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

FLSA2008-4

May 15, 2008

Dear **Name***:

This is in response to your request for an opinion regarding the application of section 3(m) of the Fair Labor Standards Act (FLSA).[1] You ask on behalf of your client (Employer) whether the requirement that employees wear a certain type of footwear makes such footwear a "uniform" under the FLSA. You also ask whether the employer may arrange for a third-party vendor to offer employees the opportunity to voluntarily purchase footwear that meets the employer's specifications; the employees would pay for such a purchase through payroll deductions. It is our opinion that the required footwear does not constitute a "uniform" under the FLSA and the employees' voluntary assignment of wages to the employer for the purchase from the third party vendor is not an impermissible deduction from wages.

You have asked that we assume the following facts. The Employer operates restaurants and requires employees to wear "dark-colored" shoes without prescribing any particular quality, brand, style, model, or type. Aside from color, the only other requirements are that they not be open-toed and that, for safety reasons, they not have a slippery sole. Employees may wear shoes they already own when hired or may purchase shoes from any vendor they may choose. Employees are free to wear the shoes outside of work.

The Employer has arranged a program through which employees may, solely at their option, purchase shoes from a shoe manufacturer. The manufacturer offers over 60 different slip-resistant shoes in a broad spectrum of styles and in numerous dark colors. If an employee chooses to purchase shoes from this vendor, the employee may either pay the vendor directly or the Employer will pay the vendor and deduct the amount of the payment from the employee's paycheck over a number of weeks. In some instances, the deductions may cause the remaining amount of the employee's paycheck to fall below the minimum wage for each hour worked during that pay period. If the employee requests that the Employer pay for the shoes through a deduction, the employee must do so by submitting a request in writing describing the shoes to be purchased, requesting the Employer pay for the shoes, and authorizing the Employer to withhold future wages in an amount sufficient to reimburse the purchase costs. Neither the Employer, nor any person acting in its interests, realizes any profit or other benefit from the purchase program,

[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.

either from employees or the shoe manufacturer. The reimbursement is merely to cover the cost of the shoes.

The first issue is whether the requirement that the employees wear "dark-colored" shoes makes such shoes a uniform and, if so, whether the costs to the employee of the uniform result in the employee being paid less than the minimum wage in the week in which the costs are incurred. It is our longstanding position that the cost to employees of uniforms may not result in wages falling below the legally required minimum. *See, e.g.*, Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001); Field Operations Handbook (FOH) § 30c12(e)(1).

Although there are no hard-and-fast rules in determining whether certain types of dress are considered uniforms for the purposes of compliance with the provisions of the FLSA, FOH § 30c12(f) provides the following principles which 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.

The question whether certain articles of clothing that an employer may require an employee to wear at work constitute a uniform is a question of fact to be considered in the context of each particular case. *See* Wage and Hour Opinion Letter FLSA2004-1NA (Mar. 30, 2004). As described in your request, the shoes prescribed by the Employer appear to be a general type of ordinary foot wear and the fact that they must be "dark-colored" and have a non-slip sole does not make them a "uniform" under the FLSA. *Id.* Therefore, the Employer is not responsible for the cost of the shoes worn by the employees in this instance.

Because the shoes are not deemed to be a "uniform" under the FLSA, the question remains whether the Employer may offer to advance the money necessary for employees to voluntarily purchase shoes from the shoe manufacturer and recoup the advance through payroll deductions where those deductions may cause the employee's paycheck to fall below the minimum wage for each hour worked in the pay period. The answer turns on whether the deduction from wages for the cost of the shoes comports with section 3(m) of the FLSA and its implementing regulations. *See* 29 C.F.R. § 531.32(a).

Section 3(m) includes as part of "wages" the "reasonable cost" to the employer for furnishing any employee with board, lodging or other facilities. *See id.* § 531.2. Reasonable cost is not more than the actual costs to the employer of the board, lodging and other facilities customarily furnished to his employees. *See id.* § 531.3(a). As

described in your letter, the costs of the voluntary purchase of shoes made by the employees from a third party vendor are reimbursed through a payroll deduction to recoup the actual costs incurred by the Employer. It is our opinion that the purchase of the shoes from the third party vendor can be considered to be the furnishing of "other facilities" by the Employer and a deduction for the actual cost of the shoes is allowed under section 3(m), even if it reduces the amount of the employee's cash wages below the minimum wage, so long as the employer does not profit or include any administrative costs. *See id.* § 531.36(a), .37(a); FOH § 30c03(a)(4) ("Goods and merchandise, such as clothing and appliances, may be considered 'other facilities' . . . Only the actual cost to the employer (not necessarily the retail cost) may be taken as a wage credit.").

You also asked whether the same rule would apply where the amount awarded was deducted from wages paid to a "tipped" employee, "causing the base wage plus tip credit to fall below the federal minimum wage." It does not matter if the employee in question is paid solely an hourly wage or is a "tipped" employee. The reasonable cost of facilities provided by the employer may be credited towards wages paid to a tipped employee. *See* 29 U.S.C. § 203(m); Wage and Hour Opinion Letters FLSA2006-21 (June 9, 2006); 1997 WL 959133 (Jan. 27, 1997).

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 issues 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).**