

barbers, or beauty operators, the employee will qualify and the tip credit provisions of section 3(m) may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than \$20 a month, such as at Christmas or New Years when customers may be more generous than usual, will not be deemed a tipped employee. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he normally and recurrently receives more than \$20 a month in tips, he will be considered a tipped employee even though occasionally because of sickness, vacation, seasonal fluctuations or the like, he fails to receive more than \$20 in tips in a particular month.

**§ 531.58 Initial and terminal months.**

An exception to the requirement that an employee, whether full-time, part-time, permanent or temporary, will qualify as a tipped employee only if he customarily and regularly receives more than \$20 a month in tips is made in the case of initial and terminal months of employment. In such months the purpose of the provision for tipped employees would seem fulfilled if qualification as a tipped employee is based on his receipt of tips in the particular week or weeks of such month at a rate in excess of \$20 a month, where the employee has worked less than a month because he started or terminated employment during the month.

**§ 531.59 The tip wage credit.**

In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m) the amount paid to a tipped employee by an employer is deemed to be increased on account of tips by an amount which cannot exceed 50 percent of the minimum wage applicable to such employee in the workweek for which the wage payment is made. This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m). The credit allowed on account of tips may be less than 50 percent of the applicable minimum wage; it cannot be more. The

actual amount is left by the statute to determination by the employer on the basis of his information concerning the tipping practices and receipts in his establishment. However, section 3(m) provides that an employee who can show to the satisfaction of the Secretary of Labor that the actual amount of tips received by him was less than the amount determined by the employer as a tip credit shall receive an appropriate wage adjustment. See § 531.50(a). As stated in Senate Report No. 1487 (89th Cong. 2d sess.), it is presumed that in the application of this special provision the employee will be receiving at least the maximum tip credit in actual tips: "If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips." Provision is made in § 531.7 for employee requests for review of tip credit determinations made by employers, in the event that the employee considers that the tip credit taken exceeds his actual tips. As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which he qualifies as a "tipped employee." Under employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income. See also § 531.54.

**§ 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 for 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), 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.

#### PART 536—AREA OF PRODUCTION

- Sec.  
536.1 "Area of production" as used in section 7(c) of the Fair Labor Standards Act.  
536.2 "Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act.  
536.3 "Area of production" as used in section 13(a)(17) of the Fair Labor Standards Act.  
536.4 Petition for amendment of regulations.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201 *et seq.*, unless otherwise noted.

SOURCE: 27 FR 400, Jan. 13, 1962, unless otherwise noted.

##### § 536.1 "Area of production" as used in section 7(c) of the Fair Labor Standards Act.

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of section 7(c) of the Fair Labor Standards Act if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodities 95 percent of which come from normal rural sources of supply located not more than the following airline distances from the establishment:

- (1) With respect to grain, soybeans, eggs, or tobacco—50 miles;
- (2) With respect to any other agricultural or horticultural commodities—20 miles.

(b) For the purpose of this section:

- (1) "Open the country or rural community" shall not include any city,

town, or urban place of 2,500 or greater population or any area within:

- (i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or
- (ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or
- (iii) Five air-line miles of any city with a population of 500,000 or greater, according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received: (i) From farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the agricultural or horticultural commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

(Sec. 7(c), 52 Stat. 1063, 29 U.S.C. 207 (c))