



cual define un empleado que recibe propinas como aquél que trabaja en una ocupación en la cual habitual y regularmente recibe más de \$30 mensuales en propinas. Según lo dispone el Artículo 3(m), *supra*, el derecho a usar dicho crédito está condicionado a que se cumplan los requisitos de los subincisos (1) y (2) de ese artículo y añade lo siguiente:

*"The preceding two sentences shall not apply with respect to any tipped employee unless such employee has been informed of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."*

Las interpretaciones sobre el pago de propinas están consignadas en el Reglamento 531, secs. 531.50 a 531.60, Título 29 del Código Federal. En lo que respecta a las características de lo que constituye una propina, la parte pertinente de dicho reglamento dispone textualmente lo siguiente:

"Sec. 531.52 General characteristics of 'tips'.

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be recipient of his gratuity. In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a 'tipped employee' within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.  
[subrayado nuestro]

Según se alega, en este caso" es el patrono quien tiene el control absoluto" de las propinas. Si en efecto éste es el caso, tal arreglo estaría en conflicto con la citada disposición del reglamento, y por lo tanto estos pagos no serían propinas según se define ese término en ley. Así lo dispone el Reglamento 531, *supra*, al citar ejemplos de cantidades recibidas que no se consideran propinas:

"Sec. 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips within the meaning of section 3 (m) and 3(t). The amounts received from customers are the employer's property, not his and do not constitute tip income to the employee. [subrayado nuestro]

Aunque en estas circunstancias no sería aplicable la clasificación de empleados que reciben propinas, por otro lado se indica que el patrono paga el actual salario mínimo federal de \$5.15 por hora, sin reclamar crédito por las alegadas propinas. El efecto de incluir esta compensación adicional es el de aumentar el tipo por hora de estos empleados a más del salario mínimo que requiere la ley. Así lo reconoce implícitamente el patrono al hacer los descuentos legales correspondientes del total recibido, incluyendo la compensación adicional. Esto difiere fundamentalmente de la situación del empleado que gana menos del salario mínimo, pero alcanza ese nivel mediante el ingreso que proviene de propinas, y cuyo tipo por hora regular, por lo tanto, es el salario mínimo aplicable. Por tal motivo, a tales empleados el cómputo del pago de compensación adicional por horas trabajadas en exceso de la jornada máxima se hace a base del salario mínimo vigente. Así lo requiere el Reglamento 531, *supra*, en la siguiente disposición:

"Sec. 531.60 Overtime payments.

(a) When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, his regular rate of pay is determined by dividing his total remuneration form

employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. (See Part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of 50 percent of the applicable minimum wage) [límite de 50% derogado por las Enmiendas de 1996 a la ley], the reasonable cost or fair value of any facilities furnished him by the employer, as authorized under section 3(m), and this Part 531, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act." [subrayado nuestro]

En vista de que el ingreso adicional que recibe el empleado en la situación descrita en su consulta no podría considerarse una propina, deberá clasificarse como una comisión o bono conforme a lo anterior, y como tal, forma parte del tipo por hora regular del empleado. Aunque no se ha planteado controversia alguna sobre el pago de horas en exceso de la jornada máxima, es a base del tipo por hora que el patrono viene obligado a pagar vacaciones y licencia por enfermedad. Así lo dispone la Ley Núm. 180 de 27 de julio de 1998 en su Artículo 6(d):

La licencia por vacaciones y enfermedad se pagará a base de una suma no menor al salario regular por hora devengado por el empleado en el mes en que se acumuló la licencia. Para empleados que reciben comisión u otros incentivos, que no quedan a la entera discreción del patrono, se podrá dividir la comisión o incentivo total devengado en el año entre cincuenta y dos (52) semanas, [para] cómputo del salario regular por hora. [subrayado nuestro]

Esperamos que esta información le resulte útil.

Cordialmente,

  
Edwin A. Hernández Rodríguez  
Procurador del Trabajo Interino