

JUMP IN! KENTUCKY TIP POOLS JUST GOT A LITTLE WARMER FOR RESTAURANT EMPLOYERS

Insights
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For years, Kentucky has been one of the few outlier states that further complicated tip pooling by requiring all tip pools to be voluntary. While federal regulations have flipped and flopped with the tide of the changing presidential administration, federal law and most states allow employers to mandate tip pools with a few restrictions. Starting on July 14, Kentucky employers can breathe a sigh of relief, as the state's law has been amended to allow employers to mandate tip pools under certain circumstances. What do you need to know about tip pooling rules? Here are four important points to keep in mind.

[Editor's Note: After the new law went into effect on July 14, 2022, the Kentucky Labor Cabinet was forced to reconcile outdated language in 803 KAR 1:080, which claimed to prohibit employers from taking a tip credit if they implemented a mandatory tip pool. The regulation has now been replaced with 803 KAR 1:081, eliminating the language and clarifying employers can still continue to take tip credit for front-of-house staff who are subject to a mandatory tip pool.]

1. Using The Tip Credit: No Mixed Pools!

The Fair Labor Standards Act (FLSA) permits employers to take a "tip credit" and pay traditionally tipped employees 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

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in an occupation in which they customarily and regularly receive more than \$30 a month in tips.”

If an employer takes a tip credit for its tipped employees, the employer cannot allow those tipped employees to participate in a mixed pool with the non-tipped employees (such as back-of-house employees like cook and dishwasher). On the flip side, employers have more flexibility to pool tips when they pay at least the standard minimum wage. The U.S. Department of Labor (USDOL) states “[a]n employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip-pooling arrangement that includes dishwashers, cooks, or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly receive tips.” Put simply—no mixed pools when you take a tip credit.

2. Keep Supervisors, Managers and Owners Out of the Pool.

Employers—including managers and supervisors—are prohibited from participating in a tip pool or otherwise keeping employees’ tips, regardless of whether the employer takes a tip credit. While managers and supervisors may contribute tips to a pool, they cannot receive those tips. Managers and supervisors are, however, permitted to keep tips they receive directly from customers for services they “directly” and “solely” provide. For example, if the manager receives a tip for serving a customer along with an employee, they did not “solely” provide the service. As a word of caution, a recent Dallas-area restaurant chain found themselves on the receiving end of an FLSA violation by allowing hourly managers to participate in their tip pool. The price tag for this mistake? The USDOL announced that the restaurant owed about \$867,500 in unpaid tips and overtime premiums.

Keeping this prohibition in mind, employers need to ensure they properly exclude employees in tip pools that would be considered managers. Although the USDOL uses the “duties test” in the FLSA’s executive exemption to determine who is a manager or supervisor, the tip-sharing rules do not require an employee be paid on a salary basis to be considered a manager. This means that assistant managers, team leaders, and shift runners could still be considered managers, even without a salary.

Instead, “manager” can include an employee who has such duties 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. Beware of the 80/20 Rule.

Employers taking a tip credit must also be aware of the FLSA's 80/20 rule, which provides that an employer is at risk for losing the tip credit for any time spent performing non-tipped side work such as rolling silverware, cleaning and setting tables, or making coffee, in excess of 20% of hours worked. While the Trump administration attempted to revoke the 80/20 rule through new regulation, the Biden administration withdrew this regulation prior to its effective date. In addition to the withdrawal, the Biden administration implemented an additional requirement in December 2021 that employers pay tipped employees the full minimum wage when they spend at least 30 continuous minutes on secondary duties that do not 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.

4. Consider Whether Service Charges Are the Solution.

A recent decision from the U.S. Court of Appeals for the Eleventh Circuit has many restaurants considering whether implementing a mandatory service charge is an alternative to the tip credit dilemma. The court held that mandatory service charges payments were not considered “tips” under the FLSA, and thus, not subject to the tip regulations. Because the mandatory service charge leaves the customer with no discretion, the employer can distribute the funds to whom and how it wishes. Unlike tip credit regulations, the 80/20 rule does not apply and a server who is paid with a service charge can perform duties that would otherwise fall under the

“directly supporting work” label – like rolling silverware – for time in excess of 20% of their working hours for the week or for more than 30 continuous minutes. The only drawback to this model is that it impacts the employees’ regular rate of pay for overtime purposes. Consult with legal counsel to determine whether this option works for your business.

Conclusion

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 our [Louisville](#) office, or any member of our [Hospitality Industry Team](#).

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