

The Tip Pool Saga Continues

Practices

Employment & Labor Law

Employee Benefits Litigation

Employee Compensation and Benefits

Employees and Technology

Employment Immigration

05.02.2018

In the past year, the U.S. Department of Labor (DOL) has made several announcements concerning the evolution of the tip pooling rules. These have focused on employees who had been banned from inclusion in a tip pooling arrangement due to the nature of their work, even if they earned the federal minimum wage and their employer did not claim a tip credit on their wages.

In the past year, the U.S. Department of Labor (DOL) has made several announcements concerning the evolution of the tip pooling rules. These have focused on employees who had been banned from inclusion in a tip pooling arrangement due to the nature of their work, even if they earned the federal minimum wage and their employer did not claim a tip credit on their wages. (For a full discussion of the prior announcements, please see our December 13, 2017 and September 20, 2017 articles.)

But in the past few weeks, Congress rolled back DOL's authority and has ultimately decided that non-tipped employees can participate in a pooling arrangement with tipped employees provided that all employees in the tip pool earn at least minimum wage, and the employer is not claiming a tip credit on their wages. Additionally, management and supervisors are banned from retaining any portion of the employee's tips, regardless of whether they do not claim a tip credit.

By way of background, in 2011 DOL issued regulations which stated that tips under the Fair Labor Standards Act (FLSA) are the property of the employee, whether the employer takes a tip credit or not. Therefore, even if the employer paid a tipped employee minimum wage and the employer was not claiming a credit, the tips still belonged to the employee. For

example, a restaurant employer, under these regulations, could not include cooks and dishwashers – who do not customarily and regularly receive tips – in a tip pool with tipped employees even if all the employees were paid minimum wage and the employer was not claiming a tip credit. But in July 2017, DOL announced it would rescind the 2011 restrictions, and on Dec. 5, 2017, the department published a notice of proposed rulemaking in the *Federal Register* to carry out the rescission.

The most recent development is an amendment to Section 3(m) of the FLSA that is part of the omnibus spending bill signed into law March 23, 2018. Known as the Tip Income Protection Act of 2018, this amendment bans employers, managers and supervisors from collecting any portion of an employee's tips, regardless of whether the employer claims a tip credit. Specifically it states: "An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit."

The amendment further provides that an employer who violates the prohibition on retaining tips will be liable for the sum of any tips taken from the employee as well as any tip credit taken by the employer. Additionally, the employer can be subject to liquidated damages equal to the same sum and a civil penalty of up to \$1,100 per violation. Finally, the amendment states that the 2011 DOL regulations shall have no further effect until the administrator of the department's Wage and Hour Division takes action.

As a result of the amendment to the FLSA, the department's Wage and Hour Division (WHD) issued Field Assistance Bulletin NO. 2018-3 on April 6, 2018, to provide guidance on the enforcement of the tip credit regulations. The bulletin allows employers to establish tip sharing agreements between "front-of-the-house" and "back-of-the-house" employees when the employees are paid a full minimum wage. Therefore, employers who pay full minimum wage are no longer prohibited from allowing employees who do not customarily and regularly receive tips – such as kitchen staff, cooks and dishwashers – to participate in a tip pool. Additionally, the bulletin clarifies that DOL will use the duties test found at 29 C.F.R. § 541.100(a)(2)-(4) to determine if an employee is a "manager" or a "supervisor." The bulletin also states that WHD will assess whether a violation is repeated or willful in assessing civil money penalties of up to \$1,100 when employers unlawfully keep employee tips.

Thus, if you are an employer with tipped employees, the FLSA amendment and recent guidance from DOL now allows the inclusion of employees such as dishwashers and cooks in a tip pool as long as all employees in the tip pool earn at least the federal minimum wage.

Tip pooling remains illegal for non-tipped employees who earn less than minimum wage, and management is strictly prohibited from retaining any portion of the tips, regardless of whether a tip credit is claimed. It is likely DOL will announce a final rule in the near future that will provide further clarity, and we will continue to monitor these developments. In the meantime, if you have any questions regarding a tip sharing arrangement at your restaurant, we strongly encourage you to seek legal advice from an experienced employment attorney.

Our Insights are published as a service to clients and friends. They are intended to be informational and do not constitute legal advice regarding any specific situation.