) Governmental subsistence allowances to veterans for vocational training or to disabled handicapped veterans, as well as allowances furnished by a State to civilians for rehabilitation, are not considered wages and may not be used by the employer to offset wages which the employee is entitled to receive under the law.
- (b) No part of a veteran's basic pension award or other grants made by the Veterans Administration during a veteran's training period may be considered as wages paid by the employer.

30b09 (Reserved.)

30b10 State or Territorial MW higher than Federal MW.

- (a) If no OT has been worked in a w/w, no attempt shall be made to enforce a State or Territorial minimum wage which is in excess of that provided in Acts enforced by WH. However, the appropriate authorities shall be notified of the underpayment.

- (b) Should OT have been worked, the regular rate of pay cannot be lower than the applicable State, Territorial, or Federal minimum, whichever is higher. (See FOH 32j01.)

30b11 PCA MW.

All covered employees performing work on a contract which is subject to PCA must be paid the MW of at least \$3.35 per hour for all hours spent in such contract work. (See Reg 41 CFR Part 50-202.2.)

30b12 Annual salary earned in shorter period - MW.

Certain employment, such as that in schools, does not normally constitute 12 months of actual work each year. For the convenience of the employee, the annual salary earned during the duty months is often paid in equal monthly installments throughout the entire year. In determining whether the statutory MW has been paid in such cases, the annual salary is considered in relation to the duty months rather than in relation to the entire year. Thus, for example, a school bus driver may receive an annual salary of \$6,000 for 10 months' duty but be paid twelve equal monthly installments of \$500 each. In such case, the employee is considered as being paid at the salary rate of \$600 per month or \$138.46 per week. Compliance with the statutory MW is determined in the usual manner based on this weekly salary. (See FOH 22b11 and 32b08.)

30b13 MW rate applicable to public agency employees.

Individuals employed by a public agency are subject to the FLSA MW standard, including Federal non-appropriated fund employees who are subject to Sec 6(a)(1) pursuant to Sec 18 of FLSA. WH has no authority under FLSA for the enforcement of the provisions of Sec 18; such matters are within the authority of the Office of Personnel Management. Section 5341 of Title 5 of the U.S Code requires the Sec 6(a)(1) rate for prevailing rate system (so called "blue collar" or Wage Board) Federal employees.

30b14 Minimum rates due domestic service employees.

- (a) Domestic service employees are within FLSA coverage by virtue of Sec 6(f).
- (b) Under Sec 6(f)(1), an employee must receive cash wages of at least \$50 in a calendar quarter from a single employer; for purposes of this test only, cash wages received from a single employer are counted.
- (c) Pursuant to Sec 3(m) and Reg 531, the reasonable cost to an employer of board, lodging, or other facilities customarily furnished to employees is considered part of wages for purposes of FLSA.

- (d) Employers are responsible for determining whether persons they employ in domestic service are covered under FLSA, that is, whether they work more than 8 hours per week in the aggregate for one or more employers, or whether they have sufficient earnings to qualify. This may require asking the employee about domestic service with other employers.

30b15 MW under Sec 7(k) - work period.

The work period chosen pursuant to Sec 7(k) (see Reg 553.230), rather than the w/w, is to be treated as the unit for MW purposes. The employee's total compensation for the work period is divided by the total number of hours worked in the work period to determine compliance with the MW provisions of FLSA, notwithstanding that in particular days or weeks within the work period the employee's earnings do not yield the MW for such shorter periods.

30c PAYMENT OF WAGES

30c00 Method of payment.

- (a) Wages may take the form of cash or facilities as defined in Reg 531. An employer who claims furnished facilities (meals, lodging, or other) as wages must maintain the records required in Reg 516.27.
- (b) The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.

30c01 "Facilities" furnished under Sec 3(m).

- (a) Section 3(m) of FLSA permits an employer, under conditions specified in Reg 531, to count toward its MW obligation, the "reasonable cost" of furnishing board, lodging, or other facilities which are customarily furnished to employees. Sec 3(m) also authorizes the Secretary to determine the "fair value" of the board, lodging, or other facilities based upon average cost to the employer or to groups of employers similarly situated, or on the average value to groups of employees. Where "reasonable cost" under Sec 3(m) has been established by an employer and appears to be excessive in relation to the facilities furnished, it will be necessary to ascertain whether the "fair value" of the facilities in question is lower than the "reasonable cost". If so, the employer must use the "fair value" rather than the "reasonable cost" in determining its wage obligation. In no case will the "fair value" be utilized where it is greater than the "reasonable cost".
- (b) The cost of board, lodging, or other facilities shall not be included as wages to the extent excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee. In most cases, a determination whether such an exclusion exists will be based upon the written provisions of the collective bargaining agreement.
- (c) Employees must receive the benefit of the facility for which the employer is taking a wage credit. Moreover, the reasonable cost to the employer of furnishing board, lodging, or other facilities (or the fair value thereof) must be included in the employee's R/R of pay for the purpose of computing OT pay.

30c02 Customarily furnished.

- (a) The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily furnished" to the employee. This requirement is satisfied if either the facilities are furnished regularly by the employer to its employees or if

the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities. However, "customarily furnished" does not require establishing an industry-wide practice with regard to charges being made for facilities furnished to employees.

- (b) Facilities furnished in violation of any Federal, State, or local law, ordinance, or prohibition will not be considered facilities customarily furnished, (e.g. housing that has been denied an occupancy permit, or which, after inspection, results in MSPA/CMPs). Any question as to whether facilities are furnished in violation of any law should be referred to the AA/OPO for resolution. Any such referral should include a detailed discussion of the facts and a copy of the applicable law.

30c03 Primarily for the benefit of the employee.

- (a) The crediting by an employer of facilities furnished to employees as wages will depend on whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by WH. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:

(1) Meals

Meals furnished by the employer are regarded as primarily for the benefit and convenience of the employees. This rule does not apply, however, to the meal expenses incurred by an employee while traveling away from home on the employer's business. (See IB 778.217(b)(3).)

(2) Lodging

Lodging, like meals, is ordinarily considered for the benefit and convenience of the employee. Circumstances may exist, however, where housing is of little benefit to employees, as where an employer requires an employee to live on the employer's premises to meet some need of the employer, or where the employee must travel away from home to further the employer's business. In such circumstances, the housing will be considered as primarily benefiting the employer. (Note: while it may be to the employer's advantage to provide such facilities at or near the worksite, courts have consistently taken the view that the employer may take a wage credit when the facilities are primarily for the benefit or convenience of the employee.)

