

Opinion No. 67-62

April 14, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Edmundo R. Delgado State Senator 325 E. Berger Street Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Assuming that an employee worked one hundred sixty hours during a month, the minimum wage rate is one dollar (\$ 1.00) an hour for the employees type of work, and that the employee received ninety dollars (\$ 90.00) in tips during the month, what would the employer be required to pay the employee as a monthly salary?
2. Assuming that an employee worked one hundred sixty hours during a month, the minimum wage rate is one dollar fifteen cents (\$ 1.15) an hour for the employee's type of work, and that the employee received ninety dollars (\$ 90.00) in tips during the month, what would the employer be required to pay the employee as a monthly salary?
3. Assuming that an employee worked one hundred sixty hours during a month, the minimum wage rate is one dollar thirty cents (\$ 1.30) an hour for the employee's type of work, and that the employee received nineteen dollars and fifty cents (\$ 19.50) in tips during the month, what would the employer be required to pay the employee as a monthly salary?
4. Does the provision "but said employee shall be paid a minimum wage of one dollar (\$ 1.00) by the employer" in Subsection D refer to one dollar (\$ 1.00) an hour or to some other period of time.

CONCLUSIONS

1. \$ 160.00 (One dollar an hour).
2. \$ 160.00 (One dollar an hour).
3. \$ 208.00 (One dollar and thirty cents an hour) or \$ 188.50.
4. One dollar per hour.

OPINION

{*89} **ANALYSIS**

Your questions involve House Labor Committee Substitute for House Bill No. 119, First Session, Twenty-Eighth Legislature. The pertinent provisions are those which amend Section 59-3-22, N.M.S.A., 1953 Compilation (P.S.). Part B of this Section, relating to minimum wages, provides as follows:

"B. For service or other employees except agricultural workers and those provided for in Subsection A of this section:

\$ 1.00 an hour beginning July 1, 1967;

\$ 1.15 an hour beginning February 1, 1968, and

\$ 1.30 an hour beginning February 1, 1969."

Turning next to Part D of Section 59-3-22, supra, it provides as follows:

{*90} "For employees who are engaged in an occupation in which he **customarily and regularly receives more than twenty dollars** (\$ 20.00) a month in tips such employees **shall receive the minimum wages provided in Section B** [quoted above] of this section, provided that their employer may credit up to fifty percent of the employee's minimum wage as coming from tips actually received by the employee, **but said employee shall be paid a minimum wage of one dollar (\$ 1.00) by the employer.**" (Emphasis added).

In construing subsections B and D of Section 59-3-22, N.M.S.A., 1963 Compilation (as amended) three facts have to be assumed from the emphasized portions of Subsection D above. First, an employee who receives more than \$ 20 per month in tips "**shall receive the minimum wage provided in Subsection B**": that is, \$ 1.00 per hour beginning July 1, 1967; \$ 1.15 per hour beginning February 1, 1968 and \$ 1.30 per hour beginning February 1, 1969. Second, an employer of an employee receiving tips of more than \$ 20 per month must always pay a **minimum** of \$ 1.00 per hour to such employee (last clause of Subsection D).

A third corollary which must be considered, is that in order for Subsection D to be applicable at all, the tipped employee must "**customarily and regularly**" receive "**more than**" \$ 20 per month in tips. What precisely is meant by **customarily and regularly**" is not stated in the act; however, it certainly is safe to assume a person who receives \$ 20 in tips one month should not have his or her wages determined under Subsection D.

Assuming that an individual customarily and regularly receives more than \$ 20 per month, how would a person's wages be determined under this enactment? During the period from July 1, 1967 through February 1, 1968 the minimum wage shall be \$ 1.00 per hour. The employer, under Subsection D, must pay \$ 1.00 per hour. Therefore, during that initial period, Subsection D will have no practical effect whatsoever.

During the period from February 1, 1968 through January 31, 1969 the minimum wage will be \$ 1.15 per hour. Assuming a 160-hour work month the minimum wage would be \$ 184.00. Again assuming an employee is covered by Subsection D, we know the employer must **always** pay at least \$ 160.00 per month. The question now is where does the difference between \$ 160 and the \$ 184 minimum wage come from. It is our opinion that the employer may take credit for tips **actually received** to make up the difference. If an employee actually received \$ 24.00 in tips, the employer could take credit for all those tips and would be required to pay only the \$ 160. If the employee received less than \$ 24 in tips, the employer would be permitted to take credit for all tips received. In addition, he would be required to make up the difference between the total of \$ 160 plus tips and the \$ 184 minimum wage. These conclusions are necessary to comply with the three basic directives contained in Subsection D and discussed above.

The same analysis would follow during the period after February 1, 1969 when the minimum wage is set at \$ 1.30 per hour.

As drafted the employer would never be permitted to take credit for one half the minimum wage as provided in Subsection D. The requirement that he must always pay a minimum of \$ 1.00 per hour contained in the last clause of Subsection D makes that section inoperative in part because here the maximum wage required is \$ 1.30 per hour. The one half of minimum wage credit could not become fully operative until the minimum wage is set at \$ 2.00 per hour.

We will now specifically answer your questions.

1. Assuming that an employee {*91} worked one hundred and sixty hours during a month and the minimum wage rate is one dollar per hour for this employee's type of work, and the employee received ninety dollars in tips during the month, what would the employer be required to pay the employee as a monthly salary?

Answer: One dollar per hour. (\$ 160 per month).

2. Assuming that an employee worked one hundred and sixty hours during a month and the minimum wage rate is one dollar and fifteen cents per hour for this employee's type of work, and that the employee received ninety dollars in tips during the month, what would the employer be required to pay the employee as a monthly salary?

Answer: One dollar per hour by virtue of the tip credit provision. (\$ 160 per month).

3. Assuming that an employee worked one hundred and sixty hours during a month and the minimum wage rate is one dollar and thirty cents per hour for this employee's type of work, and that the employee received \$ 19.50 in tips during the month, what would the employer be required to pay the employee as a monthly salary.

Answer: \$ 1.30 per hour (\$ 208 per month). The key phrase in the tip credit provision is that the employee **customarily and regularly** receives more than \$ 20.00 per month in

tips. Apparently the employee you are considering in question 3 does not customarily and regularly receive more than twenty dollars per month in tips. If this were an employee who customarily and regularly received more than \$ 20 per month in tips, then the employer would be obligated to pay \$ 188.50.

4. Does the provision "but said employee shall be paid a minimum wage of one dollar (\$ 1.00 by the employer" in Subsection D refer to one dollar (\$ 1.00) an hour or to some other period of time?

Answer: One dollar per hour.

We would further point out that the tip provision was not designed to permit the employer to take the tips of the employees. It was designed only to permit him to take credit for tips received by the employee in computing the minimum wages.

By: Oliver E. Payne

Deputy Attorney General