

Proposed DOL Tip Pool Regulations: Good News (or not?)

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Tip pooling in the hospitality industry has long been a method of increasing pay to certain employees and to allow the employer to pay lower "wages" than would otherwise be required. Under the Fair Labor Standards Act ("FLSA"), an employer may pay tipped employees a cash wage as little as \$2.13 per hour (instead of the federal minimum wage rate of \$7.25), so long as the employees receive at least \$5.12 per hour in tips. Tips may be shared among those workers who are "regularly and customarily tipped," and the employer does not retain any portion of the tips. Such arrangements are generally allowed by both federal and state law, and are widely utilized.

Tip pooling has been under seige for the last several years, particularly as federal courts have issued varied and often confusing rulings on what is proper, and whether the 2011 regulations adopted by the Department of Labor ("DOL") (which made tip pooling with back of the house employees unlawful) were properly issued. In addition, various states have enacted legislation mandating different rules for tip sharing and minimum wage increases.

In December of 2017, the DOL gave notice of proposed new regulations under the Fair Labor Standards Act ("FLSA") in an effort to clarify the regulations in response to the various court rulings. Under the proposed regulations, the class of employees with whom tip sharing will be allowed will be broadened. According to the DOL announcement, the proposal is intended to help decrease wage disparity between tipped and non-tipped workers. But there are other ramifications to the proposed regulations, and the DOL solicited comments from interested parties about the proposed changes. The proposed rule will likely be adopted in the near future.

The current Wage and Hour Regulations allow the employer to take credit against its minimum wage obligation for tips and gratuities received by employees. The regulations also allow the employer to require tip sharing among those employees who "regularly and customarily receive tips," such as wait staff and bartenders in restaurants, or bellhops in hotels.

Under the proposed regulations, tip sharing would be allowed among a larger class of employees, and would allow sharing of tips with employees who have not "regularly and customarily" received tips in the past (such as "back of the house" employees). The caveat is that this new rule would only apply if the employer pays the employees full federal minimum wage and do not take a tip credit. Those employers who use the tip credit toward their minimum wage payment obligation would not be allowed to utilize the expanded tip sharing pool. However, if the employer pays minimum wage without considering the tip credit, the new regulations would allow the employer to retain some of the tip pool, whereas the current regulations do not allow such retention by the employer (except in the case of mandatory gratuities and service charges that are set by the employer and which are therefore not considered "tips" but are instead considered "wages").

In light of the increased risk associated with tip pooling, including litigation, many restaurants have recently started experimenting with a "no tipping" policy, which necessarily has resulted in higher menu prices, in order to pay higher wages required (or desired). There are often other consequences to such action, including the possible loss of customers as well as increased rent where the rental rate has a revenue component. This is not a trend that is likely to continue.

Needless to say, this area of the law is evolving rapidly, and tip pooling is under attack in multiple courts and jurisdictions. Even if this new regulation is passed, hospitality industry employers should tread carefully when adopting and changing their compensation methods in response to such changes, and carefully consider the "ripple effect" any such changes could have. It is imperative that employers immediately review their policies and practices on a regular basis to ensure they are and remain in compliance not only with FLSA regulations, but also all rapidly changing state and local laws.

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