FLSA-531

October 1, 1973

This is in reply to your letter of August 20, 1973, concerning the effect under the Fair Labor Standards Act of deductions made from employee's wages for cash shortages.

Deductions of this kind are considered illegal to the extent that they reduce the wages of the employees below the minimum required by the Act or reduce the amount of overtime compensation due under the Act. This is discussed in 29 CFR 531.35 through 531.37 and in 29 CFR 778.307. Also see Mayhue's Super Liquor Stores, Inc. v. Hodgson, 5th Cir. 1972, 464 F. 2d 1196, 20 WH Cases 808, cert. denied 409 U.S. 1108, 93 S. Ct. 908, 20 WH Cases 1054, which involved signed agreements that employees would repay cash register shortages, and Brennan v. Veterans Cleaning Service, Inc., 5th Cir. 1973, 21 WH Cases 218.

Our answers to your questions are as follows:

Question 1. The "cash bond" (in effect, an advance by the employee to the employer) which would be paid to the employer at the time of hiring is part of the employer's business expense. As such, it cannot be shifted to the employees where it results in payment of less than the wages required under the Act. In other words the protection of the Act, which you recognize extends to the employee when deductions are made periodically from wages to accumulate a "bond" during the employment, as in your question number 2, is not lost simply by altering the mode of the transaction. If such were not the case the protection of the Act could be avoided by the simple device of requiring each employee to start work by posting a cash bond and to eliminate any periodic deductions from the wages paid to the employees. Posting such a bond would result in violation of the Act's minimum wage and overtime requirements in the initial period of employment if the employees are paid $2 per hour and work 50 hours a week as in your other questions.

Questions 2, 3 and 4. As indicated in §§531.36 and 531.37, when deductions from pay of this kind are made in overtime weeks, the amount thereof is limited to the amount which could be deducted if the employee had worked only 40 hours. The employee in each of your examples receives a stipulated rate of $2 per hour and would receive $3 per hour for each hour worked in excess of 40 per week, which is time and one-half the "regular-rate" or the bare statutory premium for overtime hours. In other words the minimum pay for overtime hours under your plan is $3 per hour. To make a deduction from this rate would reduce the overtime compensation below one and one-half times the regular rate of $2 per hour, in violation of section 7 of the Act.

Those portions of your examples which illustrate a deduction of 40¢ per hour from the $2 per hour rate for the first 40 hours of work in the week are, therefore, the only parts thereof which do not violate the Act's pay requirements. Not more than a total sum of $16 may be deducted from the week's pay in the examples given in questions 2, 3 and 4. This

is true regardless of whether the purpose of the deductions is to accumulate or re-accumulate a "cash bond" or to reimburse a shortage in the current week or a prior week. This restriction applies whether the deduction is for one of these purposes or any combination of them.

Question 5. In the Mayhue's case, the Fifth Circuit Court of Appeals observed that the treatment of cash register shortages under the Act should be distinguished from situations where the employee took money for his own use or misappropriated it. In the latter situation the court indicated that: "As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages...In such a case there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum." Accordingly, in our enforcement of the Act we would not assert a violation of its monetary requirements where there is repayment of a debt which in fact resulted from theft or misappropriation of the employer's funds.

However, since the basis for repayment or withholding payment of wages to effect repayment in such a matter is an alleged criminal act, the case must first be proven beyond a reasonable doubt. Where there is only an accusation, we would not be inclined to accept this as satisfying the burden of proving the commission of a crime by the employee beyond a reasonable doubt. Nor would the burden of proof be met by any proceeding such as a private investigation by the employer to which you refer. Such an extralegal proceeding, which does not afford the accused the protection available in a court of law, does not appear to be a proper forum in which to meet the burden of proof.

It is our opinion that for purposes of the Fair Labor Standards Act, only an adjudication by a court of law would suffice in meeting the burden of proof. Absent such an adjudication, the employee in the example you give (who worked 50 hours in the week at $2 per hour for a total pay of $110 including overtime) may not have more than $16 deducted from his final pay (or $2.00-$1.60=40¢ x 40 = $16). The remainder of his pay must be paid on the regular payday for the period in which the workweek ends. See §778.106. This is so whether or not the employee consents to assist the employer in the investigation or attends the final accounting conference or the private investigation shows the employee is responsible for the misappropriation.

Question 6. The agreement you submitted would not result in compliance with the Act for reasons discussed above. See the answer for question 1 dealing with posting the "cash bond" in full at the time of hiring. See also, the answer in question 5 regarding the amount of earned but unpaid wages which may be applied to offset an employee's alleged misappropriation of funds absent an adjudication thereon by a court.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division