U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

FLSA2026-4

January 5, 2026

Dear **Name***:

This letter responds to your request for an opinion on applying the exemption in section 7(i) of the Fair Labor Standards Act (FLSA or Act) to the overtime pay requirement for certain commission-earning employees. Specifically, you ask the Wage and Hour Division (WHD or Division) whether, in a jurisdiction where the State minimum wage exceeds the federal minimum wage, an employer must use the federal minimum wage, or, alternatively, the higher State minimum wage, to determine whether it has satisfied the minimum pay standard in section 7(i)(1). Additionally, you ask whether tips must be deemed compensation for purposes of the requirement in section 7(i)(2) that more than half of the employee's total compensation in a representative period must consist of commissions.

For the reasons set forth below, an employee of a qualifying retail or service establishment paid more than one and one-half times the *federal* minimum wage satisfies the minimum pay standard in section 7(i)(1). Moreover, although tips are not commissions under section 7(i), in some circumstances, a portion of an employee's tips would be compensation for purposes of determining whether an employee is primarily paid by commission under section 7(i)(2).

BACKGROUND

Your clients operate restaurants in a state with its own minimum wage and tip credit law; the State minimum wage exceeds the federal minimum wage. The restaurants classify servers and server assistants as exempt from overtime under section 7(i) of the Act. 29 U.S.C. § 207(i). Based on the questions presented, we understand that these employees receive commissions (which we presume are from qualifying service charges) and, at least in some instances, tips.

GENERAL LEGAL PRINCIPLES

A. The Act

The FLSA generally requires covered employers to pay all non-exempt employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked. 29 U.S.C. § 206. In addition, the Act requires payment "at a rate not less than one and one-half times the regular rate at which [the employee] is employed" to all non-exempt employees for all hours worked over 40 in a workweek. *Id.* § 207(a)(1). There are numerous exemptions, exceptions, and exclusions from the FLSA's requirements, however, including the section 7(i) exemption from overtime pay for certain commission-paid employees.

When construing or applying the Act, the Division must give the text a "fair … interpretation." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88-89 (2018) (cleaned up); WHD Op. Ltr. FLSA2021-3 (Jan. 15, 2021). Accordingly, WHD applies a "fair reading" standard to all FLSA

provisions, including the section 7(i) exemption from the overtime pay requirement. A fair reading is "neither narrow nor broad," *Dep't of Lab. v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019), and requires the Division to "interpret each FLSA exemption the same way [it] would any other statutory provision—with full attention to its text." *Munoz-Gonzalez v. D.L.C. Limousine Serv.,* 904 F.3d 208, 216 (2d Cir. 2018).

B. Section 7(i), 29 U.S.C. § 207(i) Requirements

The FLSA exempts from its overtime pay requirements certain employees of "retail or service establishment[s]."[1] 29 U.S.C. § 207(i). The exemption applies to any employee of a retail or service establishment whose (1) regular rate of pay exceeds one and one-half times the federal minimum wage and (2) compensation for a representative period is composed of more than 50% commissions.[2] *Id*.

1. Threshold Requirement: "Retail or Service Establishment"

The threshold requirement for the section 7(i) exemption is employment by a "retail or service establishment."[3] Notwithstanding the disjunctive "or" in the statutory text, the Department's

[1] Congress enacted section 7(i) as section 7(h) of the Act in 1961, which it subsequently renumbered 7(i) in the 1966 Amendments. *See* Pub. L. No. 87-30 § 6(g) (1961); Pub. L. No. 89-601, § 204(d)(1) (1966). Section 7(i) was enacted to relieve employers in retail and service industries from the obligation of paying overtime compensation to certain employees paid primarily on the basis of commissions. *See* 85 FR 29867 (2020). Even though Congress later repealed the general minimum wage and overtime exemption for such establishments in section 13 of the Act, it retained section 7(i). *See* note 3 *infra*.

