

Updated: Department of Labor Issues Final Rule Regarding FLSA Tip Regulations

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UPDATE: The Biden administration has announced that the implementation of this rule will be delayed by 60 days to provide for further review. Originally scheduled to go into effect on March 1, 2021, the rule now has an effective date of April 30, 2021. We will continue to update this page with any further actions the administration takes with respect to this rule.

On December 22, 2020, the U.S. Department of Labor (DOL) issued a final rule revising certain regulations under the Fair Labor Standards Act (FLSA) related to tipped employees. However, because of the timing of the new rule, it is unclear whether it will survive when President-Elect Biden takes office next month.

Under the DOL's existing regulations, an employer may take a "tip credit" against the employer's federal minimum wage obligations for tips received by its tipped employees. It also may institute a mandatory "tip pool" in which tips are shared among workers who "customarily and regularly receive tips" while still availing itself of a tip credit for workers in the tip pool. The DOL's new rule leaves this framework in place, but makes three changes to the regulations pertaining to tip credits and tip pools. First, an employer may now institute a mandatory "nontraditional" tip pool that includes employees who do not customarily and regularly receive tips, such as cooks and dishwashers, so long as the employer does not take a tip credit against the wages of the employees in that tip pool. In other words, employees in such a tip pool will need to be paid at least the federal minimum wage, without factoring any tips.

Second, an employer may apply the tip credit to time that a tipped employee spends performing non-tipped duties related to his or her tipped duties, so long as the non-tipped duties are performed contemporaneously with, or "for a reasonable time immediately before or after," the tipped duties. This is consistent with guidance issued by the DOL in late 2018 and represents a change from previous guidance under which tip credits could not be claimed if employees spend more than 20% of their time on non-tipped duties. The rule does not define "for a reasonable time," but rather suggests that the focus will be on "whether an employee is functionally engaged in one occupation or two."

Third, the final rule implements statutory language passed by Congress in 2018 that prohibits employers, including managers and supervisors, from keeping any portion of tips earned by tipped employees, whether or not the employer takes a tip credit. This does not, however, prohibit managers or supervisors from earning tips themselves, and nor does it prevent employers from deducting the actual costs of credit card processing charges from employee tips.

The final rule will be implemented within 60 days of publication in the Federal Register. However, because the Trump administration did not implement the rule earlier, the Biden administration may be able to stop it before it even takes effect as the rule is generally opposed by Democratic lawmakers and organized labor. Moreover, employers should also be aware that state law, such as the Massachusetts Tip Act, may provide for stricter restrictions on tip credits and tip pooling. Accordingly, employees with tipped employees should consult with their employment counsel before implementing any changes to their tip credit and tip pooling practices.

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