

# New tip rules: Prepare for a deep dive into the tip pool



Employers have long been allowed to pay tipped employees less than the usual minimum wage. In some industries, tips have traditionally been pooled, so “back-of-the-house” staff can share in customers’ generosity.

But the informality of tipping means it is a surprisingly complicated wage-and-hour issue.

**THE LAW** The Fair Labor Standards Act requires paying workers the federal minimum wage of \$7.25 per hour. However, tipped employees may take a \$5.12 tip credit as long as wages paid and tips received by the employees add up to \$7.25. Employers are not required to use the tip credit. In fact, some states do not allow employers to use the tip credit.

Federal rules prohibit employers from using the tip credit if the employer retains any tips or if the tips are redistributed to workers who do not customarily and regularly receive at least \$30 per month in tips, such as cooks or dishwashers.

**WHAT’S NEW** For employers who use the tip credit, the rules about who can receive tips have not changed. However, the rules have been less clear for employers who do not use the tip credit—in other words, those that pay the full minimum wage before tips.

The FLSA’s tip credit provision took effect in 1966. Until 1974, employers were permitted to require all tips to be turned over to the employer as a part of gross receipts.

Then Congress amended the FLSA to say that the tip credit provision does not apply to a tipped employee unless “all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.”

In other words, employers who share tips with employees who do not generally get them could lose the tip credit.

But the law still did not address whether employers who pay the full minimum wage may share tips.

## Recent court cases

In 2010, the 9th Circuit Court of Appeals ruled that the tip pooling restriction only applied to employers who used the tip credit.

In 2011, the Obama administration's Labor Department amended federal regulations to prohibit employers "from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted ... as a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool."

In 2012, the 9th Circuit backed the Labor Department after the Oregon Restaurant and Lodging Association challenged the constitutionality of the change.

Three other circuits came to the opposite conclusion, setting the stage for a potential Supreme Court battle over the issue at the end of the Obama administration.

## New amendments to FLSA

In March 2018, President Trump signed the Consolidated Appropriations Act for 2018. A section of the act contains amendments to the FLSA to specifically prohibit employers from requiring employees to share their tips with the employer, including any managers or supervisors, whether or not the employer takes a tip credit.

In other words, an employer can now violate the FLSA through an improper tip pooling arrangement even if it is paying employees the full minimum wage.

When determining who managers and supervisors are, for tip pooling purposes, the DOL includes employees:

1. Whose primary duty is management of the enterprise or of customarily recognized departments or subdivisions thereof
2. Who customarily and regularly direct the work of two or more other employees
3. Who have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Theoretically, this means employers could include low-level supervisors.

**HOW TO COMPLY** For employers who use tip pools, this is a good time to have your attorney review the tip pool rules. The goal is to ensure that your practices comply with the law, DOL guidance and state and local laws.

## Key points

Here are the key points to remember when reviewing or establishing your tip pool practices:

- Very little has changed for employers who take the tip credit. Employers cannot retain tips paid to employees, except as part of a valid tip pooling arrangement. Tip pools may not include management or supervisory employees, or other employees who do not customarily and regularly receive tips.
- Employers must ensure that they are not taking any improper deductions from employee tips, such as credit card processing fees in excess of the employer's cost.
- In most jurisdictions, employers who do not use the tip credit are now free to adopt tip pooling arrangements that include back-of-the-house employees. However, employers should be sure to check state and local law.