



4 Reminders for Employers After a Texas BBQ Chain's \$900K Tip Pooling Mistake

Insights

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Employers in the restaurant and hospitality industries know it's a common practice to ask workers to share gratuities. Tip pools can promote teamwork and a better customer experience – but they can also land you in hot water if you don't comply with federal and state wage and hour laws. A Dallas-area restaurant chain, Hard Eight BBQ, recently learned this lesson when the Department of Labor (DOL) found it violated the Fair Labor Standards Act (FLSA) by allowing hourly managers to participate in the tip pool. The agency announced on April 21 that the restaurant owed about \$867,500 in unpaid tips and overtime premiums. How can you avoid a similar fate? Here are four tips for complying with the FLSA's tip-sharing rules.

1. Don't Include Managers in the Tip Pool

Although managers and supervisors are allowed to contribute tips to a pool, they are prohibited from keeping any portion of an employee's gratuities or sharing in a tip pool with non-managerial workers. The DOL recently clarified 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."

But employers must still proceed with caution. In situations where a manager helps serve a customer along with an employee, they may not keep any tip that the customer leaves because the managers did not "solely" provide service.

2. Know How 'Manager' is Defined

Although the DOL looks to the duties test of the FLSA's executive exemption to determine who is a manager or supervisor, the department's tip-sharing rules don't require employees to be paid on a salary basis to be deemed managers and supervisors. Because of this, assistant managers, team leads, and shift runners who are not paid on a salary basis or who are paid a salary of less than \$684 per week could be considered a manager. The term "management" is defined broadly and includes activities such as: interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; disciplining employees; and planning the work.

3. Understand the Rules for Taking a Tip Credit

The FLSA permits employers to take a so-called “tip credit” and pay employees who traditionally receive tips – such as servers and bartenders – less than the federal minimum wage, so long as employees make up the difference in tips and the employer follows certain other requirements. The FLSA defines a “tipped employee” as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.”

You should proceed with caution, however, because employers that take a tip credit must follow stricter rules. For example, the DOL has said that an employer can allow “non-tipped” employees – such as dishwashers and cooks – to participate in a tip pool only if it pays tipped employees the full minimum wage and does not take a tip credit. Notably, managers and supervisors are prohibited from participating in a tip pool regardless of whether the employer takes a tip credit.

You also need to understand the tip rules in your state. Many states require employers to pay a higher minimum wage for tipped employees than the federal rate and some states – such as California, Nevada, Oregon, and Washington – have altogether banned tip credits and require employers to pay tipped workers the full state minimum wage.

4. **Beware of the ‘80/20’ Rule**

If you take a tip credit, you should also be aware of the requirements under the FLSA’s notorious “80/20” rule. The tip credit may only be taken for time spent by employees when they are “engaged in” a tipped occupation. Time spent outside of the tipped occupation must be paid at the federal minimum wage without applying a tip credit to those hours. Under the 80/20 rule, employers lose the tip credit for the workweek if an employee spent more than 20% of their time performing non-tipped side work, such as rolling silverware into napkins, cleaning and setting tables, and making coffee.

Since this standard creates significant confusion for employers, the Trump administration sought to do away with the 80/20 rule and create a new rule focusing on “dual job” tipped employees who would be permitted to spend a “reasonable time” on non-tip-related job duties without losing the tip credit. However, following the change in administration, the DOL withdrew the dual-job rule prior to its effective date.

Under a final rule from the Biden administration, an employer loses the tip credit if a tipped employee spends more than 20% of their weekly hours performing work that is not tip-producing work or work that directly supports tip-producing work. The final rule, which took effect in December 2021, also requires employers to pay tipped employees the full minimum wage when they spend at least 30 continuous minutes on secondary duties that don’t generate gratuities.

Tip-producing work is defined as “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.” Work that directly supports

tip-producing work is defined as “work that assists a tipped employee to perform the work for which the employee receives tips.” Both of the foregoing time limitations apply to those hours for which the tip credit is taken. Hours paid at minimum wage (or higher) are excluded when making the 20% and 30-minute determinations.

Conclusion

In fiscal year 2021, the DOL Wage and Hour Division conducted 4,237 investigations in the food service industry and collected \$34.7 million in back wages for more than 29,000 employees. Recent DOL announcements show the department is clearly still focused on this area in 2022.

If your business utilizes a tip pool or takes a tip credit, you should review your practices for compliance with evolving federal and state wage and hour laws. Fisher Phillips will continue to monitor these rules 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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