[2] Employers claiming the section 7(i) exemption are required to keep records of the employee's pay and hours worked each workday and each workweek, and an appropriate representative period must also be designated and substantiated in the employer's records. *See* 29 C.F.R. §§ 516.16, 779.417(d).

[3] The FLSA's use of "retail or service establishment" has a long history. As originally enacted in 1938, the Act exempted from the minimum wage and overtime requirements "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Pub. L. 75-718, § 13(a)(2), 52 Stat. 1060, 1067 (1938). In 1949, Congress amended the definition, exempting such establishments "75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." Fair Labor Standards Amendments of 1949, Pub. L. 81-393, § 11, 63 Stat. 910, 917 (1949); *see also* 29 C.F.R. § 779.312. In 1989, Congress repealed section 13(a)(2) of the Act, and with it, the statutory definition of "retail or service establishment," despite retaining the exemption in section 7(i). *See* Fair Labor Standards Act Amendments of 1989, Public Law 101-157, § 3, 103 Stat. 938, 939 (1989). However, WHD has continued to apply the repealed definition of "retail or service establishment" to determine whether an employer qualifies as a "retail or service establishment" for purposes of the section 7(i) exemption. *See* 85 FR 29867–68 n.1 (2020). The Division has done so because the phrase "retail or service establishment" was defined in section 13(a)(2) of the Act when the section 7(i) exemption was added to the Act in 1961, and certain portions of "the legislative history of the 1961 amendments to the Act [indicated] that no different meaning was intended by the term 'retail or service establishment' from that already established by the Act's definition." *Id.* And despite amending the Act more than ten times between 1989 and 2022, Congress has not further clarified the meaning of "retail or service establishment" under section 7(i). Recognizing the limitations of relying solely on modern legislative history today, the Division determined that continuing to apply the repealed definition offered a more defensible path than creating a new administrative framework via

guidance requires a "retail or service establishment" to have a "retail concept." 29 C.F.R. § 779.316. The guidance further provides that such an establishment typically "sells goods or services to the general public," "serves the everyday needs of the community," "is at the very end of the stream of distribution," provides its products and skills "in small quantities," and "does not take part in the manufacturing process." *Id.* at § 779.318(a).

2. Pay Requirements

The remaining requirements for the section 7(i) exemption are based on an employee's pay. A qualifying establishment may claim the exemption with respect to an employee only if the employee's pay meets both requirements below.

(a) *Pay Requirement 1: Section 7(i) Minimum Pay Standard*

Section 7(i)(1) requires that the employee's "regular rate of pay" exceed one and one-half times "the minimum hourly rate applicable" to him or her under "section 206" of Title 29, that is, the federal minimum wage, which is currently $7.25 per hour. *See* 29 U.S.C. §§ 206(a)(1)(C) and 207(i)(1). Accordingly, the exemption currently requires that the employee's regular rate exceed $10.875 per hour ($7.25 × 1.5)—or, for practical purposes, that the employee's regular rate be at least $10.88 per hour—for any workweek in which the employer claims the exemption.

(b) *Pay Requirement 2: Primarily Commissioned for a Representative Period*

In addition, section 7(i) requires that any commissions on goods or services paid to the employee comprise more than 50% of the employee's compensation for a representative period of not less than one month. 29 U.S.C. § 207(i)(2). In other words, the total amount of commissions for the representative period must exceed all other compensation paid to the employee for the employer to meet this condition. *See* 29 C.F.R. 779.415.

Bona fide tips are not commissions for purposes of the Act; however, service charges keyed to the employing establishment's sale of goods or services (*e.g.*, a percentage of the customer's bill) and paid to employees commonly qualify as "commissions." *See* WHD Op. Ltr. WH-379, 1976 WL 41731 (Mar. 26, 1976); WHD Non-Administrator Op. Ltr. (Aug. 29, 1997); WHD FOH 21h07; *see also* 29 C.F.R. § 531.55(a) (distinguishing service charges from tips).

