

LEGAL UPDATE



HIGHLIGHTS

- On Jan. 5, 2026, the DOL issued Opinion Letter FLSA2026-4, addressing the applicable minimum wage and tip compensation for exempt commissioned employees.
- The DOL confirms that if an employee at a qualifying retail or service business is paid more than 1.5 times the federal minimum wage, the employee meets the minimum pay requirement in Section 7(i)(1).
- The DOL advises that, in certain circumstances, a portion of an employee's tips can be considered compensation when determining whether the employee is mainly paid by commission under Section 7(i)(2).

DOL Clarifies Applicable Minimum Wage and Tip Compensation for Exempt Commissioned Employees

On Jan. 5, 2026, the U.S. Department of Labor (DOL) issued Opinion Letter [FLSA 2026-4](#), addressing the following:

- Whether, in a jurisdiction where the state minimum wage exceeds the federal minimum wage, an employer must use the federal minimum to determine if it has satisfied the minimum pay standard in Section 7(i)(1) of the Fair Labor Standards Act (FLSA); and
- Whether tips must be considered compensation when determining if more than half of an employee's earnings come from commissions, as required by Section 7(i)(2).

The opinion letter concerns an employer operating restaurants in a state with its own tip credit law and minimum wage that exceeds the federal minimum wage.

Background

The FLSA generally requires employers to pay employees at least the federal minimum wage for every hour worked and 1.5 times their regular pay rate for each hour worked over 40 in a workweek. Section 7(i) of the FLSA exempts retail and service establishment employees from overtime pay requirements if their regular rate of pay exceeds 1.5 times the federal minimum wage and their compensation for a representative period is composed of more than 50% commissions.

Under Section 7(i), tips are generally not considered compensation for employment. However, in certain circumstances, the FLSA permits an employer to use a portion of an employee's tips towards the employer's wage obligations (known as a tip credit). Because these tips are part of an employee's guaranteed earnings, such tips constitute compensation for purposes of Section 7(i). Bona fide tips are not commissions under the FLSA; however, service charges keyed to an establishment's sale of goods and services (e.g., a percentage of a customer's bill) and paid to the employee commonly qualify as commissions.

Key Highlights

The DOL confirms that Section 7(i)(1) expressly incorporates the federal minimum wage and not any higher applicable minimum wage. Therefore, if a retail and service establishment 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. Additionally, the DOL advises that tips are compensation for purposes of Section 7(i)(2) only to the extent that an employer relies on them to meet federal, state or other wage obligations. These tips can be included when determining if more than half of an employee's earnings come from commissions.

Employer Takeaway

Employers should regularly review Section 7(i) exemptions to ensure they meet their FLSA pay requirements.