U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-12

January 15, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether employees known as "barbacks" qualify as tipped employees for the minimum wage tip credit under the Fair Labor Standards Act (FLSA).[1] We believe a barback, as you describe the position, would qualify as a tipped employee, and be eligible for a tip credit, provided the FLSA requirements for this provision are met.

You state that your client is a restaurant and bar that employs both bartenders and a barback on a nightly basis. You also state that the term "barback" refers to a bartender's assistant who learns the profession of bartending under the tutelage of a bartender and whose primary job duty is to support the bartender. The barback typically works the same hours as the bartender and is responsible for restocking the bar and ensuring that the bar area remains clean and organized. You indicate that the barback may also bus the service counter, clean empty glasses sitting on the bar, take out the trash from behind the bar and clean the floor of the bar area. You state that the barback works primarily in the bar area, in front of and around customers, and has the opportunity to occasionally interact with customers.

You further state that your client currently pays the barback the minimum wage, but the barback also receives over $30 in tips per month from the bartenders that he or she supports. Moreover, you state that a barback is an occupation that regularly and customarily receives tips from bartenders for providing services. For purposes of this letter, we assume that your description of this tip sharing arrangement between the barback and the bartenders reflects common practice in the locality in this type of establishment. *See* FOH § 30d04(d); Wage and Hour Opinion Letter October 26, 1989 (copy enclosed) (custom in the locality and industry is considered in determining whether employees regularly receive tips themselves or share in tip pools). You want to know whether the barback in this case may qualify as a tipped employee under the FLSA when the only tips received by this employee are those obtained from the bartenders under this tip sharing arrangement.

Pursuant to section 3(m) of the FLSA, an employer may take a credit towards the minimum wage for a "tipped employee" provided the employer informs the employee of the provisions of this section of the law and the tipped employee retains all the tips received. The latter requirement does not prohibit "the pooling of tips among employees

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov

who customarily and regularly receive tips." 29 U.S.C. § 203(m). Section 3(t) of the FLSA defines the term "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Tips actually received by tipped employees may be counted as wages for purposes of the FLSA, but the employer must pay not less than $2.13 an hour in direct wages.[2]

The legislative history of the 1974 FLSA Amendments indicates that the tip pooling exception in 29 U.S.C. § 203(m) applies to "the practice of pooling, splitting or sharing tips with employees who customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (1974); FOH § 30d04(a). On the other hand, "the employer will lose the benefit of this exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips—*e.g.*, janitors, dishwashers, chefs, laundry room attendants, etc." *Id.* The use of the words "*e.g.*" and "etc.," indicates that the occupations in these two lists are examples, and that the lists are not intended to be exhaustive.

The legislative history includes bus persons ("busboys") in the list of occupations that may participate in tip pools, although they do not receive tips directly from the customers. *See id*. at 43. These employees customarily and regularly receive tips from their participation in tip pooling or tip sharing arrangements with the servers. "Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t)." 29 C.F.R § 531.54.

It does not matter that in this case the barback receives his or her tips exclusively from the bartenders, rather than directly from the customers. As indicated above, the legislative history and the Department's regulations provide that some employees, *e.g.*, bus persons, who derive their qualifying tip income exclusively from tip sharing or tip pooling arrangements can nonetheless qualify as tipped employees, provided they meet the other requirements of the law. *See Kilgore v. Outback Steakhouse of Fla.*, 160 F.3d 294, 301-2 (6th Cir. 1998) (upholding a tip pool in which certain employees derive their tip income solely from the tip pool); *Marshall v. Krystal Co.*, 467 F. Supp. 9, 13 (E.D. Tenn. 1978) (finding that waiters, bus persons, and bartenders are permitted to derive their tip income from the tip pool); *see also* FOH § 30d04:

> 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).

[2] "If an employee's tips combined with the employer's direct wages of at least $2.13 an hour do not equal the minimum hourly wage of $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009; the employer must make up the difference." Wage and Hour Fact Sheet No.15.

FOH § 30d04(a); Wage and Hour Opinion Letter March 26, 1976 (copy enclosed) ("It is not required that the particular busboys and others who share in tips must themselves receive tips from customers.")

We believe that the barback you describe qualifies as a tipped employee within the meaning of section 3(t) of the FLSA, because he or she is engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. Therefore, the barback is also a "tipped employee" within the meaning of section 3(m), and the employer can take a tip credit for that employee provided that the FLSA requirements are met, including the proviso that a tipped employee must receive at least the minimum hourly wage through the employer's cash wage payment and tips received. This conclusion is consistent with the legislative history of the Act, which included employees who do not receive tips directly from customers, such as busboys and service bartenders, within the categories of employees who were eligible to participate in a tip pool because they "customarily and regularly" received tips, whether through tip pools or tip sharing arrangements with other employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to 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.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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