



FLSA2025-1

January 14, 2025

Dear **Name***:

This is in response to your letter on behalf of your client requesting an opinion concerning the prohibition against keeping employees' tips in section 3(m)(2)(B) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(m)(2)(B). You represent that you do not seek this opinion for any party that the Wage and Hour Division of the Department of Labor (WHD) is currently investigating or for use in litigation that began before your request.

BACKGROUND

According to your letter, your client is a "quick service restaurant." Its employees serve "meals assembled to order on a line" and "customers select, receive, and purchase their food before finding a table in the restaurant's dining area." Your client does not take a tip credit. All of its employees receive a cash wage of at least the Federal minimum wage and, where applicable, any state minimum wage. Customers leave tips by adding them to their credit card payments or leaving cash in a jar, and these tips are pooled together and distributed among your client's employees.

Your client employs four classifications of employees—Crew Members, Shift Leads, Assistant Team Leads, and Team Leaders—all of whom work in a team setting. You have asked us to consider both Assistant Team Leads and Team Leaders to be managers and supervisors under 203(m)(2)(B) for purposes of this opinion. You state that Team Leaders and Assistant Team Leads often engage in the same customer service and cleaning duties as Crew Members and Shift Leads. Due to short staffing, there are times when a shift is staffed solely by Team Leaders and Assistant Team Leads, and there are times when a shift is staffed solely by Crew Employees and Shift Leads.

You ask whether Team Leaders, Assistant Team Leads, and Shift Leads may receive tips from the tip pool under certain circumstances, discussed below.

GENERAL LEGAL PRINCIPLES

Section 3(m)(2)(B) of the FLSA prohibits employers from "keep[ing] tips received by their employees for any purpose, including allowing managers or supervisors to keep any portion of employees' tips." 29 U.S.C. 203(m)(2)(B). Thus, an employer may not receive tips from a tip pool and may not allow managers or supervisors to receive tips from a tip pool, since tip pools include other employees' tips. 29 C.F.R. § 531.54(c)–(d). The prohibition against keeping employees' tips, including allowing managers or supervisors to keep other employees' tips, applies regardless of whether the employer takes a tip credit. 29 U.S.C. 203(m)(2)(B); 29 C.F.R. § 531.54(d). A manager or supervisor may, however, keep tips that they receive directly from

customers based on the service the manager or supervisor directly and solely provides. 29 C.F.R. § 531.52(b)(2)

The Department's regulations implementing section 3(m)(2)(B) define a manager or supervisor who may not keep tips as an employee who meets the executive employee duties test at 29 C.F.R. §§ 541.100(a)(2)–(4). 29 C.F.R. § 531.52(b)(2).¹ This is the same duties test that (along with other tests) the Department uses to determine whether an employee is exempt from the FLSA's overtime and minimum wage protections because they are employed in a bona fide executive capacity. To meet this duties test, an employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; the employee must have the authority to hire or fire other employees, or their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight; and the employee must have a primary duty of managing the enterprise or a customarily recognized department or subdivision of the enterprise. 29 C.F.R. §§ 541.100(a)(2)–(4). Management includes activities such as interviewing, selecting, and training employees; setting and adjusting employee rates of pay and hours of work; planning the work; determining the techniques to be used; and apportioning the work among the employees. 29 C.F.R. § 541.102.

An employee's primary duty is the principal, main, major, or most important duty the employee performs. Determining which duties are the primary ones is based on all of the facts related to each employee and depends on factors including the relative importance of the employee's various duties, the amount of time spent performing the work of an exempt employee, and the employee's relative freedom from direct supervision. 29 C.F.R. § 541.700(a). The primary duty test is based on the employee's duties on a workweek basis or whatever longer period of time is appropriate to capture the character of the employee's job as a whole. WHD Field Operations Handbook (FOH) 22a03(a) (citing 29 C.F.R. § 776.4). An employee whose primary duty is management may perform some non-managerial work and still meet the executive employee duties test. *See* WHD Op. Ltr. FLSA2006-29, 2006 WL 2792443, at *4 (Sept. 8, 2006). Generally, an employee whose primary duty is management decides when to perform non-managerial duties like cleaning and serving customers, rather than being directed by a supervisor to perform those duties. 29 C.F.R. § 541.106(a).

