



USDOL To Propose Modified Tip-Pooling Regulation

Insights

7.24.17

By: The Editor

Readers will recall our prior posts regarding the U.S. Department of Labor's regulatory position adopted in 2011 saying that an employer may not retain any of an employee's tips even if it:

- ◆ Takes no tip-credit under the federal Fair Labor Standards Act's Section 3(m), and
- ◆ Instead pays the employee not less than the full FLSA minimum wage in direct wages (plus any FLSA overtime compensation due).

The relevant part of USDOL's regulation says:

Tips are the property of the employee whether or not the employer has taken a tip credit . . . under the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in [the FLSA]: As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

29 C.F.R. § 531.52. This position has been a subject of much debate recently, including in the courts.

The agency has now announced that a forthcoming Notice of Proposed Rulemaking will "propose to rescind the current restrictions on tip pooling" by employers who do not rely upon the tip-credit. Furthermore, Bloomberg BNA reports that USDOL has also instructed its investigators not to enforce this portion of the regulation.

USDOL's announcement suggests that the NPRM will be released in August, but it is not unusual for these timetables to be extended. Once the NPRM is actually issued, there will likely be a 60-day period for public comment. It is difficult to predict how long it will be after the period closes before USDOL takes additional or final action.

In the meantime:

- ◆ USDOL has not yet revised the regulation or withdrawn any part of it;
- ◆ Current or former employees might still assert this aspect of the regulation in their own FLSA lawsuits; and

◇ Employers should not assume that any eventual USDOL regulatory changes will affect analogous positions taken under state or local law.

Interested employers should seriously consider submitting comments to USDOL once the period for doing so opens.