DOL's New Tip-Credit Interpretations

Insights
6.01.11

(Hospitality Update, No. 2, June 2011)

The federal Fair Labor Standards Act's "tip credit" was among the many topics addressed by the U.S. Labor Department's recent final rule. DOL's tip-related pronouncements are a mixed-bag for employers.

The General Principles
The FLSA allows an employer to credit a portion of a tipped employee's tips toward the FLSA-required minimum wage (currently $7.25 per hour). Employers taking an FLSA tip credit must pay a cash wage of not less than $2.13 per hour, so at present they are limited to a tip credit of no more than $5.12 per hour ($7.25 – $2.13 = $5.12).

The FLSA defines tipped employees as those who are engaged in occupations in which they "customarily and regularly" receive more than $30 a month in tips. For FLSA tip credit purposes, a "tip" is a payment that patrons decide in their discretion whether or not to make, including how much to give and for whom to leave it; so, not all "gratuities" are "tips." This rule does not apply to service charges, for example.

The law says that you may take a tip credit only if 1) the tipped employees have been "informed" of the law's provisions; and 2) the employees retain all of the tips they receive, except for amounts pooled among employees who customarily and regularly receive tips.

What Does "Informed" Mean?
DOL's position is that an employer must tell the employee that it intends to take a tip credit and must also specifically notify the employee in advance:

- of the amount of the direct cash wage you will pay to the employee;
- of the amount you are taking as a credit against tips received, which cannot exceed the difference between the FLSA minimum wage and the actual cash wage paid to the employee;
- that the additional amount you claim as a tip credit may not exceed the value of the tips the employee *actually* receives;
- that the tip credit shall not apply with respect to any tipped employee unless the employee has been informed of the FLSA's tip-credit provisions; and

been informed of the FLSA's tip credit provisions; and

- that all tips employees receive must be retained by the employees, except for the pooling of tips among employees who customarily and regularly receive tips.

DOL says that an employer is not required to provide these notifications in writing, but it notes that doing so would provide evidence that you have, in fact, given them.

No Limit On Pool Contributions

In the past, DOL's enforcement position was that an otherwise-valid tip-pool arrangement could not require employees to contribute a greater percentage of their tips than was "customary and reasonable," but added that it would not question pool contributions of 15% or less of the employee's tips.

DOL now acknowledges that the law "does not impose a maximum contribution percentage on valid mandatory tip pools". But DOL takes the position that an employer "must notify its employees of any required tip pool contribution amount. . . . "

Time For A Check-Up

As with other areas affected by the Final Rule, employers can expect DOL investigators and plaintiffs' lawyers to be scrutinizing tipped-employee pay practices even more than they already were. Take a fresh look at where your tipped-employee compensation stands. This review should include not only DOL's recent changes, but also other potential FLSA tipped-employee issues, as well as any state or local requirements and limitations.

More DOL News

In a press release on April 20, 2011, the Wage and Hour Division cautioned restaurants in a Southeastern part of the country: "The restaurant industry employs some of our country's lowest-paid workers who, especially during hard economic times, are vulnerable to exploitation. Investigators will be making unannounced visits to full-service restaurants to remedy widespread labor violations, and ensure that law-abiding employers who pay their workers full and fair wages are not placed at a competitive disadvantage."

The Wage and Hour Division said they are concerned about the prevalence of unlawful pay practices such as 1) requiring employees to work exclusively for tips, without regard to minimum wage standards; 2) making illegal deductions from workers' wages for walk-outs, breakages, and cash register shortages; and 3) incorrectly calculating overtime by using the $2.13 per hour base rate before tips, instead of using the federal minimum wage of $7.25 per hour.

The Division also noted that significant child labor violations – such as allowing minors to operate hazardous equipment including dough mixers and meat slicers – persist in this industry.

For more information check out our Wage and Hour Law Blog or contact the author at jthompson@fisherphillips.com or 404-231-1400.