Chapter 30

RECORDS, MINIMUM WAGE, AND PAYMENT OF WAGES

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30d TIPS AND TIPPED EMPLOYEES

[12/15/2016]

30d00 General.

(a) Tipped employees are subject to the section 6(a)(1) minimum wage. Section 3(m) of the FLSA (*see* 29 USC 203(m)) permits an employer to claim a partial credit against its minimum wage obligation to a tipped employee based on tips received by the employee. This credit against wages due is called a tip credit. 29 CFR 531 contains further guidance on this topic. The cash wage required under section 3(m), when an employer takes a tip credit, is not a subminimum wage. Tipped employees are entitled to the full section 6(a)(1) minimum wage, which may be comprised of both a direct or cash wage and a tip credit as set forth in section 3(m). The terms "direct wage" and "cash wage" are used interchangeably in the FOH when discussing the tip credit.

(b) Section 3(m) of the 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 against its minimum wage obligations. The employer may not claim a tip credit greater than the tips received. If the direct (or cash) wage paid plus the tips received is less than the section 6(a)(1) minimum wage, the employer is required to pay the balance on the regular pay day for the pay period so that the employee receives at least the minimum wage with the combination of wages and tips.

(c) The language of section 3(m) was amended by the Small Business Job Protection Act of 1996. Effective 08/20/1996, section 3(m) provides:

"In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to – (1) the cash wage paid such employee which for purposes of such determination shall not be less than the cash wage required to be paid such an employee on August 20, 1996; and (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title. The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding two sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."

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The required cash wage to be paid a tipped employee on 08/20/1996 was not less than $2.13 per hour.

(d) FLSA 3(m) tip credit

The "FLSA 3(m) tip credit" is the tip credit an employer is permitted to claim against its minimum wage obligations as determined by section 3(m). Under section 3(m), the sum of the cash wage paid and the FLSA 3(m) tip credit will always equal the section 6(a)(1) minimum wage.

(e) Tip credit principles

As amended in 1996, section 3(m) limits the tip credit an employer may claim against its minimum wage obligations to "the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1)." Thus, the FLSA 3(m) tip credit is capped at the difference between the section 6(a)(1) wage and the direct or cash wage paid. The direct wage paid may not be less than the cash wage required to be paid a tipped employee on 08/20/1996, which was $2.13 per hour. Under section 3(m), the direct wage paid may be comprised of cash, board, lodging, or facilities in accordance with 29 CFR 531 and FOH 30c. Because the FLSA limits the section 3(m) tip credit to the difference between the cash wage paid and the federal minimum wage, for purposes of the FLSA, employees who are paid using the 3(m) tip credit are paid the minimum wage for each hour they work in a non-overtime workweek.

29 CFR 531.50

(1) *Definition of tipped employee*

A "tipped employee," as defined in section 3(t) of the FLSA (*see* 29 USC 203(t)), is any employee engaged in an occupation in which the individual customarily and regularly receives more than $30.00 a month in tips.

Although some states define "tipped employee" differently, the definition in section 3(t) is used for FLSA enforcement purposes.

Tip provisions apply on an individual employee basis. An employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others.

29 CFR 531.50(b)

(2) *Tips are the property of the employee*

A tip is a sum presented by a customer to the tipped employee as a gift or gratuity in recognition of some service performed for him or her. *See* 29 CFR 531.52. The only ways in which an employer may use its employee's tips are through a valid tip pool, as defined in FOH 30d04, or as a partial wage credit. *See* FOH 30d00(d) and FOH 32j18(h). These restrictions on an employer's use of its employees' tips apply even when the employer has not taken a tip credit; in such a case, the employer may only use its employee's tips in furtherance of a valid tip pool.

(3) *Notice requirement*

An employer cannot take an FLSA 3(m) tip credit unless it informs the tipped employee of the provisions of section 3(m) prior to taking a tip credit. Where an employer does not inform the tipped employee of the use of the tip credit, the full minimum wage is due. *See* FOH 30d01(b).

29 CFR 531.59(b) states that the employer must inform its tipped employees, in advance of taking the FLSA 3(m) tip credit, of the following requirements in section 3(m):

a. The amount of the cash wage that is to be paid to the tipped employee by the employer, which may not be less than $2.13 per hour

b. The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer

c. The amount of the tip credit claimed may not exceed the value of the tips actually received by the employee

d. All tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips

e. An employer may not claim a tip credit for any employee who has not been informed of these provisions

The WH-1088: Employee Rights under the FLSA (minimum wage poster) alone is not sufficient to meet these regulatory requirements. *See* 29 CFR 531.59(b) and WHD Opinion Letter FLSA (January 21, 1997).