(3) Transportation

- a. Transportation furnished employees between their homes and work (i.e. normal, daily home-to-work travel) where the travel time does not constitute hours worked is generally an "other facility." However, transportation which is an incident of or necessary to the employment is not an "other facility." (See FOH 30c13 regarding transportation of migrant and seasonal agricultural workers.)
- b. Transportation furnished for normal home to work travel from a voluntary assembly point to a job site and vice versa where the time does not constitute hours of work and the transportation is primarily for the benefit of the employees is an "other facility." In contrast, travel to distant or remote job sites is normally for the employer's benefit and does not qualify as an "other facility."
- c. Cars furnished by an employer to employees primarily for the personal transportation use of the employees and not primarily for company business are "facilities" for which a wage credit may be claimed by the employer. (See FOH 30c11 regarding demonstrators used by automobile salespersons.)

(4) Merchandise

Goods or merchandise, such as clothing and appliances, may be considered "other facilities" under Sec 3(m) and Reg 531. Only the actual cost to the employer (not necessarily the retail cost) may be taken as a wage credit.

(5) Tuition expenses

Tuition furnished to an employee for courses or training for the individual's own personal benefit is a bona fide "facility" for which a wage credit may be taken, unless the training is related to employment or is required to retain employment.

(6) Child care

Child care facilities which are furnished by an employer are bona fide "facilities" for which a wage credit may be taken.

30c04 Primarily for the benefit of the employer.

The following are examples of items not considered bona fide "other facilities" under Sec 3(m) and Reg 531, because they are provided primarily for the benefit or convenience of the employer:

1. Electric power used for commercial production in the interest of the employer.
2. Telephones used for business purposes.
3. Taxes and insurance on the employer's building which is not used as lodging furnished to the employees.
4. Medical services and hospitalization which the employer is obligated to furnish under workers' compensation laws or similar Federal, State or local laws.
5. Rental of uniforms where the wearing of a uniform is required by law, the employer, or by the nature of the work.
6. Business-related travel expenses. (See IB 778.217.)
7. Necessary tools or uniforms used in the employee's work.

30c05 Reasonable cost of facilities.

- (a) "Reasonable cost" cannot exceed the actual cost to the employer. In deciding whether wage credits for facilities are in amounts permissible under Sec 3(m) and Reg 531, experience and judgment must be used by COs and ADs. It should be kept in mind that the test in Reg 531.3 is "reasonable cost" rather than market value or comparable prices. "Reasonable cost" does not include a profit to the employer. The cost of furnishing lodging and/or other facilities must be established based upon available records. The employer has the burden of establishing such cost and must maintain adequate records to support a determination, as required by Reg 516.27. Bills, purchase orders, and cash register tapes may be appropriate for such purpose. A comparison of wage credits for comparable facilities furnished by other employers in the area may also provide guidance.
- (b) The method used by an employer for determining "reasonable cost" must be based on good accounting practices. Good accounting practices do not include accounting practices which are not accepted by the Internal Revenue Service.
- (c) Furthermore, an employer may not take a credit where no cost is incurred. For example, when a meal is made available to an employee, but is not consumed, and subsequently is retained in the employer's inventory for service to customers, no credit may be taken.

30c06 Examples of determining reasonable cost.(a) Meals - Food service establishments

- (1) The "reasonable cost" of meals furnished by a food service establishment to its employees includes only the actual cost to the employer of the food, its preparation, and related supplies. Salary or wage costs, as distinguished from material or supply costs, may be claimed only to the extent that such salary or wage costs are shown to be directly attributable to the cost of providing meals to employees. If food preparation/serving employees of a food service establishment would be paid the same rate of pay even if meals were not provided to the employees of the establishment, their wage costs cannot be included in determining reasonable cost. Conversely, if it were necessary to hire extra personnel or pay higher wages to existing employees in order for them to assist in furnishing meals to employees, such extra expense would be a legitimate cost which could be included in determining the "reasonable cost" of meals.
- (2) Costs which a food service employer incurs regardless of whether the employees were furnished meals may not be included in determining the "reasonable cost." In a food service establishment, items such as employee insurance, payroll taxes, menus, decorations, other operating supplies, laundry, telephone, maintenance services, advertising and promotion, building and equipment rental, licenses and taxes, insurance and depreciation, franchise cost, and general administrative costs are a part of the overall cost of the operation of the employer's business establishment which may not be charged to the reasonable cost of employees' meals.

(b) Meals - Non food service establishments

Determination of the "reasonable cost" of meals furnished to employees of an establishment which is not a food service establishment involve different criteria for expenses for which an employer may take credit. For example, where meals are provided to employees of a non food-service establishment by a catering service and there are no special facilities wherein meals are consumed, the actual cost of the catering service, assuming no rebate to the employer, would be the "reasonable cost." In more complex situations where dining areas are provided, the factors discussed in (a) above must be considered in making a determination of the "reasonable cost" of meals furnished to employees of a non food-service establishment.

(c) Lodging

Employers taking credit for housing as part of wages must show that the amounts charged are not more than the actual cost to the employer. (See Reg 531.3(a).) However, if the actual cost of providing lodging is more than its established rental value, the rental value shall be deemed to be the reasonable cost of lodging. (See FOH 30c07.) The actual cost to the employer generally involves the following factors:

(1) Adequate Depreciation.

Reg 531.3(c) allows an employer to include "adequate depreciation" as an element of cost. Depreciation is a concept primarily used in and extensively regulated under the tax laws. Depreciation is applicable to certain capital goods (e.g. buildings, vehicles, machines, etc.). It is never applicable to land. For purposes of Reg 531 "adequate depreciation" is not more than the amount of depreciation actually claimed and allowed under the tax laws for the property in question for the period in question. It should be noted that the amount of depreciation allowable on any property may vary from year to year. If the employer declines to provide tax returns or similar evidence as to the claim and allowance of depreciation under the tax laws, no allowance will be made under Reg 531.3(c).

- a. For tax purposes, depreciation might be claimed under several line items for property involved in the furnishing of a facility. For example, an employer furnishing lodging might properly claim the depreciation of the building at one place; the depreciation of the beds at another; and the depreciation of linens at another. The addition of several such items of depreciation could be appropriate. Similarly, an employer might claim, in a single line item, depreciation on a greater piece of property than is involved in furnishing the facility in question. For example, the owner of a 20 unit motel who furnishes one unit for the lodging of an employee might claim depreciation on the entire motel building as a single line item. Under these circumstances, pro rata allocation of the claimed depreciation would be required. In the example, assuming no complications (e.g. no part of building used for other purposes; all units equal size, etc.), the allowable depreciation would be $1/20 = 5$ percent of the total depreciation taken.
- b. For tax purposes, depreciation is claimed by the year and can be prorated as appropriate.