OPINION

You ask the following questions: First, can a Team Leader or Assistant Team Lead who is a supervisor or manager for purposes of section 3(m)(2)(B), but who clocks in and works a shift in a non-supervisory capacity, participate in the tip pool with non-supervisory employees for that shift?² Second, can a Shift Lead, who is not a supervisor or manager for purposes of section

¹ An individual who meets the requirements of 29 C.F.R. § 541.101 (business owner) also qualifies as a manager or supervisor for purposes of the prohibition against keeping tips. 29 C.F.R. § 531.52(b); *see* [WHD Op. Ltr. FLSA2024-02 \(Dec. 18, 2024\)](#).

² As noted in the Background, in answering these questions, you request that we consider Team Leaders and Assistant Team Leads to be managers or supervisors under 29 C.F.R. § 531.52(b)(2).

3(m)(2)(B) but who is the highest-ranking employee during a particular shift, participate in the tip pool during that shift?

In response to your first question, an employer may not allow managers or supervisors to keep any portion of other employees' tips, including from a tip pool. 29 U.S.C. 203(m)(2)(B); 29 C.F.R. § 531.54(d). Assuming your client's Team Leaders and Assistant Team Leads meet the executive employee duties test, and thus qualify as managers or supervisors for purposes of section 3(m)(2)(B),³ they may not receive any tips from an employer-mandated tip pool. This includes where they spend a shift performing the non-managerial duties of, for instance, a Shift Lead or Crew Member. This is because whether an employee is a manager or supervisor under the Department's regulations, 29 C.F.R. § 531.52(b)(2), does not vary from shift to shift, since, as explained above, the primary duty of an employee is determined on at least a workweek basis. FOH 22a03(a). To permit an individual whose primary duty (based on their job as a whole) is management to receive tips from a tip pool because the individual works a shift in a non-managerial capacity would circumvent the statutory prohibition against allowing managers or supervisors to keep any portion of other employees' tips.⁴

In response to your second question, assuming Shift Leads do not meet the executive employee duties test, and therefore are not managers or supervisors for purposes of section 3(m)(2)(B), they may receive tips from an employer-mandated tip pool, including for shifts when they are the most senior employee working at the establishment. As emphasized above, the primary duty test is based on at least a workweek basis, not a shift-by-shift basis. If a Shift Lead's primary duty (based on their job as a whole) is not management, the employee does not meet the executive employee duties test and therefore, is not a manager or supervisor prohibited from receiving tips from an employer-mandated tip pool for purposes of section 3(m)(2)(B) of the FLSA. 29 C.F.R. §§ 531.52(b)(2), 531.54(d); *see* 29 C.F.R. § 541.106(c) (employee whose primary duty is nonexempt work does not become exempt because they occasionally have some responsibility for directing the work of others).


³ As noted above, your client's Team Leaders and Assistant Team Leads are managers and supervisors for purposes of section 3(m)(2)(B) of the FLSA if they have a primary duty of management and meet the executive employee duties test—a determination that depends on the facts of each case, with the emphasis on the character of the employee's job as a whole. 29 C.F.R. §§ 531.52(b)(2); 541.107(a).

⁴ You also ask whether Team Leaders and Assistant Team Leads (who you have asked us to consider 203(m)(2)(B) managers and supervisors in this opinion) may receive tips from a tip pool during shifts staffed solely by other managers and supervisors. The Department has previously explained that because section 3(m)(2)(B) prohibits managers and supervisors from keeping "any portion of employees' tips," it does not permit tip pools composed solely of managers and supervisors, as this would by definition result in managers and supervisors keeping portions of other employees' tips, since managers and supervisors themselves are employees under the FLSA, 29 U.S.C. 203(e). *See* 86 FR 52973, 52982 (Sept. 24, 2021). As noted above, however, a manager or supervisor may keep tips that they receive directly from customers based on the service the manager or supervisor directly and solely provides. 29 C.F.R. § 531.52(b)(2).

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.

We trust that this letter is responsive to your inquiry.

Sincerely,


Jessica Looman
Administrator

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