

FLSA-202

July 1, 1977

This is in reply to your letter of December 17, 1976, regarding the application of the Fair Labor Standards Act to employees of a retail establishment dealing in food services products who are required to wear and maintain uniforms and who are "tipped employees" within the meaning of the Act. For the purposes of this reply it will be assumed that the employees are entitled to the monetary benefits of the Act.

In answer to your first question which pertains to uniform allowances, to reimburse the employees for costs incurred in laundering and replacing uniforms, you propose the following allowances be added to the employees' paychecks.

Part-time employees, less than 20 hours per week--\$3.00 per week. Employees working 21-30 hours per week--\$3.75 per week. Employees working over 31 hours per week--\$4.50 per week

Payment under the above schedule would allow for \$2.30 per week maintenance and .70¢ per week for uniform replacement; \$2.30 per week maintenance and \$1.45 per week for uniform replacement; and \$2.30 per week maintenance and \$2.20 per week for uniform replacement, respectively.

If the above payments will in fact enable the employees to replace the uniforms when worn out or not longer serviceable, they will satisfy the requirements of the Act with respect to uniform maintenance and replacement.

It is assumed, of course, that when the employees begin work, they have uniforms not purchased for the particular employment or are furnished the initial set of uniform at no cost; in this connection, see our letter to your firm dated July 19, 1976, a copy of which is enclosed for your convenience.

Section 7(a)(2) of the Act excludes from the regular rate of pay payments made for expenses incurred by an employee in the furtherance of his or her employer's interest.

In your second question you pose the following: a tipped employee is paid \$1.50 an hour in cash and has a tip credit of 80¢ an hour, for a total of \$2.30 an hour. If the employee works overtime, you ask whether the employer may increase the tip credit to \$1.15 and reduce the cash to \$1.15, in an attempt to maintain a regular rate of \$2.30 for overtime purposes.

The example you present may be illustrated as follows:

<u>Non-OT Hours</u>	<u>OT Hours</u>
\$1.50 cash	\$1.15 cash

<u>+\$0.80 tip credit</u>	<u>+\$1.15 tip credit</u>
\$2.30	\$2.30
	<u>+\$1.15 add'l cash for OT</u>
	\$3.45

In our opinion the proper method in this example for OT hours is:

\$1.50 cash
 +\$0.80 tip credit
+\$1.15 add'l cash for OT
 \$3.45, of which \$2.65 is cash

We take this position because we believe that if the tip credit were permitted to be increased during overtime hours, the purposes of the overtime provisions in Section 7(a) of the FLSA would be thwarted. As stated by the Supreme Court in Walling v. Helmerick & Payne, Inc., 323 U.S. 37, 40 (1944), "the Congressional purpose in enacting §7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement * * * and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." If the tip credit could be increased during overtime hours, an employer could avoid this financial pressure. To take the most graphic example, if an employer took no tip credit during the first 40 hours but a full \$1.15 tip credit during the overtime hours, his out-of-pocket wage bill would be \$2.30 during all hours:

<u>Non-OT Hours</u>	<u>OT Hours</u>
\$2.30 cash	\$1.15 cash
<u>+\$0.00 tip credit</u>	<u>+\$1.15 tip credit</u>
\$2.30	\$ 2.30
	<u>+\$1.15 add'l cash for OT</u>
	\$3.45

As this example illustrates, in order to prevent the purposes of the overtime provision from being thwarted, we believe that the tip credit used during overtime hours must be the same as the tip credit used during straight time hours.

We regret that we were unable to respond to your inquiry sooner.

Sincerely,

Warren D. Landis
 Acting Administrator

Enclosure