



USDOL Seeks To Narrow Tip-Retention Prohibition (Updated 12 13 17)

Insights
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UPDATED 12 13 17: The U.S. Department of Labor is extending the comments deadline to February 5, 2018.

We have previously written about the U.S. Department of Labor's position adopted in 2011 saying that an employer may not retain any of an employee's tips even if management:

- ◇ 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 agency has now proposed regulatory revisions to rescind that prohibition.

The Proposed Modifications

USDOL appears to acknowledge that it has no authority to regulate employer control over an employee's tips when management does not rely on the Section 3(m) tip-credit to satisfy its FLSA minimum-wage obligation. The agency's commentary says that, "due to the Department's serious concerns that it incorrectly construed the [FLSA] in promulgating its current tip regulations to cover employers who pay a direct cash wage of at least the full Federal minimum wage . . . the Department is proposing to rescind the portions of the current regulations that apply to employers that pay a direct cash wage of at least the Federal minimum wage and do not claim a tip credit against their minimum wage obligations."

Although the changes would alter only four sentences in the earlier provisions, nonetheless they would have the effect of removing some considerable obstacles to tip-pooling arrangements where the FLSA is concerned. Among other things, the revised regulations would mean that, if an employer pays its employees the full FLSA minimum wage (currently \$7.25 an hour) in direct wages and does *not* take a tip credit, the employer may maintain a tip pool whereby tips are shared even with employees who do not customarily and regularly receive tips (such as cooks and dishwashers). USDOL was careful to make clear that its proposal would not change its longstanding position that a

tip-pool will be invalidated by the participation of non-tipped employees if the employer *does* take the tip credit.

A stated purpose for the proposed rulemaking is USDOL's belief that it would "reduce wage disparities" between tipped and non-tipped employees.

The Bottom Line

USDOL asks the public to submit comments and information, including:

- ◇ How employers might respond to the proposals if they become final; and
- ◇ Data relating to existing tip-pooling practices.

These comments are due by January 4, 2018, a mere 30 days after publication. This shorter-than-usual timeframe might signal that USDOL will adopt regulations very much like the proposed ones early in 2018. Employers should take this opportunity to review their tip-related practices, including by evaluating whether and how the proposed regulations might affect what they are doing.

Tipped-worker employers should also be sure to determine whether they are in compliance with applicable state and local laws. For one thing, many jurisdictions maintain their own requirements and prohibitions with respect to tipped employees, including that they might prohibit any tip-credit, might preclude an employer's retention of any tips for any reason, and might impose other wage-related obligations and restrictions that are more employee-favorable than anything provided in or under the FLSA.

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