



FLSA2021-5

January 15, 2021

Dear **Name***:

This letter responds to your request for an opinion concerning the proper calculation of overtime pay when a tipped employee works as a server and bartender, and receives tips and amounts charged as automatic gratuities or service charges. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

Your request asked how to calculate overtime pay in the following situation:

During a single workweek, an employee worked 42 hours as a server and bartender. The employee received a cash wage of \$2.13 for each hour worked as a server and \$75.00 for each shift worked as a bartender. During the workweek in question, the employee worked 18 hours as a server and three shifts as a bartender—two of the shifts lasted nine hours each and another shift for six hours. The employee received \$732.00 in tips and \$160.00 in service charges.

GENERAL LEGAL PRINCIPLES

The FLSA requires that covered, nonexempt employees receive at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. *See* 29 U.S.C. §§ 206, 207.

The tip credit provision in Section 3(m)(2) of the FLSA permits an employer to pay its tipped employees not less than \$2.13 per hour in cash wages and take a “tip credit” equal to the difference between the cash wages paid and the federal minimum wage, which is currently \$7.25 per hour. *See* 29 U.S.C. § 203(m)(2)(A); 29 C.F.R. § 531.60.¹ The tip credit may not exceed the amount of tips actually received and under the current minimum wage may not exceed \$5.12 per hour (\$7.25 - \$2.13). *See* 29 C.F.R. § 531.59. Any tips received by an employee in excess of the tip credit need not be included in the regular rate. *See* 29 C.F.R. § 531.60. A compulsory service charge (*e.g.*, 15 percent of the bill) is not a tip, and must be included in the regular rate when paid to employees. *See* 29 C.F.R. §§ 531.52, 531.55; *see also* WHD Opinion Letter FLSA2005-31, 2005 WL 3308602 (Sep. 2, 2005).

¹ Section 3(t) of the FLSA defines a “tipped employee” as any employee engaged in an occupation in which he or she customarily and regularly receives not less than \$30 a month in tips. *See* 29 U.S.C. § 203(t); 29 C.F.R. § 531.51.

In determining the regular rate of pay for a tipped employee, both the cash wage and any tip credit must be included. *See* 29 C.F.R. § 531.60. For example, if the employee is paid a cash wage of \$2.13 per hour and the employer claims an FLSA 3(m) tip credit of \$5.12 per hour, the regular rate of pay will be \$7.25 (\$2.13 + \$5.12) and the overtime rate will be \$10.88 ($\7.25×1.5). *See* WHD Field Operations Handbook (FOH) 32j18(e).

Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, the employee's regular rate of pay for that week is the weighted average of such rates. *See* 29 C.F.R. § 778.115. The employee's total earnings (except statutory exclusions) are computed to include the employee's compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs to determine the regular rate of pay. *Id.*

OPINION

Using the example provided in your letter, the calculation would be done as follows:²

Total Straight Time Wages:

- 18 hours worked as a server \times \$7.25 per hour (\$2.13 cash wage + \$5.12 tip credit) = \$130.50
- 3 shifts worked as a bartender \times \$75.00 per shift = \$225.00
- \$130.50 + \$225.00 + \$160.00 (service charges)³ = \$515.50 (total straight time pay)

Regular Rate of Pay Calculation:

- \$515.50 (total straight time pay) / 42 (total hours worked) = \$12.27 (regular rate of pay)

Overtime Pay Due:

- \$12.27 (regular rate of pay) \times .5 (half-time due for all hours worked over 40) \times 2 (overtime hours) = \$12.27 (overtime premium due)


This letter is an official interpretation by the Administrator of the Wage and Hour Division for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

² For purposes of this letter, we assume that the employee in question is not working in a state or locality that has a minimum wage higher than the current federal minimum wage of \$7.25 per hour. If the employee works in a state or locality with a minimum wage that exceeds the federal minimum wage, that higher minimum wage would be used in place of the federal minimum wage in this example. *See* 29 C.F.R. § 778.5 (The regular rate of pay cannot be less than the applicable federal, state, or local minimum wage); FOH 32j18(e).

³ For purposes of this calculation, we include the total service charges here because we assume that the service charges are paid only for the bartending shifts. If the service charges instead are also paid for the time worked as a server, it would lower the regular rate because part of the service charge would be credited toward the cash wage paid for server hours. This would diminish the amount of the service charge included in this step.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M. Stanton". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Cheryl M. Stanton
Administrator

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