U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

WHD-OL-1996

June 5, 1996

Name*

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to a private country club which wishes to establish a voluntary gratuity program.

You state that individuals joining a private membership organization, such as the country club you represent, generally do so to obtain extraordinary service and generally are willing to pay for excellent services. The Board of Directors of the club determines the policy of the club in regards to voluntary gratuities versus mandatory service charge and determines then application percentage to be placed on the "chit" (meal charge ticket) that is the generally accepted rate in the area. A voluntary gratuity statement which reads "A gratuity has been added to this check for your convenience. The payment of this gratuity is subject to your complete discretion and may be increased, decreased, or eliminated entirely", will be placed on the men and on the "chit."

Voluntary gratuities are actually paid to the service employees. These employees are generally paid a regular wage, before the allocation of voluntary gratuity, that exceeds the minimum wage. It is understood that if the club if not paying minimum wage, the amount of the voluntary gratuity that is used to meet the minimum wage base cannot escape the various tax issues. The voluntary gratuity is included in the employees' income subject to all payroll tax issues and is reported annually on their W-2 Form. The distribution of the gratuities to the service staff is based upon an established formula predetermined by management or to a particular employee if the member specifically directs. The membership organization does not retain any portion of the voluntary gratuity for its own purpose.

As explained in section 3(m) of the FLSA (copy enclosed), tips received by tipped employees may be counted by an employer as "wages" in an amount up to 50 percent of the applicable minimum wage which amounts to the maximum tip credit of $2.125 an hour based on the current minimum wage of $4.25 an hour. In addition, the FLSA requires that tipped employees be informed by the employer of the tip credit provision of section 3(m), and all tips received by such employees by retained by the employees. A "tipped employee" is referred to in section 3(t) of the FLSA as any employee engaged in an occupation in which he or she customarily and regularly receives not less than $30 a month in tips. The Congressional Record (in particular, pages 42 and 43 of Senate Report No. 93-960, February 22, 1974) indicates that employees who "customarily and regularly" receive tips are waiters, bellhops, waitresses, counterman, busboys, and service bartenders. It also indicates that janitors, dishwashers, chefs, and laundry room attendants are not "tipped employees."

It is our opinion that a voluntary gratuity such as you describe would constitute a tip under the FLSA if, in fact, there is some variation in the amount the club's patrons pay to the service employees. In addition, since tips are considered the property of the employee receiving them, it is our position that tips due the employee must be paid to the employee not later than the next regular pay day and may not be held by the employer while waiting to be reimbursed by the club's patrons. Where tips are not considered to be wages under the FLSA, they need not be included in an employee's regular rate of pay for overtime pay purposes. We cannot tell whether your client's method of distributing the employees' tips satisfies the requirements of the FLSA. In this regard see section 531.34 of Regulations, 29 CFR Part 531, a copy of which is enclosed. Also enclosed for your information is a copy of WH Publication 1433, "Tipped Employees Under the Fair Labor Standards Act."

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures

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