

DOL Issues Final Tip Credit Rule

PUBLISHED ON

October 29, 2021

The U.S. Department of Labor has issued its long-awaited final tip credit rule under the Fair Labor Standards Act (FLSA), estimated to affect over 470,800 establishments in the casino, hotel, bar, restaurant, snack bar and nail salon industries.

The FLSA generally requires non-exempt employees be paid minimum wage - currently \$7.25 per hour. Employers of certain tipped employees, however, may meet this minimum wage obligation by taking a "tip credit" based upon the amount of tips an employee receives. If certain conditions are met, employers may pay "tipped employees" - those engaged in an occupation that customarily and regularly receives more than \$30 per month in tips - at least \$2.13 per hour. Thus, the employer can take a "tip credit" of up to \$5.12 per hour when the employee's tips are great enough to bring the employee's hourly earnings up to the minimum wage.

The "tip credit" is not new. However, the final rule [aims to clarify the conditions under which employers can claim a tip credit](#), over which prior administrations and courts have differed, and offer helpful illustrations.

What are those conditions?

Under the final tip credit rule, an employer can take a tip credit *only* when the tipped employee is performing *tip-producing work*, or when the tipped employee is performing *work that directly supports tip-producing work*, as long as the directly supporting work does not exceed 20% of the hours worked during the workweek or is not performed during a continuous period of time that exceeds 30 minutes.

Tip-Producing Work

Recognizing that tip-producing work encompasses many aspects of customer service, the final rule defines tip-producing work as "any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips." Examples of tip-producing work:

- When a server provides table service, takes orders, makes recommendations, and serves food and drink.
- When a bartender makes and serves drinks, talks to customers at the bar, and serves bar food to customers, and when a service bar tender prepares drinks for table service.
- When a nail technician performs manicures and pedicures and assists patrons in selecting services.
- When a busser assists servers with table service, fills water glasses, clears dishes from tables, fetches and delivers items to and from tables, busses tables, changes linens and sets tables.
- When a parking attendant parks and retrieves cars, and shuttles cars to retrieve a customer's car.
- When a hotel housekeeper cleans hotel rooms, and when a bellhop assists customers with luggage.

Work Supporting Tip-Producing Work

This is defined as "work performed by a tipped employee in preparation of or to otherwise assist the tipped employee's tip producing work." Examples of directly supporting tasks:

- A server's dining room prep work such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables.
- A busser's pre- and post-table service prep work such as folding napkins and rolling silverware, stocking the busser station, vacuuming dining areas, wiping down soda machines and ice dispensers, food warmers and other equipment in the service alley.
- A bartender's slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles and fetching liquor supplies, vacuuming under tables in the bar area, cleaning ice coolers and bar mats, making drink mixes, and filling drink mix dispensers.
- A nail technician's cleaning pedicure baths between customers, cleaning and sterilizing private salon rooms between customers, and cleaning tools and the floor of the salon.
- A parking attendant's cleaning the valet stand and parking area, and jockeying cars to facilitate the parking of patron's cars.
- A hotel housekeeper's stocking the housekeeper cart, and a bellhop's rearranging the luggage storage area and maintaining clean lobby areas.

Work Not Part of a Tipped Occupation

On the other hand, an employer cannot take a tip credit, and must pay a tipped employee at least minimum wage, when tipped employees perform work that is not part of a tipped occupation. Examples of such work include:

- A server preparing food, salads and cleaning the kitchen or bathrooms.
- A busser cleaning the kitchen or bathrooms.
- A bartender cleaning the dining room or bathroom.
- A nail technician ordering supplies for the salon.
- A parking attendant servicing vehicles.
- A hotel housekeeper cleaning non-residential areas of the hotel such as an exercise room, restaurant or meeting rooms.
- A bellhop retrieving room service trays from guest rooms.

The final rule does not impose any additional record keeping requirements. Several comments noted difficulties in tracking time spent on directly supporting tasks, to which the DOL suggests companies schedule these tasks so as not to exceed the 20% and continuous 30-minute thresholds.

The DOL's final tip credit rule will go into effect on December 28.

If you have any questions on the new rule, please [contact me](#) or any member of the [Barley Snyder Employment Practice Group](#).

:



Jill Sebest Welch

Partner

Tel: (717) 399-1521

Email: jwelch@barley.com