



New DOL Regulations Provide Clarity for Compensating Tipped Employees

On December 22, 2020, the Department of Labor (DOL) announced a final rule amending the Fair Labor Standards Act (FLSA) regulations that apply to tipped employees.

Dec 23, 2020

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Tip Sharing

Under the revised regulations, employers are explicitly prohibited from retaining any tips received by their employees for any purpose, regardless of whether the employer takes a tip credit or not. Most managers or supervisors are also prohibited from receiving any portion of employees' tips.

Tip Pooling

Employers that take a tip credit must continue to ensure that any mandatory, "traditional" tip pool includes only workers who customarily and regularly receive tips. The new regulations, however, now allow employers that do not take a tip credit — i.e., pay at least the full minimum wage — to implement mandatory, "nontraditional" tip pools that may include back-of-the-house employees such as cooks and dishwashers. Employers who choose to implement mandatory, nontraditional tip pools must follow similar recordkeeping requirements as those employers who operate traditional, mandatory tip pools, such as identifying employees who receive tips on payroll records and recording the amounts of tips received by each employee.

The new regulations also clarify that when an employer collects tips to distribute as part of a mandatory tip pool — traditional or nontraditional — the employer must fully redistribute the tips at least as often as it pays other wages.

Sidework

Additionally, the final rule provides clarity regarding when an employee is performing tipped work for which the employer can take a tip credit. Employers may take a tip credit during times when a tipped employee performs related non-tipped duties either simultaneously with or for a reasonable time either before or after tipped duties. According to the DOL, a non-tipped duty is presumed to be “related to” a tip-producing occupation if it is listed as a task of the tip-producing occupation in [O*NET](#), a site with detailed descriptions of various occupations. For example, some of the tasks of waiters and waitresses identified by O*NET include taking orders from patrons, checking with customers to ensure they are enjoying their meals, and collecting payments from customers.

Concluding Thoughts

The DOL’s recent guidance for tipped occupations has been the subject of significant litigation, and it is possible that an interested party may challenge these new regulations. Congress may act to revoke these regulations, or a future administration may repeal these regulations. Barring any such actions, however, these new regulations are scheduled to become effective in February 2021.

Employers should be mindful that while these regulations are applicable to the federal FLSA, state and local wage and hour laws may provide additional requirements and limitations on the compensation of tipped employees, which may impact the guidance above. Some states, for example, prohibit mandatory tip sharing arrangements that would otherwise be permissible under the FLSA. Employers must ensure that they comply with not only the FLSA, but also all applicable state and local laws.

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