(2) Capital Invested.

The computation of "a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer" (as referred to in Reg 531.3(c)) is made as follows:

Step 1: An amount, V, represents the total depreciable value of the property to the employer. (See (1) above. This number is not derived from or necessarily related to "fair market value".) Ordinarily, this will be the purchase price plus the cost of capital improvements. It should be noted that no part of the cost of land is included.

Step 2: Compute the amount, A, by which the depreciable value, V, exceeds the depreciation already taken (or which might have been taken) as a tax deduction (i.e., subtract total allowable depreciation to date from V, the result is A.) This number is required to be reported on the employer's tax returns. If the employer declines to make tax returns available for verification, then A shall be deemed to be zero. If $A = 0$, no further computation is required; the allowance for this part is zero.

Step 3: Determine the amount, E, of the employer's equity in V. This would ordinarily be the sum of the down payment, portions of mortgage payments applied toward principal, and the cash contribution toward any capital improvements included in V.

Step 4: Compute (E/V) times (A). Conceptually, this is the portion of the equity which has not been "returned" to the employer through depreciation. A "reasonable allowance", i.e., a "return on investment" of up to 5 1/2 percent of this number, may be included in the employer's cost.

(d) Cost of operation

- (1) Annual costs of operation incurred in furnishing lodging facilities must be considered in making "reasonable cost" determinations: these include interest on loans to purchase, maintain, or improve the lodging facility, taxes, repairs and maintenance, insurance, and utilities (electricity, water, sewers, garbage collection, fuel oil, and so forth.) Repair and maintenance expenses refer to the costs which are not included under capital improvements. Only the portion of those costs which are directly related to the lodging facility used by the employee(s) may be taken into account in determining the actual cost of providing the lodging. As an example, the cost of property insurance should be prorated in proportion to the space of the lodging actually used by the employee(s).
- (2) When the employer leases a property from another person, the amount of rent paid by the employer to the other person is considered part of the "reasonable cost" provided that the rent charged provides no profit for the employer, directly or indirectly. As an example, if an employer pays a higher rental charge with the promise of a rebate from the property owner as an encouragement to lease certain lodging facilities, such higher rent payment may not be used as a component of the "reasonable cost" for leasing the lodging facilities. The allowable "reasonable cost" amount would be the rent paid by the employer minus the amount of rebate promised and received by the employer from the property owner.

- (3) When determining the weekly "reasonable cost" of a lodging facility which may be claimed as a wage credit, the sum of the annual costs (as determined in (1) and (2) above) is divided by the number of weeks during which the lodging facility is used for occupancy. Where the facility is used for other purposes, in addition to lodging, the annual cost is first prorated among the uses. Once the weekly "reasonable cost" amount has been determined, it should be divided by the actual number of occupants in the lodging facility where each is provided an equal amount of living area. However, if the living areas within the lodging facility are not equal in size, the weekly "reasonable cost" amount should be divided by the square feet of the dwelling. The wage credit which may be claimed per employee in such cases shall be based upon the number of square feet occupied by the employee and /or that individual's family.

30c07 Fair value of facilities.

In those cases where cost to the employer is not a true measure of the value of the facilities to the employees, it may be appropriate to apply the "fair value" provisions of Sec 3(m). "Fair value" is not synonymous with "reasonable cost." The "fair value" of a facility allowable under Sec 3(m) as wages may be utilized in lieu of the actual measure of cost in determining the wages paid to any employee. Such a determination is authorized for defined classes of employees and in defined areas based on average cost or average value. To obtain a determination of "fair value", the facts specified in Reg 531.4 and 531.5 should be obtained and the issues submitted to the AA/OPO.

30c08 Formal determinations of "reasonable cost" and "fair value" of facilities.

Regs 531.4 and 531.5 set forth the procedures to be followed in making a formal determination of "reasonable cost" or "fair value" as these terms are used in Sec 3(m), whether initiated by the Adm or any interested person. When such a request is made, the petitioner should be informed of the procedures and instructed to forward the request and required information to the Adm.

30c09 Facilities - voluntary and uncoerced.

- (a) An employer may credit against cash wages owed employees the lesser of "reasonable cost" or "fair value", in accordance with Reg 531 and the principles in FOH 30c01 - 30c08, of facilities regularly provided to employees.

- (b) Reg 531.30 provides that an employee's acceptance of facilities must be "voluntary and uncoerced." The "voluntary and uncoerced" provision has been rejected in several court of appeals and district court decisions regarding meals provided to employees. WH no longer enforces the "voluntary" provision with respect to meals. Therefore, where an employee is required to accept a meal provided by the employer as a condition of employment, WH will take no enforcement action, provided that the employer takes credit for no more than the actual cost incurred. (See FOH 30c05 and 30c06).

30c10 Voluntary assignment of wages, loans, and advances.

- (a) Although sums paid by an employer under voluntary assignment of an employee to a third party for the benefit of the employee are not bona fide "facilities", they may be deducted from the employee's wages provided the employer does not directly or indirectly benefit. Deductions for "administrative" or "bookkeeping expenses" incurred by the employer in connection with such payments, however, are illegal to the extent that they cut into the MW or OT pay due under FLSA.
- (b) While loans and cash advances made by an employer are not "facilities" the principal may be deducted from the employee's wages even where such a deduction cuts into the MW or OT due under FLSA. Deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the MW or OT pay. The existence of the loan or advance shall be verified to the extent possible.
- (c) In the situation where an employee is granted vacation pay prior to that individual's anniversary date, or the established date of entitlement, with the understanding that such pay constitutes an advance of pay and the employee quits or is terminated before the entitlement date, the employer may recoup the advanced vacation pay, even where such recoupment cuts into the MW or OT pay required under FLSA.

30c11 Demonstrators - automobile salespersons.

Transportation which the employer provides to an employee is not furnished as a "facility" for purposes of Sec 3(m) if it is an incident of and necessary to the employment or if the transportation is furnished for travel by the employee which constitutes hours worked compensable under FLSA (Reg 531.32(a) and (c).) Demonstrators which are provided to automobile salespersons for their personal use as a form of advertising are not primarily for the benefit of employees and do not constitute wages under FLSA. This is true notwithstanding the fact that IRS may require employers to treat as taxable income any portion of the benefit received by the employee.

30c12 Cost of furnishing and maintaining uniforms.(a) Where uniforms are required by law, employer, or type of work

If the wearing of clean uniforms is required by law, by the employer, or by the nature of the work, the financial burden of furnishing or maintaining these clean uniforms may not be imposed upon the employees if to do so would reduce their wages below the MW (see Reg 531.3(d)(2), 531.32(c) and 531.35).