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interpretive rulemaking. *See* WHD Op. Ltr. FLSA2005-44 (Oct. 24, 2005) (applying the repealed section 13(a)(2) definition of "retail or service establishment"); WHD Op. Ltr. FLSA2003-1 (Mar. 17, 2003) (same). Some courts have accepted this approach. *See Gieg* v. *DDR, Inc.,* 407 F.3d 1038, 1047 (9th Cir. 2005) (agreeing that repealed section 13(a)(2)'s definition of "retail or service establishment" applies to the section 7(i) exemption); *Reich* v. *Delcorp, Inc.,* 3 F.3d 1181, 1183 (8th Cir. 1993) (same). Others have not. *See Alvarado* v. *Corp. Cleaning Servs., Inc.,* 782 F.3d 365, 369–71 (7th Cir. 2015) (refusing to apply repealed section 13(a)(2)'s definition of "retail or service establishment" to the section 7(i) exemption and criticizing the Department's defense of an "incomplete, arbitrary, and essentially mindless" regulatory list of establishments that could not be retail or service establishments, which the Department later rescinded in 2020).

OPINION

You pose two questions regarding section 7(i). For the purposes of this letter, we assume that each of the employing establishments at issue (1) qualifies as a retail or service establishment, which is a threshold requirement for this exemption, (2) uses a representative period consistent with the exemption, and (3) pays bona fide commissions (presumably from qualifying service charges).

A. Applicable Wage Rate for Purposes of Section 7(i)(1)

Should an employer use the federal minimum wage, or alternatively, a higher State minimum wage, to determine whether it has met section 7(i)(1)'s minimum pay standard?

Section 7(i)(1) expressly refers to the rate "applicable … under section 206 of this title." 29 U.S.C. § 207(i)(1). The plain language of the statute, therefore, explicitly incorporates the federal minimum wage established at 29 U.S.C. § 206 (currently $7.25 per hour), and not any other higher applicable minimum wage. *See also* 29 C.F.R. § 779.419(a) (explaining that the required rate of pay for purposes of section 7(i)(1) is from "the minimum wage provisions of section 6 of the Act"). Accordingly, so long as the employee receives a regular rate of pay greater than 1.5 times the federal minimum wage, the employer satisfies the minimum pay standard in section 7(i)(1) for a particular workweek.[4] As noted above, currently, this criteria for the section 7(i) exemption requires a regular rate *exceeding* $10.875 ($7.25 × 1.5).

[4] The FLSA explicitly does not "excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under" the Act or "justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under" the Act. 29 U.S.C. § 218(a). An employer must ensure compliance with all applicable laws, and, because the FLSA's minimum wage requirement is a federal floor that does not preempt state or local laws, there may be situations in which a higher state or local rate applies as well.

A higher state or local minimum wage, however, is irrelevant to the particular parameters of section 7(i), where the statute explicitly sets forth a special rule to carve out certain workers. The language of section 7(i)(1) makes clear that employers satisfy this requirement by paying a rate exceeding 1.5 times the *federal* minimum wage, not a higher state minimum wage. Some district courts have suggested that the highest applicable minimum wage, such as a state minimum wage, must be used to determine if an employee's regular rate satisfies section 7(i)(1). *See, e.g., Petersen v. Ink 477, LLC*, No. 24-20008-CIV, 2025 WL 1040819, at *11 (S.D. Fla. Apr. 8, 2025) and *Volpe v. VMSB LLC*, No. 23-CV-23888-RAR, 2025 WL 947508, at *8 n.2 (S.D. Fla. Mar. 28, 2025); *but see, e.g., Gray v. AquaTerra Contracting, LLC*, No. 4:23-CV-351-SPM, 2024 WL 1177983, at *3 (E.D. Mo. Mar. 19, 2024); *Diggs v. Ovation Credit Servs., Inc.*, 449 F. Supp. 3d 1280, 1286 (M.D. Fla. 2020); *Charlot v. Ecolab, Inc.*, 136 F. Supp. 3d 433, 449 (E.D.N.Y. 2015) (concluding that an employee must be paid 1.5 times the federal minimum wage). To the extent that any of these courts rely on *Compere v. Nusret Miami*, 28 F.4th 1180 (11th Cir. 2022), such reliance is misplaced because the Eleventh Circuit's observation that the employer in that case had, in fact, paid higher than 1.5 times the state minimum wage was stated in dicta. These courts misapply a general principle to a specific exemption despite clear statutory language to the contrary. Requiring the employer to meet any other rate effectively could (and in this State would) supplant the specific statutory requirement in the section 7(i) exemption. An employer's non-compliance with a more protective state law (based on the state's own law and definitions) might give rise to a state law claim, but it will not defeat the FLSA exemption if all of section 7(i)'s statutory requirements are met.

