

Tip Credit Final Rule Could Spark Controversy

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A U.S. Department of Labor final rule handed down in the last days of the administration of former President Trump concerning the "tip credit" could set up a battle with the current administration.

The [DOL's rule](#) addresses tip credit issues under the Fair Labor Standards Act. While the final rule will become effective early March, there already are signals that the administration under current President Joe Biden could look to change the rule.

The Tip Credit

Normally, the FLSA requires covered employers to compensate their employees at least the federal minimum wage - which is currently \$7.25. The so-called "Tip credit" is a special rule that permits employers to use a lower direct cash wage for "tipped employees" who customarily receive more than \$30 per month in tips. The FLSA permits employers to pay tipped employees as little as \$2.83 per hour in Pennsylvania and take a credit for the difference between the federal minimum wage and the minimum cash wage. Employers, however, may only take a tip credit if the employee receives at least \$5.12 per hour in tips directly from customers or indirectly through a tip pooling arrangement among tipped employees. If the combined total of the lower cash wage and a tipped employee's tips falls under the \$7.25 threshold, the employer is required to pay the employee the standard minimum wage of \$7.25 per hour without taking credit for the tips the employee received. Likewise, only certain employees may participate in a tip pooling arrangement if the employer wishes to utilize the tip credit. Specifically, only those employees who customarily and regularly interact with customers may receive tips from a tip pooling arrangement if the employer wishes to pay those employees the lower cash wage permitted by the tip credit.

2018 Amendments

But what if the employer doesn't want to take a tip credit? May the employer require that employees who receive tips from customers share those tips with employees who don't normally interact with customers, such as line cooks or prep staff? In 2018, Congress adopted multiple amendments to the FLSA. Perhaps the most important amendment prohibited employers from keeping 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 2018 amendments also permit employers that do not take the tip credit to require their tipped employees to share tips with back-of-the-house employees or other non-managers through a mandatory tip pool.

The Final Rule

The Trump administration's final rule, issued in December, permits employers to exert control over an employee's tips if the employer:

- Promptly distributes tips to the employees who received them
- Requires employees to share tips with other eligible employees
- Facilitates tip pooling by collecting and redistributing tips to eligible employees in a tip pool by the next regularly scheduled payday

Additionally, the final rule states that employers are permitted to compel tipped employees to share tips with non-tipped employees as long as:

- The employer does not take a tip credit
- The tips are not shared with supervisors, managers or the employer
- The employer compensates all of the employees in the tip pool (both tipped employees and non-tipped employees) federal minimum wage

It is likely that this change will spark some controversy because the FLSA prohibited this mandatory "nontraditional tip pool" practice prior to 2018.

Will the new regulations last under the Biden Administration?

It's too early to tell. What we do know is the Biden administration's DOL - under the leadership of Marty Walsh - has already begun to undermine the Trump administration's final rule on tip credits. The DOL has withdrawn an opinion letter that permitted a restaurant to engage in the nontraditional tip pool. The withdrawal of this opinion letter strongly suggests that Biden's DOL may take the position that the Trump administration exceeded its authority when issuing its final rule.

While we certainly expect more updates with this issue, please [contact me](#) or anyone in the [Barley Snyder Employment Practice Group](#) if you have any questions regarding how the final rule, which is scheduled to go into effect on March 1, 2020, may affect your business.