Feds Now Have Broader Authority to Assess Monetary Penalties for Tip Violations

Insights
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Federal labor officials just finalized a rule that broadens their ability to assess monetary fines against those business that commit wage and hour violations with regards to tip payments, a development several months in the making that should cause hospitality employers and others with tipped employees to ensure compliance with strict federal regulations. The September 24 release from the Department of Labor (DOL) concerns tips and their treatment under the Fair Labor Standards Act (FLSA) and withdraws a Trump-era regulation – most notably permitting the DOL to assess monetary fines of up to $1,162 per violation with regard to tips beginning November 23. What do employers need to know – and what should you do as a result?

Updated Rule in a Nutshell

The FLSA already allows the DOL to pursue tips and liquidated damages. The broadening of the standard for assessing civil money penalties simply adds another risk to employers with tipped employees, particularly those in the hospitality industry which already has been hit hard by the COVID-19 pandemic. The Final Rule will become effective on November 23, 2021, and makes the following notable changes to the existing administrative regulations:

- The Final Rule provides that the DOL may assess civil money penalties of up to $1,162 per violation of the FLSA's tip provisions *even if the violations are not repeated or willful*. This is significant as DOL civil money penalties as to minimum wage and overtime violations are limited to repeated or willful conduct by an employer.
- The Final Rule adopts the same considerations and monetary amount considerations as the DOL applies for other FLSA civil money penalties. The Final Rule provides that multiple circumstances can be used by the DOL to show that an employer's violation of the FLSA's tip provisions is willful (i.e., knowing or done with reckless disregard for whether the conduct violates the FLSA).
- The Final Rule provides that while managers or supervisors may not receive tips from mandatory tip pools, managers or supervisors are not prohibited from *contributing* tips to eligible employees in mandatory tip pools *and* also are not prohibited from keeping tips *directly received* for services a manager or supervisor *directly and solely provides*.
- Notably, the Final Rule does not implement the DOL's separate June 2021 proposed rulemaking that proposed a more onerous form of the notorious 80/20 Duties Rule (sometimes called the

that proposed a more onerous form of the notorious 80/20 Duties Rule (sometimes called the "20% Rule") for those employers who take a tip credit. That portion of the regulations has been delayed and is expected to be published in late 2021 or early 2022. Additionally, many regulations related to tips already became effective in April 2021 (for example, provisions related to allowed tip pooling for employers who do not take a tip-credit and recordkeeping provisions).

While the Final Rule does not prohibit the use of the tip credit (i.e., paying a wage of $2.13 per hour or a higher rate depending on state law) and taking a credit toward the remainder of the federal minimum wage of $7.25 per hour based on the tips an employee receives, it raises a looming problem for employers. In the event the expanded 80/20 rule goes into effect in late 2021 or early 2022, it will be increasingly difficult for employers to utilize the tip credit and the fines associated with violations of the FLSA and the tip provisions will be easier for the DOL to assess. Keep in mind that some states prohibit the use of a tip credit and the DOL's regulatory activity to date seems designed to reach that result without having to amend the FLSA through legislation.

Civil Money Penalties and The FLSA Tip Provisions

In 2018, Congress amended the FLSA to add new statutory language which expressly prohibits employers from keeping employees' tips "for any purposes," even for employers who do not take a tip credit. This includes a prohibition against "managers or supervisors" from keeping tips. Congress also amended the FLSA to give the DOL discretion to impose civil money penalties of up to $1,100 when employers unlawfully keep tips.

In situations where the DOL investigates and finds a violation of the minimum wage, overtime pay, or tip provisions of the FLSA, the statute authorizes the DOL to assess civil money penalties. The FLSA provides that the DOL may assess civil money penalties for minimum wage and overtime pay only when the violations are repeated or willful. However, a 2018 amendment to the FLSA added new penalty language for employers who violate the FLSA by keeping tips does not limit the DOL's assessment of civil money penalties to repeated or willful violations. Instead, it allows the DOL to assess civil money penalties for violations of the tip provisions "as the Secretary [of the DOL] deems appropriate."

Under the Final Rule, the DOL can now assess civil money penalties of $1,162 (amount adjusted for inflation) per violation of the tip provisions of the FLSA even if the violation is not repeated or willful. However, the Final Rule does preserve longstanding rules for civil money penalties that include the obligation of the DOL to consider the size of an employer's business when determining the amount of any civil money penalty.

What's "Willful"?

While the DOL can assess a civil money penalty for violation of the FLSA's tip provisions even if the employer's conduct is not repeated or willful, a willful violation of the FLSA increases the likelihood that the DOL will impose civil monetary penalties. Per the regulations, a willful violation is one

where "the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA."

The Final Rule provides that an employer's failure to adequately inquire into whether it violated the FLSA when it should have done so is considered tantamount to reckless disregard. Reckless disregard can be proven by evidence other than the employer not making inquiries. While the DOL will still consider all of the relevant facts and circumstances, the revised regulations make clear that an employer is in reckless disregard of the FLSA when, among other situations, the DOL determines that the employer should have inquired about whether its conduct was lawful but failed to do so. The DOL standard for whether an employer has acted willfully applies regardless of the size of the employer. The size of the employer only factors into the amount of the civil money penalty assessed.

Clarification of Rules Regarding Managers and Supervisors

The FLSA prohibits employers from keeping tips received by employees. The FLSA prohibition on keeping tip includes a restriction that the employer may not allow its managers or supervisors to keep any portion of an employee's tips. Under the Final Rule, "manager" or "supervisor" is defined as those employees who meet the duties test of the FLSA's executive exemption.

The Final Rule clarifies that an employer does not violate the FLSA when a manager or supervisor keeps tips that "he or she received directly from customers based on the service that he or she *directly and solely* provides." Thus, managers and supervisors may keep their own tips, but cannot keep tips received by employees other than themselves and also cannot participate in a lawful, mandatory tip pool in which non-managerial or supervisor employees participate.

While managers and supervisors may not participate in a tip pool, the Final Rule provides that an employer may require a manager or supervisor to contribute tips to such an arrangement. This Final Rule is intended to recognize the reality that some managers and supervisors perform work for which they directly receive tips, while at the same time ensuring that managers and supervisors do not keep any portion of other employees' tips in violation of the FLSA.

What's Next for Employers?

The DOL's Final Rule provides an easier path for the agency to assess civil money penalties against employers who violate the tip provisions of the FLSA, regardless of whether the employer takes a tip credit. With implementation of an expanded 80/20 Rule looming, this is particularly true for employers who utilize the tip credit and who will have to carefully monitor the amounts of time that tipped employees spend when performing various job duties.

For employers who take the tip credit, this presents a real dilemma: Should you utilize the tip-credit in the context of a DOL regulatory scheme which allows the assessment of civil money penalties against employers regardless of whether such violation was repeated or willful? Some employers

may well conclude that the headache associated with monitoring the tip-credit duties rules is simply not worth the risk. Perhaps that is DOL's goal.

Fisher Phillips will continue to monitor this situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in Wage and Hour Practice Group, or any member of our Hospitality Industry Team.

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