(b) Cost of and time spent in maintaining uniforms

- (1) Where employee uniforms require ironing, drycleaning, daily washing, commercial laundering, or other special treatment, because of heavy soiling in work usage or in order to meet cleanliness or appearance standards set by law, by an employer, or by the nature of the work, the employees must, absent documentation of the greater or lesser cost, be reimbursed for uniform maintenance costs which reduce their wages below the MW in accordance with the amounts set forth in (b)(3) below.
- (2) However, in those instances where uniforms are (a) made of "wash and wear" materials, (b) may be routinely washed and dried with other personal garments, and (c) do not require ironing or any other special treatment such as drycleaning, daily washing, or commercial laundering, WH will not require that employees be reimbursed for uniform maintenance costs. This position is not applicable where daily washing is required and the employer furnishes or reimburses the employee for a single uniform.
- (3) For enforcement purposes, WH will accept the payment to the employee of \$3.35 per week or 67 cents per day as satisfying this requirement.
- (4) Since the uniform cost would presumably be the same for any day, regardless of the number of hours worked, allocating this cost on an hourly basis should be avoided except as in (d)(2) below. However, if an employer pays on a "cents-per-hour" basis, no monetary violation will exist if the employees receive the full daily and/or weekly amounts in each w/w as indicated in (3) above.
- (5) Where this enforcement position is followed, the time spent in washing uniforms will not be considered hours worked for either MW or OT pay purposes.
- (6) Employers or employees are free to establish actual costs, as indicated in (d) below.

(c) Employee chooses not to use employer's free laundry service

Where an employer gives notice to employees that the employer will launder or clean all uniforms required to be worn by employees, free of any charge, and all or some employees elect not to avail themselves of such service, the employer will not be required to reimburse the employees for expenses incurred by them for laundering or cleaning their uniforms on their own.

(d) Other standards for determination of cost

- (1) The enforcement position in (b)(3) above does not prohibit the determination of the cost of laundering or maintaining uniforms from being made on some other basis, so long as the actual cost does not cut into required MW or OT compensation. For example, where an employer contracts with a laundry or rental service and in turn charges the employees or requires the employees to bear the cost directly, the actual cost may be used if reasonable.
- (2) Similarly, where a specific amount has been negotiated under a bona fide collective bargaining agreement (e.g., 5c for each hour worked), this amount may be used, if reasonable.
- (3) Where the employer does not use the flat daily or weekly basis set forth in subsec (b)(3) above, it is essential that the CO determine and document in the case file the actual cost incurred by the employee.
- (4) In preparing a case for settlement or for litigation, the enforcement position in subsec (b)(3) cannot be relied upon as a basis for action where the employer uses another basis for reimbursing employees for uniform maintenance expenses.

(e) Cost of purchasing and repurchasing uniforms

- (1) When an employee is required to purchase a uniform, the employee must be reimbursed for the cost of the uniform to the extent that the expense cuts into the MW or OT compensation required by FLSA/PCA/SCA/CWHSSA.
- (2) This reimbursement must be made promptly on the regular payday for the w/w in which the expense was incurred and may not be spread over the life of the garment.
- (3) Further, employers may not avoid such costs by requiring employees to obtain uniforms before starting the job. In such a case, the cost of the uniform is, in effect, an advance of an expense that must be borne by the employer.

(4) On the other hand, where an employee already has a uniform which has been paid for by the firm, and the employee is paid at least the MW and proper OT and there is a clear understanding between the employer and the employee that so much per hour will be paid in addition to the MW for the sole purpose of replacing an existing uniform, and, in fact, the amount so paid is sufficient to purchase replacement uniforms when worn out or no longer serviceable, no violation would occur.

(f) Definition of "uniforms"

(1) Although there are no hard-and-fast rules in determining whether certain types of dress are considered uniforms for purposes of Sec 3(m), the following principles are applicable:

- a. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be uniforms.
- b. On the other hand, where the employer does prescribe a specific type and style of clothing to be worn at work, e.g. where a restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality, such clothing would be considered uniforms.
- c. Other examples would include uniforms required to be worn by guards, cleaning and culinary personnel, and hospital and nursing home personnel.

(g) Employee elects to buy additional uniforms, in excess of number required

Where an employer supplies, free of charge, or reimburses the employees for a sufficient number of uniforms required to be worn, and all or some employees elect to purchase additional uniforms in excess of the number required, the employer will not be required to reimburse the employees for costs incurred in purchasing uniforms in excess of the required number.

(h) For the application of these principles on uniforms under SCA, see FOH 14f01 and Reg 4.168(b).

30c13 Deductions from wages of migrant and seasonal agricultural workers.

- (a) The reasonable cost or fair value of facilities furnished a migrant or seasonal agricultural worker are generally creditable as wages. (However, see FOH 30c03.) Examples of facilities for which deductions or credits are generally permissible include:
- (1) Meals and beverages actually furnished to the worker.
 - (2) Off-the-job insurance authorized by the worker.
 - (3) Canteen articles purchased by the worker, but not cigarettes or alcoholic beverages sold to the worker, if such sales are determined to be unlawful by appropriate local law enforcement authorities. Apparent violations of State or local licensing laws should be referred promptly to the appropriate enforcement authority. (See FOH 52a09, 53g03 and 54: WH-124.) Prior to disallowing a deduction or wage credit based upon action by a State or local authority concerning illegal sales, the matter should be discussed through JRC procedures.
 - (4) Lodging used by a worker, including utility costs, unless required to be provided free of charge pursuant to the employment contract or applicable law. However, no credit may be taken nor may any charge be made where:
 - a. workers are required to live on the premises as a condition of employment or where for other reasons the housing primarily benefits the employer rather than the employee, or
 - b. the housing has been denied an occupancy permit because of failure to meet substantive S & H standards as determined by an inspection by any agency, or
 - c. S & H violations have been found for which MSPA CMPs are being assessed or violations of substantive S & H standards have been found by OSHA, a State, or county agency. If the violations are corrected, a charge may be made or a credit taken for such lodging only during the period of compliance.
- (b) ETA regulations require that workers placed pursuant to a Job Service clearance order who are unable to return daily to their permanent residence must receive housing as a term and condition of their employment. Such workers (and accompanying family members) must receive housing at no cost or public housing which meets the Federal and State standards (20 CFR 653.501(d)(2)(xv)). Where it appears that a deduction has been made or a wage credit taken in apparent violation of ETA regulations, the matter should be reviewed through JRC before disallowing the deduction or wage credit.

