



Can You Include Sushi Chefs — and Other Unique Positions — in Your Tip Pool? 5 Key Questions for Restaurateurs to Review

Insights

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Do you utilize a tip pool in your restaurant? If so, you are likely aware of the various rules on maintaining a valid, lawful tip pool under the federal Fair Labor Standards Act (FLSA) and applicable state laws. You surely know that managers and supervisors are prohibited from keeping any portion of an employee's gratuities or sharing in a tip pool with non-managerial workers. You know that "non-tipped" employees, like dishwashers and cooks, may participate in a tip pool only if you pay tipped employees the full minimum wage and do not take a tip credit. If you do take a tip credit, you recognize that such "non-tipped" employees may not participate in the tip pool. But compliance can still get complicated, particularly with positions that don't fall neatly into standard categories. For example, what about sushi chefs? Are they considered "tipped" or "non-tipped" employees? Read on to learn more about this unique position and under what circumstances you can include it — and possibly other unique roles — in your tip pool.

First, a Little Background

The FLSA permits employers to take a tip credit and pay employees who traditionally receive tips less than the federal minimum wage, so long as employees make up the difference in tips and the employer meets certain other requirements. While hospitality employers generally have flexibility on allowing non-tipped employees to join the tip pool when you pay tipped employees the full minimum wage, you must follow stricter rules when you take a tip credit.

So, who is considered a "tipped" employee? The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which [they] customarily and regularly receives more than \$30 a month in tips." Over the years, the U.S. Department of Labor (DOL) has said that servers, bell staff, counter personnel serving customers, and service bartenders are among the kinds of employees who may participate in a traditional tip pool. But DOL has also taken the position that workers such as chefs, cooks, and dishwashers generally may not be allowed to join mandatory tip-pooling arrangements if you take a tip credit.

Still, some positions — such as sushi chefs who may be customer facing — don't clearly fall into these categories. So, under what circumstances can you include them in your tip pool if you take a tip credit? You'll have to look beyond the job title to what the employee actually does. Uncertainty about where to draw the dividing line led one restaurateur to ask for a DOL opinion as to which

group itamae-sushi chefs and teppanyaki chefs fell into. Here are five key questions to consider as you evaluate your sushi chefs and other unique roles.

1. Do Your Sushi Chefs Have Direct Customer Contact?

If so, and if they receive more than the FLSA “tipped employee” threshold of \$30 a month in tips, then they can participate in the tip pool with tip credit employees, according to this DOL opinion letter. In the letter, the DOL noted servers and bussers assisted the chefs by taking orders, serving water, and clearing tables, while the chefs interacted with customers by preparing and serving them their food in a bar area or at the customers' tables. DOL viewed the chefs as providing direct service to patrons similar to that furnished by a counterperson who serves customers and has long been considered the kind of employee who can participate in the pool.

2. Does this Affect How the DOL Would View Other Positions?

Although the letter does not expressly say so, this letter (and experience in DOL investigations) shows that DOL evaluates whether and to what extent an employee performs significant customer-service functions in contact with patrons when determining whether they can participate in a mandatory tip pool with tip credit employees. This typically involves analyzing whether the nature, frequency, and quantity of an employee's direct customer service and interaction support characterizing the worker as being among those who customarily and regularly receive tips.

For instance, it is unlikely that an employee who engages in customer contact infrequently or only to a trivial extent would be classified that way. As an illustration, DOL has concluded in the past that cooks and salad-preparers at a buffet-style restaurant could not take part in the employer's mandatory tip-pool. The workers' principal activities consisted of cooking and preparing food in the kitchen, placing the food on serving tables, wiping spills, replenishing items, and stirring and keeping food warm. The employees sometimes answered customers' questions about the food, but this was the extent of the workers' interaction with them.

3. Are You Familiar with 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 beyond 20% of hours worked spent performing non-tipped side work — such as rolling silverware, cleaning and setting tables, or making coffee. Additionally, employers must pay tipped employees the full minimum wage when they spend at least 30 continuous minutes on secondary duties that do not generate gratuities. For additional information on the 80/20 rule, you can check out our previous Insight [here](#).

4. What is the Impact of the DOL's Opinion Letter?

Courts do not need to follow DOL letter interpretations, but employers should expect a similar analysis from judges. For example, a federal appellate court has ruled that an employer's

mandatory tip pool with tip credit employees should not have included waitstaff members whose work was limited to salad preparation and related tasks. The employees had no personal contact with patrons and instead worked outside of their view. Moreover, the employees' duties were, as the court put it, restricted to work traditionally classified as food preparation or kitchen support.

5. What Should You Do?

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. You should be particularly mindful regarding state laws in the jurisdictions where you operate. For example, some states altogether preclude workers who are not front of house from participating in a tip pool. Other states have their own definitions of a “tipped employee” and/or who can participate in the pool.

Moreover, recent regulatory activity from DOL has made compliance with the FLSA an increasingly difficult task for employers with tipped employees. To simplify your tip pooling obligations and ensure you are not including anyone who should not participate, it may be easier to make sure everyone is making the minimum wage.

Conclusion

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

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