B. Circumstances Under Which Tips Can Be Considered Compensation for Purposes of Section 7(i)(2)

In determining whether more than half of an employee's "compensation" for a representative period represents commissions, are an employee's tips considered "compensation"?

In general, compensation under section 7(i)(2) is compensation *for employment*. *See* 29 C.F.R. § 779.415(a). "A tip," however, "is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer." 29 C.F.R. § 531.52(a). Whether to tip and how much to tip are within the discretion of the customer. *See id.* (discussing the characteristics of tips). The FLSA prohibits employers, moreover, from keeping tips received by employees for any purpose. *See* 29 U.S.C. § 203(m)(2)(B). Thus, tips are generally not considered "compensation" for employment paid to the employee by or on behalf of the employer. *See generally* 29 C.F.R. § 779.415(a).

In certain circumstances, however, the FLSA permits an employer to use a portion of an employee's tips towards the employer's wage obligations for the employee. *See* 29 U.S.C. § 203(m)(2)(A). This is known as a "tip credit." *See, e.g.,* 29 U.S.C. § 203(m)(2). Currently, the FLSA permits an employer to take a tip credit of up to $5.12 per hour against the $7.25 federal minimum wage owed an employee. In addition, as noted above, state or local minimum wage laws may also permit tip credits, which similarly allow an employer to use a portion of an employee's tips to satisfy the employer's state or local wage obligations. Because such tips are part of an employee's guaranteed earnings under applicable law, these tips are remitted "for employment" and necessarily constitute "compensation" for purposes of section 7(i).

The Division therefore concludes that tips are "compensation" for purposes of section 7(i)(2) only to the extent that an employer, in fact, relies on them to meet a federal, state, or other wage obligation with respect to the employee, such as under section 3(m)(2)(A) of the FLSA, or under an applicable analogous state or local tip credit provision.[5] Such tips should be included when

[5] The Fourth Circuit appears to have reached a different conclusion, holding that *all* tips received by servers constitute "compensation" under section 7(i). *See Wai Man Tom v. Hosp. Ventures*, 980 F.3d 1027, 1039 (4th Cir. 2020). In so holding, the Fourth Circuit relied in significant part on the Department's interpretive regulation at 29 C.F.R. § 779.415, the second sentence of which provides (in relevant part) that when computing an employee's "compensation" for purposes of section 7(i)(2), "[a]ll such compensation in whatever form or by whatever method should be included[.]" *See Wai Man Tom*, 980 F.3d at 1039 (citing 29 C.F.R. § 779.415(a)). Although WHD agrees that this statement describes "compensation" broadly in terms of how it is paid and the types of payments that may qualify, as the first sentence of section 779.415 makes clear, compensation for purposes of 7(i)(2) (in whatever form and by whatever method) must be paid "to or on behalf of" an employee "*for employment*." 29 C.F.R. § 779.415(a) (emphasis added). For the reasons discussed above, tips are not compensation for employment except to the extent that they are part of an employee's guaranteed earnings under applicable law, such as where an employer takes a federal, state, or local tip credit.