- (c) An employer who makes deductions from the wages of workers for board, lodging or other facilities or who furnishes such facilities to workers as additions to wages is required to maintain records substantiating the cost of such facilities in accordance with Reg 516.27.
- (d) In Marshall v. Glassboro Service Association, Inc., the Third Circuit affirmed the district court's judgment that money advanced to farm workers for transportation costs from Puerto Rico to the mainland was primarily for the benefit of the employer and therefore could not be deducted from the workers' wages to the extent it reduced the wages below the statutory minimum. The court similarly upheld the district court's conclusion that FLSA prohibits the employer from taking a wage credit for facilities excluded from wages by the terms of a labor agreement which is the functional equivalent of a collective-bargaining agreement. The U.S. Supreme Court denied review. The Court of Appeals also ruled that, regardless of the manner or method by which the employer sought to pass on to its employees certain transportation costs, where the effect was to bring the wage rate below the statutory minimum, such practice was unlawful.
- (e) It is the WH position that no deduction that cuts into the MW may be made for transportation of migrant workers from the point of hire and return to that point. This is so since in virtually all situations the transportation is primarily for the benefit of the employer and transportation costs are an incident of and necessary to the employment of migrant workers. Where an employer advances money to migrant workers to cover transportation expenses from the point of hire to a worksite, the employer may not recoup such advances when to do so results in a worker receiving less than the statutory MW. Such remains the case even though the transportation costs so recovered are accumulated and subsequently returned to the worker at some specified time during the season or upon the worker's return to the point of hire, after the individual has worked a full season or specified portion thereof. Further, such transportation costs may not be included as part of an employer's cost of furnishing board, lodging, or other facilities.
- (f) Farm labor contractors and agricultural associations often provide daily transportation to both migrant and seasonal farmworkers as an integral part of their business of supplying agricultural workers to those who use their farm labor contracting services. Agricultural employers also transport their own workers under similar circumstances. Such daily transportation is provided to assure that sufficient workers will be available at the required time and place since the workers being transported are needed to work upon perishable commodities. Their availability for employment often depends upon being provided transportation. Where alternative transportation is readily available which the workers are permitted to use (i.e., personal auto or carpool arrangements) and where they know the location of the place where they are to work, the reasonable cost to an employer (or fair value, whichever is less) in providing transportation may be creditable towards wages.

In contrast, where furnishing transportation to workers is primarily for the benefit and convenience of the employer, and is necessary to and an incident of the employment, it is not considered a facility within the meaning of section 3(m). (See Reg 531.32(a) and (c).) Accordingly, it is the WH position that:

- (1) Where the transportation is an incident of and necessary to the employment, it is for the benefit of the employer and no deduction may be made for the transportation of migrant or seasonal farmworkers that cuts into the MW. For example, transportation of migrant or seasonal farmworkers from the pickup point and return to that point, or from the temporary labor camp to the fields or for the return trip is transportation that is an incident of and necessary to the employment.
- (2) Where the transportation is not incidental to the employment, it is for the worker's benefit and deductions may be made which cut into the MW, provided that if such transportation is subject to MSPA it must be furnished in vehicles which meet all substantive Federal and State motor vehicle safety and insurance standards. Transportation which is not incidental to the employment (and thus deductible) includes:
 - a. the transportation of migrant workers to conduct personal business, such as trips from the rural temporary labor camp to a laundry, post office, and grocery store, and
 - b. the daily transportation of migrant and seasonal farmworkers, where alternative transportation is readily available, which the workers have the option to use, and they know where to report to work but choose to use the employer's transportation, provided that the transportation is not required to be furnished by law or regulation.

30c14 Employees' taxes paid by employer may constitute "wages".

- (a) Pursuant to Reg 531.38, taxes which are assessed against an employee and which are collected by the employer and paid to the appropriate government agency may constitute "wages".
- (b) The same principle applies to taxes which, although owed by the employee, are paid by the employer. Thus, an employer may pay an employee's share of social security (FICA) taxes. Such payment constitutes "wages" and may therefore be credited toward the MW and OT requirements.
 - (1) Where an employee receives the MW of \$3.35, the employer and the employee must each make an FICA contribution of 24 cents an hour ($\$3.35 \times .0715 = .2395$). (7.15 percent is the current FICA rate which is, of course, subject to change.)

Example:

Employer pays employee	\$3.11	
Employee pays FICA	<u>.24</u>	
		3.35

Payroll Costs

Employer pays employee	\$3.11
Employee pays FICA	.24
Employer pays FICA	<u>.24</u>
Total payroll costs	3.59

(2) Where the employer pays the employee's FICA contribution, a smaller direct wage payment to the employee would normally be made. Because the amount of the direct payment to the employee is reduced, the employer's FICA obligation, which is a percentage of that amount, would also be reduced. Since the employee and the employer contribute an equal percentage of FICA, the employee's obligation (which the employer is assuming) has also been reduced. By reducing FICA expenses, this practice permits an employer to reduce payroll costs without reducing an employee's net "post-FICA" wages.

a. An employer may pay an employee \$3.13 in direct wages and still meet the MW obligation ($\$3.35 - \3.13)
 1.0715

Example:

Employer pays employee	\$3.13	
Employer pays FICA for employee	<u>.22</u>	
Total wages		3.35

Payroll Costs

Employer pays employee		\$3.13
Employer pays FICA for employee	.22	
Employer pays own FICA		<u>.22</u>
Total payroll costs		3.57

b. Where this practice is utilized, the employee's direct wages and the FICA contribution paid on behalf of the employee by the employer must meet the statutory MW.

c. The same principle is applied when crediting the FICA contributions to OT compensation due. However, FICA contributions paid on the employee's behalf by the employer must be included in the regular rate of pay for OT purposes.

30c15 Car expenses – employee’s use personal car on employer’s business.

In some cases it is necessary to determine the costs involved when employees use their cars on their employer’s business in order to determine MW compliance. For example, car expenses are frequently an issue for delivery drivers employed by pizza or other carry-out type restaurants.

- (a) As an enforcement policy, the Internal Revenue Service (IRS) standard business mileage rate found in IRS Publication 917, “Business Use of a Car” may be used (in lieu of actual costs and associated recordkeeping) to determine or evaluate the employer’s wage payment practices for FLSA purposes. The IRS standard business mileage rate (currently 28 cents per mile) represents depreciation, maintenance and repairs, gasoline (including taxes), oil, insurance, and vehicle registration fees. In situations where the IRS rate changes during the investigation period, the applicable rates should be applied on a pro-rata basis.
- (b) The IRS standard business mileage rate may be used in lieu of actual costs for FLSA purposes whether or not the employee will be able to take a deduction on his or her tax return for the business use of the employee’s car.

