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New Rules for Employers with Tipped Employees

The rules under federal law have just changed for employers with tipped employees. Many employers with employees who customarily and regularly receive tips as part of their occupation — servers, bartenders, taxicab and other drivers, skycaps, etc. — take a tip credit against their minimum wage obligation. This means employers can pay a tipped employee a cash wage as low as \$2.13 per hour, if the employee receives enough tips to bring his or her total wages above the mandatory minimum.

Because many of these tipped employees work as part of a team, employers sometimes require these employees to share their tips with the other members of the team. The Department of Labor (DOL) regulates tip pools for employers that also take a tip credit. For example, such employers can only require employees to share their tips with other employees who have more than minimal interaction with customers. An employer that does not follow these rules may be required to pay damages to its employees.

In the last decade, wage and hour litigation against service industry employers has skyrocketed. To avoid the time, expense, and potential damages associated with these lawsuits, many employers have done away with the tip credit altogether. These employers pay their employees at or above the minimum wage. By doing so, they believed the DOL would have no jurisdiction to regulate their tip pools. Many courts agreed and dismissed lawsuits brought by employees claiming tip pool violations.

That all changed in 2011, when the DOL adopted regulations that purportedly extended its tip pool regulations to those employers that did not even take a tip credit. These regulations were challenged in numerous court proceedings as being in excess of the DOL's statutory authority.

Congress stepped in on March 23, 2018, and amended the Fair Labor Standards Act (FLSA) to resolve this conflict. The amendment **rescinded** the 2011 DOL regulations, thereby limiting the DOL's jurisdiction to regulate tip pools when the employer does not take a

tip credit. Under this amendment, however, an employer is not permitted to “keep tips received by its employees for any purposes including allowing managers or supervisors to keep any portion of employees’ tips.” The amendment also changed the penalties associated with an employer that violates these provisions of the FLSA.

On Monday, the DOL issued interim guidance implementing this recent amendment to the FLSA. In this [Field Assistance Bulletin](#), the DOL now recognizes that “employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped — such as cooks and dishwashers — to participate in tip pools.” The DOL also indicated that it would be using the duties test for **exempt executive employees** to evaluate whether an employee is the type of manager or supervisor that cannot be allowed to keep any portion of an employee’s tips.

Before employers make changes to their tip credit and tip pool policies, they should first consult all applicable state and local laws to determine whether those laws impose more stringent requirements for the use of tip pools and tip credits than federal law. Frost Brown Todd has a team of Labor and Employment attorneys with extensive experience advising businesses on complying with federal and state tip credit and tip pooling regulations. If you have any questions about the use of tip credits and tip pools, please contact [Kyle Johnson](#) or any other attorney in Frost Brown Todd’s [Labor and Employment Practice Group](#).

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