Establishments in the geographic territory of the Fourth Circuit should not rely on this opinion letter to the extent it is inconsistent with *Wai Man Tom*.

determining for purposes of the 7(i) exemption whether more than half of an employee's "compensation" for a representative period represents commissions.

These principles may be illustrated by the following example:

Meghan and Suzanne work as food servers in a state with a $14.00 per hour applicable minimum wage and a state tip credit of $2.00 per hour. For purposes of the section 7(i) exemption, each of their employers has designated a quarterly representative period for determining whether more than half their compensation comes from commissions.

Meghan

Meghan frequently tends to large parties or other events where her employer's restaurant charges customers a mandatory service charge based on a specific percentage of the bill, which constitutes a commission under section 7(i). In addition to service charges paid to Meghan from her employer, she also receives tips from customers. Such tips are not commissions.

In a particular workweek, Meghan works a total of 50 hours and earns $800.00 from service charges and $200.00 in tips. Though Meghan receives tips, her employer does not take an FLSA or state tip credit. Meghan's regular rate exceeds $10.875 per hour, and therefore meets the minimum pay standard under section 7(i)(1). It is irrelevant under 7(i)(1) whether her regular rate also meets the state minimum wage or exceeds one and one-half times the state minimum wage.

Over the representative period, Meghan earned $11,000 in service charge-based commissions, plus $2,500 in additional tips from customers. No portion of those tips constitute compensation under section 7(i) because her employer did not rely on them to meet its wage obligations in any workweek, such as by taking a federal or state tip credit. As a result, Meghan's commissions constituted 100% of her compensation for purposes of section 7(i). Thus, Meghan met the primarily commissioned requirement at section 7(i)(2) for the representative period, and the employer may claim the section 7(i) exemption in this workweek.

The employer should analyze Meghan's pay for each representative period to determine whether her commission pay from service charges makes up more than half of her compensation.

Suzanne

Unlike Meghan, Suzanne only occasionally tends to large parties or other events for which her employer charges a service charge based on a specific percentage of the bill. On those occasions, she can earn large service charge-based commission payments. However, most workweeks she earns no such commission payments. Her employer pays her a base hourly wage of $12.00 per hour and, to meet its state minimum wage obligations, takes a state tip credit of up to $2.00 per hour based on tips she receives from customers.

In a particular workweek, Suzanne works a total of 45 hours. She earns no commissions, but the employer pays her $12.00 per hour in base wages. She receives $450.00 in tips (averaging to $10.00 per hour worked), and her employer takes a tip credit towards the state minimum wage (an

additional $2.00 per hour). Because Suzanne's regular rate of pay exceeds $10.875 per hour, she meets the minimum pay standard in section 7(i)(1).

Over the representative period, Suzanne received $5,760 in base wages, and $2,000 in commissions, plus an additional $6,000 in tips. Her employer took a state tip credit of $2.00 an hour, totaling $960 for the period. The amount of tips her employer uses to meet its wage obligations (i.e., the state tip credit amount) is considered compensation for purposes of section 7(i)(2). Suzanne's $2,000 in commissions do not exceed her other compensation ($5,760 in base wages, plus $960 in tips used to satisfy a tip credit) during the designated representative period. Therefore, she does not meet the primarily commissioned requirement at section 7(i)(2), and her employer cannot claim the section 7(i) overtime exemption for the relevant period.

Because compensation and commissions can vary between employees, or even vary for one employee over the course of a representative period, it is imperative that employers regularly review any section 7(i) exemption designations to ensure that both pay requirements are met for each employee for the appropriate time periods.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the Wage and Hour Division of the United States Department of Labor 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.*

We trust that this letter is responsive to your inquiry.

Sincerely,

Andrew B. Rogers
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).** You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your request. This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.