30c16 Deductions in non-overtime weeks.

Deductions for articles that do not qualify as “board, lodging, or other facilities” under FLSA section 3(m), such as tools, equipment, cash register shortages, and other similar items, may be made in non-OT workweeks (*i.e.*, weeks of 40 hours or less, and weeks in which statutory OT does not apply) *provided* the employee continues to receive, after the deductions are made, any required MW, free and clear, for all compensable hours worked in the week (*i.e.*, average hourly earnings for the workweek after the deductions are not less than the highest applicable MW enforced by WH). (See Regs 531.35 and 531.36.) Deductions for non-3(m) items that cut into the highest applicable MW enforced by WH are illegal in a non-OT workweek unless the law establishing that MW (*e.g.*, DBRA, SCA, H-2A, H-1B, *etc.*) allows the particular deduction from wages. **NOTE:** If a MSPA contract specifically discloses that the employer will make certain particularized deductions not otherwise prohibited by other law, those deductions would be permitted. For example, if a MSPA-covered employer disclosed a wage rate of \$8.00/hour and fully disclosed in writing at the time of recruitment that \$1.50/hour would be deducted for non-3(m) items, and the deductions are otherwise legal and not prohibited by other applicable laws, then those fully-disclosed deductions are permitted to reduce the hourly wage rate to below the \$8.00/hour contracted “promised wage” (*i.e.*, to \$6.50/hour). Furthermore, various other Federal, State and local laws regulate payment of wages, prohibit or restrict payment of wages in services or facilities, outlaw “kickbacks,” restrain assignments, and otherwise govern the calculation of wages and the frequency and manner of paying them. Nothing in the FLSA or other WH-administered statutes, regulations, or

interpretations overrides or nullifies any higher standards or more-stringent provisions of these other laws. (See Reg 531.26.) (WH enforcement in *non*-OT workweeks is limited to the highest applicable MW enforced by WH, which includes WH-enforced prevailing wages when they apply (*e.g.*, DBRA, SCA, H-1B, *etc.*.) If no OT has been worked in a particular week, WH will not enforce any other State or local MW higher than the highest MW applicable under the laws enforced by WH; the Inv will advise the employer of the apparent violation of such other higher MW standards and notify the appropriate authorities of the employer's deduction policies and possible underpayments that may have occurred. (See FOH 30b10.) Permissible deductions in an OT week are discussed in FOH 32j08.

30d TIPS AND TIPPED EMPLOYEES

30d00 General.

- (a) A "tipped employee", as defined in section 3(t) of FLSA, is any employee engaged in an occupation in which the individual customarily and regularly receives more than \$30.00 a month in tips.
- (b) Section 3(m) of FLSA makes clear the intent of Congress to place on the employer the burden of proving the amount of tips received by "tipped employees", and the amount of tip credit, if any, which the employer may claim. Since Sec 3(m) is not an exemption from the MW, but merely allows the employer to claim up to 40 percent of the MW as tip credit, the employer is responsible for ascertaining that the MW provisions are complied with in compensating "tipped employees".
- (c) (1) The tip provision applies on an individual employee basis. Thus, an employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others.
- (2) In establishments where employees perform a variety of different jobs, an employee's status as one who "customarily and regularly receives tips" will depend on the total fact situation and will be determined on the basis of such employee's activities over the entire w/w.
- (d) When an individual is employed in a tipped occupation and a non-tipped occupation (dual jobs), the tip credit is available only for the hours spent in the tipped occupation. Also, such employee must customarily and regularly receive at least \$30 a month in tips.
- (e) Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

30d01 Retention of tips by employee.

- (a) Pursuant to Sec 3(m), all tips received (i.e., given to or designated for the employee by a patron) by a "tipped employee" must be retained by the employee except to the extent that there is a valid pooling arrangement.

Thus, the effect of the language of Sec 3(m) precludes an agreement between an employer and a "tipped employee" that any part of tips received by such employee belongs to the employer and must be turned over to the employer. Further, the specific language added to Sec 3(m) reinforces the intent of Congress that an employee who receives \$30 per month in tips is a tipped employee and that the employer and employee cannot agree to remove the employee from that status or agree to waive such employee's right to retain all tips received. Such an employee must retain all tips received from customers, whether in cash or through allocation by credit card charges, and in addition must receive remuneration from the employer for at least 60 percent of the applicable MW in the w/w.

(b) Where an employer does not strictly observe the provisions of Sec 3(m), no tip credit may be claimed and the employees are entitled to receive the full cash MW, in addition to any tips they may have received. For example, where an employer does not inform employees of the statutory provision, or pays no wages to employees who receive tips, the full MW in cash is due and no tip credit will be allowed.

(1) Several courts have held that an employer who did not comply with the tip credit provisions of Sec 3(m) was not entitled to take a tip credit on a retroactive basis. For example, an employer who paid no wages (i.e., employees received only tips) was required to pay the full MW to achieve retroactive compliance rather than simply pay 60 percent of the MW as BWs. Similarly, employers who acquired all or a portion of employees' tips were not permitted to take the tip credit and, in addition, were required to restore the tips to the employees.

(2) In the past, in the administrative settlement of investigations which disclosed violations of the tip credit provisions of Sec 3(m), WH permitted employers to achieve retroactive compliance (for example, by restoring tips) and allowed employers to retroactively claim the tip credit. In view of the court decisions, WH will not allow an employer to claim the tip credit on a retroactive basis unless all aspects of Sec 3(m) have been met. (Also see FOH 52n00.)

30d02 Tip credit - SMW.

Special minimum wages authorized under section 14 of FLSA are considered to be the "applicable minimum wage" in determining amounts creditable toward the MW for tips for purposes of Sec 3(m). Thus, for example where an employee is subject to a SMW of \$2.85 per hour, the maximum amount creditable on account of tips would be \$1.14 per hour (40 percent).

30d03 Service charges.

A compulsory service charge (generally noted on the menu) which is added to a customer's bill is not part of the server's (waiters/waitresses) tip income but, rather, is included with the employer's gross receipts. Therefore, the employer has complete discretion in choosing the manner in which the compulsory service charge is used, which would include using it to pay servers and/or server helpers (busboys/busgirls). Where service charges are imposed and the employees receive no tips, the employer must pay the entire MW and OT required by FLSA. If, in addition to service charge income, the servers receive tips from customers, such tip income may be credited toward the MW in the usual manner.

30d04 Tip pooling.