(4) *Deductions*

a. Non-3(m) deductions when employer claims an FLSA 3(m) tip credit

When the employer claims an FLSA 3(m) tip credit, the tipped employee is considered to have been paid only the minimum wage for all non-overtime hours worked in a tipped occupation; however, for overtime hours the employee's regular rate may exceed the FLSA minimum wage. Because section 3(m) caps a tipped employee's hourly wage in a non-overtime workweek at the minimum wage, an employer that claims an FLSA 3(m) tip credit may not take deductions for non-3(m) costs (*e.g.*, walkouts, cash register shortages, breakage, cost of uniforms, etc.), because any such deduction would reduce the tipped employee's wages below the minimum wage. Even when an employer pays more than the $2.13 minimum direct wage, the employee will have only received the minimum wage, and non-3(m) deductions cannot be made. For example, if an employer pays a direct wage of $3.13, the FLSA 3(m) tip credit will be $4.12 ($7.25 - $3.13 = $4.12), and the employee will have only received the minimum wage for all non-overtime hours.

b. Non-3(m) deductions when the employer does not claim an FLSA 3(m) tip credit

Non-3(m) deductions may only be made from a tipped employee's wages when the employer does not claim an FLSA 3(m) tip credit *and* pays a direct wage in excess of the minimum wage. For example, if an employee receives $10.00 per hour in cash wages, the employer cannot claim an FLSA 3(m) tip credit, and the employer may take up to $2.75 ($10.00 - $7.25 = $2.75) in non-3(m) deductions from the employee's hourly wage. *See* 29 CFR 531.37.

(5) *Other laws*

Where the FLSA and a state or local law regulating wages for tipped employees are concurrently applicable, it is the employer's responsibility to comply with the more protective wage standard.

(f) Dual jobs

(1) When an individual is employed in a tipped occupation and a non-tipped occupation—for example, as a server and janitor (*i.e.*, dual jobs)—the tip credit is available only for the hours the employee spends working in the tipped occupation, provided the employee customarily and regularly receives more than $30.00 a month in tips. *See* 29 CFR 531.56(e).

(2) 29 CFR 531.56(e) permits the employer to take a tip credit for any time the employee spends in duties related to the tipped occupation, even though such duties are not themselves directed toward producing tips.

(3) WHD staff will consult the Occupational Information Network (O*NET), an online source of occupational information, and 29 CFR 531.56(e) to determine whether duties are related or unrelated to the tip-producing occupation. Duties will be considered related to the tipped occupation when listed as "core" or "supplemental" under the "Tasks" section of the "Details" tab for the appropriate tip-producing occupation in O*NET.

a. An employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless whether those duties involve direct customer service. *See* WHD Opinion Letter WH-502 (March 28, 1980), which concludes that a server's time spent performing related duties (*e.g.*, vacuuming) after restaurant closing is subject to a tip credit. For example, the core tasks currently listed in O*NET for waiters and waitresses (*see* the O*NET Summary Report for waiters and waitresses) include: cleaning tables or counters after patrons have finished dining; preparing tables for meals, which encompasses setting up items such as linens, silverware, and glassware; and stocking service areas with supplies such as coffee, food, tableware, and linens. In addition, O*NET lists garnishing and decorating dishes in preparation for serving as a supplemental task for waiters and waitresses. An employer may take a tip credit for any amount of time a

waiter or waitress who is a tipped employee spends performing these related duties.

b. The WHD recognizes that there will be unique or newly emerging occupations that qualify as tipped occupations under the FLSA for which there is no O*NET description. *See, e.g.,* WHD Opinion Letter FLSA2008-18 (December 19, 2008) regarding itamae-sushi chefs and teppanyaki chefs. For such tipped occupations, the duties usually and customarily performed by employees in that specific occupation shall be considered related duties as long as they are consistent with the related duties performed in similar O*NET occupations. For example, in the case of unique occupations such as teppanyaki chefs, the related duties would be those that are included in the tasks set out in O*NET for counter attendants in the restaurant industry.

(4) An employer may not take a tip credit for the time an employee spends performing any tasks not contained in 29 CFR 531.56(e), or in the O*NET task list for the employee's tipped occupation, or—for a new occupation without an O*NET description—in the O*NET task list for a similar occupation. Some of the time spent by a tipped employee performing tasks that are not related to a tipped occupation, however, may be subject to the *de minimis* rule in 29 CFR 785.47.

See WHD Opinion Letter FLSA2018-27 (November 8, 2018).

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