FLSA-1389

August 12, 1975

This is in reply to your letter of April 25, 1975, concerning the burden of proof with respect to tips received by employees under the tip credit provisions of section 3(m) of the Fair Labor Standards Act. As we have been carefully considering the problems associated with the treatment of tipped employee we were not able to immediately respond to your letter.

You state that many waiters and waitresses fail to report all of their tips. Where the employee has reported tips of less than one-half of the minimum hourly wage, the employer becomes unable to prove that he is entitled to the 50 percent tip credit. You indicate this problem occurs in situations where 15 percent of the business done at tables served by the employee would be an amount of money in excess of 50 percent of the minimum wage. You ask how an employer may prove in such a case that his claim of a 50 percent tip credit is justified.

As stated on page 43 of Senate Report No. 93-690, the changes to section 3(m) "make clear the original 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 such employer is entitled to claim as to tipped employees." The employer is responsible for compliance with the minimum wage requirement in claiming a tip credit not in excess of 50 percent of the minimum wage in compensating "tipped employees." The tip credit percentage claim if any, must reflect, accordingly; the extent that the tips received by the employee provide wages up to a maximum of 50 percent of the minimum wage. The reporting of tips above this amount, which may be necessary for Federal or state income tax purposes, is not needed under the tip credit feature of section 3(m).

Aside from the requirement that the employee must retain all his tips, it is not necessary that there be an accounting of all tips received by a waiter or waitress in determining compliance with section 3(m) of the Act. It must be determined only whether the tips received would qualify the employee as a "tipped employee" under section 3(t) of the Act, whether the tips received equal one-half of the minimum wage due for the workweek or the extent by which the tips fall short of the tip credit claimed by the employer. Whether or not a "tipped employee" receiving in tips an amount equal to the amount of tip credit claimed by the employer is a question of fact. Where the amount is in dispute because the tip credit claimed by the employer exceeds the tips reported by the employee, it must be ascertained whether there is other creditable evidence to support the tip credit claimed by the employee. In this regard the employer may wish to question the employee at the time the tips are reported to him, for the purpose of aiding the waitresses establish the correctness of their tip reports. The amount of business done at the tables served by an employee could not be taken alone as a basis for estimating whether sufficient tips have been received to fulfill the claimed tip credit since there is no

relationship between the amount of business and tipping practices in an establishment unless a correlation is established from the tip experience of other similarly situated employees in the particular establishment.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division