- (a) The requirement that an employee must retain all tips does not preclude tip-splitting or pooling arrangements among employees who customarily and regularly receive tips. The following occupations have been recognized as falling within the eligible category:

- | | |
|------------------------|---|
| (1) waiters/waitresses | (3) counter personnel who serve customers |
| (2) bellhops | (4) busboys/girls (server helpers) |
| | (5) service bartenders |

It is not required that all employees who share in tips must themselves receive tips from customers. The amounts retained by the employees who actually receive the tips, and those given to other pool participants are considered the tips of the individuals who retain them, in applying the provisions of sections 3(m) and 3(t).

- (b) A valid tip-pooling arrangement cannot require employees who actually receive tips to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, WH will not question contributions to a pool where the net amount of tips contributed (after return of any tips from the pool) does not exceed 15 percent of the employee's tips. However, only those tips that are in excess of tips used for tip credit (e.g. where the maximum tip credit is taken, those in excess of 40 percent of the MW) may be taken for a pool. If such requirements are met, it is not necessary that the pooling be voluntarily consented to by the employees involved (notwithstanding Reg 531.54).
- (c) Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements. The following employee occupations would therefore not be eligible to participate:

- | | |
|-----------------|-----------------------------|
| (1) Janitors | (3) Chefs or cooks |
| (2) Dishwashers | (4) Laundry room attendants |

However, it does not appear that the Congress, even in requiring as a general principle that tipped employees retain all their tips, intended to prevent tipped employees from deciding, free from any coercion whatever and outside of any formalized arrangement or as a condition of employment, what to do with their tips, including sharing them with whichever co-workers they please. Tips given to such co-workers as are listed in this subsection may not, however, be used as a tip credit.

- (d) Questions regarding eligibility of employees to share in tip pooling arrangements, and the percentage of tips that the eligible employees are required to contribute to a pool which cannot be answered on the basis of these guidelines should be submitted thru channels to the AA/OPO for resolution. In the case of host/hostesses, head waiters or seater/greeters and other employees not referred to above, facts should be developed showing the practices regarding their sharing of tips in the locality and type of establishment involved.

30d05 Tips charged on credit cards.

- (a) Where tips are charged on credit cards, WH will not question the reduction of the credit card tips paid over to the employee if the amount deducted is no greater than the percentage charged by the credit card company. For example, where a credit card company charges an employer 5 percent on all sales charged to its credit service, the employer may pay the employee 95 percent of the tips without violating FLSA.
- (b) Payment of both MW and OT compensation, including the charged tips, due a "tipped employee" must ordinarily be made at the regular payday for the w/w, or when the pay period covers more than a single w/w, at the regular payday for the period in which the particular w/w ends (see FOH 30b04). The procedures required to process charges made by customers through credit cards may delay actual receipt of the funds by the employer for one or two months. Nevertheless, the employer is required to pay over the charged tips to the employee on the employee's next regular payday.
- (c) In some situations, a credit card transaction is not collected from a credit card company. In such cases, the employer is not required to pay a tipped employee the amount of tips specified on the credit card slip. Of course, this assumes the inability to collect is not a result of the employer's failure to submit the slip for reimbursement, etc.
- (d) The employer may recover from a tipped employee the tip amount stated on the uncollected credit card slip if the tip amount has been paid to the tipped employee. This may be accomplished either by payroll deduction or by out-of-pocket reimbursement by the employee to the employer. Regardless of how effectuated, the recovery of the tips should be accurately documented by the employer. However, the amount of uncollected credit card tips which are recovered by the employer must not reduce the tips retained by the tipped employee for the earlier w/w below the claimed tip credit. The amount of tips to be recovered which would cut into the claimed tip credit is unrecoverable by the employer.

- (e) Where there are tip pools, tip pool recipients are responsible for reimbursing the employer for the share of tips from an uncollected credit card transaction which was allocated into the tip pool. The tipped employee who contributed to the tip pool cannot be held accountable for tips which are not in the individual's possession.

30d06 Comparison of State and Federal tip credit provisions.

- (a) Where FLSA and a State law regulating the amount of tip credit that may be taken by an employer are concurrently applicable, neither law preempts the other. Each law must be applied separately and the provision of the law which requires the higher cash wage payment is the standard that must be complied with in order to determine the legal tip credit that may be taken by the employer. In the following example, the FLSA MW of not less than \$3.35 per hour is controlling and the State cash wage requirement of \$2.25 per hour must be complied with.

	<u>State</u>	<u>Federal</u>
Minimum wage	\$3.00	\$3.35
Tip credit allowable	<u>x .25</u>	<u>x .40</u>
Tip credit	\$0.75	\$1.34*
Minimum wage	\$3.00	\$3.35
Less: tip credit	<u>- .75</u>	<u>-1.34</u>
Cash wage required	\$2.25	\$2.01

* Section 3(m) limits the tip credit to no more than 40 percent of the FLSA MW.

- (b) The difference between the FLSA MW and the cash wage payment required by State law of \$1.10 per hour (\$3.35 - \$2.25) may be credited toward the tip credit allowed under Federal law, provided that the employee earns not less than \$1.10 per hour in tips.
- (c) In a situation where a State law requires a MW of \$2.50 per hour and forbids any tip credit and the Federal MW is \$3.35 per hour, the employer may take a tip credit of 85 cents per hour (\$3.35 - \$2.50) where the employee earns not less than 85 cents per hour in tips.
- (d) In a situation where a State MW is greater than the Federal MW, the tip credit allowable under Sec 3(m) is limited to a maximum of 40 percent of the Federal MW, i.e., \$1.34 per hour.

30d07 Changing amount of tip credit in OT hours.

- (a) An employer may not take a different tip credit during OT hours than is taken during non-OT hours. To so allow would conflict with the purposes of the OT provisions of FLSA.

- (b) For example, in the case of an employee paid the MW, if an employer took no tip credit during the first 40 hours in the w/w but took a full tip credit for the OT hours, the actual cash wage paid by the employer would be \$3.69 for the OT hours and would not constitute compliance. This is illustrated by the following example:

<u>Non-OT Hours</u>	<u>OT Hrs.</u>	<u>Actual OT due</u>
\$3.35 cash	\$3.35 (MW)	\$3.35
<u>0.00</u> tip credit	<u>-1.34</u> (tip credit)	<u>1.68</u> (1/2x3.35)
\$3.35	\$2.01 (cash wage)	\$5.03
	<u>+1.68</u> (1/2 T)	
	\$3.69	

- (c) Where an employer pays a cash wage to a tipped employee in excess of the amount required by Sec 3(m) and also wishes to claim the full tip credit amount, the employee's regular rate of pay for OT purposes is the sum of the cash wage paid and the tip credit amount claimed. For example, where an employer pays a cash wage of \$2.50 per hour and claims a tip credit of \$1.34 per hour (40 percent of \$3.35) the employee's regular rate of pay is \$3.84 per hour and the employee would be due \$5.76 per hour for each OT hour worked.

