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

FLSA2008-10

Oct 24, 2008

Dear **Name***:

This is in response to your letter requesting an opinion regarding cost reimbursement for uniforms provided to a tipped employee without charge that are damaged in a non-work related context. It is our opinion that if the employer supplies a reasonable and sufficient number of wash and wear uniforms and replaces any uniforms that are damaged in the course of work-related duties, the employer has satisfied its obligations under the Fair Labor Standards Act.*

This situation involves an FLSA covered, tipped employee who regularly receives more than $30 a month in tips. In accordance with the FLSA, the employer pays not less than $2.13 an hour in direct wages, and the employer claims tips actually received as a tip credit allowance to make up the difference for the applicable federal minimum wage. The tipped employee works in a dining facility and is required to wear a uniform provided by the employer. You cite Wage and Hour Opinion Letter FLSA-559, dated April 5, 1991, which states in part that "where restaurant employers require that tipped employees wear uniforms, the uniform is primarily for the benefit of the employer and therefore any recoupment of the cost of the uniform would not comply with the FLSA if it would reduce the employee's wage below the applicable minimum wage or overtime pay due the employee."

In a discussion with a member of the Wage and Hour Division staff, you stated that the employer provides a sufficient number of uniforms to the employees relative to the nature of their work assignments and job duties. These uniforms are made of regular wash and wear materials, are routinely washed and dried with other personal garments by the employees, and do not require special laundering. The employer provides replacement uniforms at no charge.

Your question here involves an employee who has damaged multiple uniforms while riding a skateboard on days off work. You ask to what extent an employer is bound to repeatedly supply additional uniforms when an employee wears and damages his uniforms in a non-work-related context. You further ask whether an employer can, after repeatedly replacing uniforms damaged in a non-work-related context, require an

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

employee to pay for his or her replacement uniforms, or whether the only alternative is to terminate the employee.

The employees who wear the employer-required uniforms in your establishment are those for whom the employer claims tip credit as part of wages. As you know, tipped employees are those who customarily and regularly receive more than $30 a month in tips. *See* 29 U.S.C. § 203(t); Field Operations Handbook (FOH) § 30d00(a). Tipped employees must be informed in advance that the employer elects to use the tip credit and the amount of tip credit claimed. *See* 29 U.S.C. § 203(m). The employer must be able to show that employees receive at least the applicable minimum wage when wages and tips are combined, and the employer must pay at least $2.13 per hour in cash wages. Also, employees must retain all of their tips, except in the case of valid tip pool arrangements. *See* FOH § 30d01(a).

Under 29 C.F.R. § 531.35, "[w]hether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer . . . part of the wage delivered to the employee." Moreover, section 3(m) of the FLSA defines a tipped employee's wage rate as the cash amount paid (at least $2.13) plus an amount of tips sufficient to bring the employee to the minimum wage. Thus, for employees earning only the required cash amount of $2.13 per hour, any amount of tips an employee may receive in excess of the amount required to bring the employee's pay to the minimum wage may not be considered wages for purposes of the FLSA and may not be the source of a deduction by the employer. All monies, both the wage payment of $2.13 per hour and all tips received, must be paid to the tipped employee free and clear.

The FLSA further requires that expenses that are primarily for the benefit of the employer cannot be counted as wages and thus must be paid by the employer (or reimbursed) if failure to do so would bring the employee's wages below minimum wage in any week. *See* 29 U.S.C. § 206(a)(1); 29 U.S.C. § 203(m); 29 C.F.R. § 531.3(d). Uniforms required by the employer to be worn while on duty are considered to be for the benefit or convenience of the employer. Employees may not be required to pay for such items if, by so doing, their wages would be reduced below the required minimum wage or overtime compensation. *See* Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001) and Wage and Hour Opinion Letter Jan. 21, 1997 (copy enclosed); FOH § 30c16. This is true even if an economic loss suffered by the employer is due to the employee's work-related negligence. *See* Fact Sheet #16: Deductions from Wages for Uniforms and Other Facilities. Employers may not avoid FLSA minimum wage and overtime pay requirements by having the employee reimburse the employer in cash for the cost of such items because the effect is the same as deducting the cost from the employee's wages. *See* 29 C.F.R. §§ 531.3(d), 531.32(c), 531.35.

An employer's obligations under the FLSA are not unlimited, however. If an employer supplies a reasonable and sufficient number of wash and wear uniforms and replaces any uniforms that are damaged in the course of work-related duties, the employer has

satisfied its duty to pay expenses that are primarily for the benefit of the employer. The FLSA does not compel the employer to supply its employees with clothing for personal use.

A covered, tipped employee may acquire, of his or her own choice, additional uniforms beyond those routinely provided by the employer. Where, as it appears to be the case here, an employer supplies free of charge, or reimburses the employees for, a sufficient number of uniforms required by work conditions to be worn, and all or some employees elect voluntarily to purchase additional uniforms in excess of the number required, the employer need not reimburse the employees for costs incurred in purchasing the excess uniforms. *See* FOH § 30c12(g). The purchase may be made with cash paid by the employee or by a voluntary assignment made by the employee to the employer who is acting as a creditor for this purpose. As stated in 29 C.F.R. § 531.40, this wage assignment may not result, directly or indirectly, in any profit or benefit to the employer or a third-party acting on behalf of the employer from the transaction. Accordingly, an employee may voluntarily reimburse the employer for extra replacement uniforms without violating the FLSA.

We note that the provisions of 29 C.F.R. § 516.2(a)(10) require an employer to maintain, for a period of two years, records showing the total additions to or deductions from wages paid each pay period. Thus, records documenting any deductions from wages of employees for purchasing employer-required uniforms must be maintained. Similarly, records documenting any deductions from wages of employees for voluntarily purchasing additional uniforms in excess of the number provided, as discussed above, must also be maintained. However, if employees purchase excess uniforms on their own, rather than through the employer, no record of such private transactions need be kept under the FLSA.

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

Enclosure: Wage and Hour Opinion Letter Jan. 21, 1997

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