

New Federal Tip Rules Expected in October 2018

Law and the Workplace Blog on **October 19, 2018**

Since 1966, Section 3(m) of the Fair Labor Standards Act permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (currently \$2.13) and the federal minimum wage (currently \$7.25). Employers using the tip credit must be able to show that tipped employees receive at least the minimum wage when direct wages and the tip credit amount are combined. If the employee's tips combined with the direct wages do not equal the minimum wage, the employer must make up the difference.

Congress amended the FLSA in 1974 to require that employers notify tipped employees of the use of the tip credit in advance, and to permit mandatory tip pooling among employees who "customarily and regularly receive tips." The U.S. Department of Labor's longstanding position following the 1974 amendments was that the limitation on mandatory tip pool participants to employees who "customarily and regularly receive tips" applied whether or not the employer pays a tip credit—in other words, that even employers that pay the full minimum wage cannot require employees to share tips with employees (such as cooks, dishwashers, and other "back of the house" employees) who do not "customarily and regularly receive tips."

In 2011, the Obama Administration amended the FLSA tip credit regulations (specifically, 29 C.F.R. § 531.54) to codify the DOL's interpretation of FLSA § 3(m) that "mandatory tip pools ... can only include those employees who customarily and regularly receive tips."

In July 2017, the Trump Administration announced its intention to rescind the 2011 regulatory amendments.

In the Consolidated Appropriations Act signed by President Trump in March 2018, Congress amended § 3(m) to prohibit employers from keeping tips received by their employees, regardless whether the employer takes a tip credit. The 2018 law also withdrew those portions of the FLSA regulations (§§ 531.52, 531.54, and 531.59) that barred tip pooling when employers pay tipped employees at least the full federal minimum wage and do not claim a tip credit, pending additional DOL rule making.

As a consequence of the 2018 amendments to § 3(m), employers that pay the full federal minimum wage are no longer prohibited from allowing employees who are not “customarily and regularly” tipped to participate in tip pools. In other words, employers can pool all tips and divide them among all staff—regardless of whether they are customarily tipped employees—provided they are not managers or supervisors.

In the Fall 2018 Regulatory Agenda published earlier this week, the DOL [announced that a Notice of Proposed Rule Making on the FLSA tip regulations is expected in October 2018](#)

. As the DOL explained,

In the FY 2018 Consolidated Appropriations Act, Congress amended multiple provisions of the [FLSA] with respect to an employer’s use of its employees tips and additionally provided that portions of the [DOL’s] 2011 rule regarding tips shall have no further force or effect until any future action taken by the [DOL]. In this Notice of Proposed Rulemaking, the [DOL] will align its regulations with the recent statutory changes.

Employers in states that have more restrictive or different laws governing the tip credit, tip pooling, and tip sharing—[such as New York](#)—will be less concerned about federal developments in this area. But nationwide hospitality employers are paying close attention.

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