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DOL proposes new tipped wage rules

On October 8, the DOL proposed regulations under the FLSA governing how tipped workers are paid. The proposal would eliminate the so-called 80/20 rule that requires employers to pay the full minimum wage to tipped employees who spend more than 20% of their time on non-tipped work and would relax the rules on tip pooling. Employers in the service and hospitality industries in general, and the restaurant sector in particular, will want to closely monitor developments.

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Authors

Nancy Vary, JD

Kenneth Kim, JD

Background

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay employees at least the federal minimum wage. However, in certain circumstances, employers may count a limited amount of the tips its tipped employees earn as a credit against the minimum wage obligation — but only if the tipped employees keep all their tips. The 80/20 rule, which was adopted by DOL guidance in 2011, prevents employers from taking a tip credit if the employee's non-tipped duties — such as cleaning and setting tables or occasionally washing dishes or glasses — exceed more than 20% of the employee's work time. After years of legal challenges, the DOL removed the 20% limit in a November 2018 [opinion letter](#) and ceased its enforcement.

The FLSA does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips. In December 2017, the DOL [proposed](#) a rule that would have allowed non-tipped employees to participate in mandatory tip pools and businesses, managers, and supervisors to keep employee tips as long as the employer was not taking the tip credit. In response, Congress amended the FLSA in the [Consolidated Appropriations Act of 2018](#) (CAA) to prohibit employers from keeping employee tips for any reason — including sharing with managers or supervisors — regardless of whether the employer takes a tip credit.

Proposed regulations

On October 8, the DOL [proposed](#) new FLSA regulations governing how tipped workers are paid. The proposal would make it easier for employers to require "front-of-the-house" employees who customarily receive tips — such as servers and bartenders — to share them with "back-of-the-house"

workers who typically do not receive tips — such as cooks and dishwasher. In addition to withdrawing the DOL’s December 2017 proposal, the new tip regulations would:

- Eliminate the 80/20 rule to allow employers to take a tip credit for *any* time that tipped employees perform related non-tipped duties contemporaneously with their tipped duties, or within a reasonable time immediately before or after performing the tipped duties
- Permit employers that do not take a tip credit to include a wider group of workers in a mandatory tip pool
- Prohibit employers, managers, and supervisors from keeping or sharing in the tips or pooled tips their employees receive, regardless of whether the employer takes a tip credit

Under the proposed regulations, employee eligibility to participate in a mandatory tip pool would depend on whether the employer is claiming a tip credit or not. Employers that do not claim a tip credit would be permitted to include non-tipped workers in such a tip pool provided they pay tipped employees at least the full minimum wage. However, employers that claim a tip credit would only be allowed to include workers who customarily and regularly receive tips. Employers that use a mandatory tip pooling arrangement would be required to distribute tips at least as often as it pays wages.

Implementing the CAA’s provisions, the proposed regulations would prohibit employers from keeping any employee tips, whether from a tip pool or otherwise, or from sharing them with managers or supervisors. In determining whether an employee is a manager or supervisor for these purposes, the proposed regulations rely on the duties test under the FLSA’s executive employee exemption. Further, an employee with at least a 20% equity interest in the business who is actively engaged in its management would be considered a manager or supervisor.

In closing

While the proposed rule would provide needed clarity with respect to tip credits and tip pooling under federal rules, employers should be mindful that states in which they operate may have more stringent laws. The DOL will accept public comments until December 9, 2019.

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