<u>Non-OT Hours</u>	<u>OT hours</u>
\$2.50 cash wage paid	\$2.50 cash wage paid
<u>1.34</u> tip credit claimed	<u>1.34</u> tip credit claimed
\$3.84	3.84 reg. rate
	<u>1.92</u> additional cash due for OT
	\$5.76 OT rate of

pay

30d08 Tips in excess of statutory tip credit may not be credited against uniform purchase and maintenance costs.

- (a) Where, for example, the employer pays \$2.01 per hour in cash wages and employees earn \$2.00 per hour in tips, then the maximum tip credit is \$1.34 per hour (see footnote in FOH 30d06(a)) and, therefore, the employees' R/R is \$3.35. Accordingly, the employer may not make any deductions for uniform purchases or maintenance, etc., since tips received by an employee in excess of \$1.34 per hour (40 percent of the MW) are not deemed wages for purposes of FLSA.

- (b) On the other hand, where the employer pays \$2.50 per hour in cash wages and claims a tip credit of \$1.34 per hour and the employees receive not less than \$1.34 per hour in tips, the employees' R/R is \$3.84 per hour. In such cases, deductions of up to 49 cents per hour (\$3.84 - \$3.35) may be made for such things as uniform purchases and maintenance without cutting into the required MW. (The employees would still be due \$5.76 per hour for each OT hour worked ($\$3.84 \times 1 \frac{1}{2}$) (See 30d07(c).)

30d09 IRS tip allocation rules.

Where an employer withholds taxes from a tipped employee based upon a percentage of sales, rather than on reported tips, a reduction in an individual employee's net pay may result, but this is not an FLSA violation. Employees who contact WH alleging over-withholding should be referred to the nearest IRS office.

30e FLSA SEC 6(e)(1) - CONTRACT SERVICES OTHER THAN LINEN SUPPLY

30e00 General provisions -Sec 6(e)(1). contract services (other than linen supply services).

Section 6(e)(1) of FLSA provides: "Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section". (Effective 12/31/77, subsec (b) provided for payment of wage rates not less than those provided in subsec (a)(1).)

30e01 Application of Sec 6(e)(1) - establishment basis .

As an enforcement policy, the MW standard provided by Sec 6(e)(1) of FLSA will be applied only within an establishment in which work is performed on a government service contract. Thus, where an employer operated more than one establishment but performs on government service contracts in only certain of these establishments, WH will not assert application of Sec 6(e)(1) to those establishments which do not perform on government service contracts.

30e02 Application of Sec 6(e)(1) - w/w basis.

The application of Sec 6(e)(1) of FLSA depends on the performance of contract services and not on the coverage or exemption status of the establishment under the Act. Thus, during any w/w in which the establishment is engaged in the performance of contract services, the wage rate provided in Sec 6(b) of FLSA would be applicable to all employees of the establishment other than those specifically exempt under Sec 13(a)(1) of FLSA or those subject to a higher wage rate pursuant to SCA.

30e03 Application of Sec 6(e)(1) - contract services.

Section 6(e)(1) of FLSA applies to every employer providing any contract service (other than linen supply services) under a contract with the United States or any subcontractor thereunder. It is not necessary that the contract be subject to SCA.

30e04 OT and Sec 6(e)(1).

Section 6(e)(1) of FLSA contains no reference to OT standards and Sec 7 makes no provision for OT for employees covered by Sec 6(e). OT compensation for employees covered on a traditional or enterprise basis may be required under section 7(a) of FLSA or under CWHSSA.

30f FLSA SEC 6(e)(2) - GOVERNMENT CONTRACT LINEN SUPPLY SERVICES

30f00 General provision - Sec 6(e)(2), government contract linen supply services.

Section 6(e)(2) of FLSA provides: "Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section". (Effective 12/31/77, subsec (b) provided for payment of wage rates not less than those provided in subsec (a)(1).)

30f01 Linen supply services

- (a) The application of section 6(e)(2) of FLSA is determined by the type of service contracted for and not by the type of establishment performing the service. Thus, for example, a laundry may provide linen supply service within the meaning of Sec 6(e)(2).
- (b) The term linen supply services as used in section 6(e)(2) of FLSA refers to the supplying of various items to the Government on a rental basis by a contractor who owns the item being supplied. On the other hand, the mere laundering of items which are owned by the Government is a laundering service and is not a "linen supply service" within the meaning of Sec 6(e)(2).
- (c) The term "linen supply services", in addition to including such services as the rental of tablecloths, sheets, and pillowcases, would also include contracts for such items as dresses, uniforms, other wearing apparel, bibs aprons, etc., of the type used by barbers, doctors, waitresses, waiters, nurses, food workers, beauticians, etc. It would not include services for such items as diapers, laundry, or dry cleaning (family or commercial), nor services for such items as industrial wiping towels, safety equipment and salvage, dust control -- including treated dust tool covers and cloths, treated dust mops or rugs, or for industrial work uniforms, such as those worn by mechanics and production workers in heavy industry, machine shops, garages, service stations and the like.

30f02 Application of Sec 6(e)(2) - establishment basis.

The MW standard provided by section 6(e)(2) of FLSA applies only within an establishment in which work is performed on a government linen supply contract. Thus, where an employer operates more than one establishment but performs on government linen supply contracts in only certain of the establishments, WH will not assert application of Sec 6(e)(2) to the establishments which do not perform on government linen supply contracts.

30f03 Application of Sec 6(e)(2) - w/w basis.

The application of section 6(e)(2) of FLSA depends on the performance of linen supply services to the government and not on the coverage or exemption status of the establishment under the Act. Thus, during any w/w in which the establishment is engaged in the performance of linen supply services, the wage rate provided in Sec 6(b) of FLSA would be applicable to all employees of the establishment other than those specifically exempt under Sec 13(a)(1) of FLSA or those subject to a higher wage rate pursuant to SCA.

30f04 Application of Sec 6(e)(2) - linen supply services.

Section 6(e)(2) of FLSA applies to every employer providing linen supply services under a contract with the United States or any subcontract thereunder. It is not necessary that the contract be subject to SCA.

30f05 OT and Sec 6(e)(2).

Section 6(e)(2) of FLSA contains no reference to OT standards and Sec 7 makes no provision for OT for employees covered by Sec 6(e). OT compensation for employees covered on a traditional or enterprise basis may be required under section 7(a) of FLSA or under CWHSSA.