USDOL Issues Proposed Changes to the Tip Credit Regulations

Insights
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Employers that utilize the "tip credit" in the federal Fair Labor Standards Act ("FLSA"), or whose employees receive tips, should carefully consider regulatory changes that were proposed by USDOL today. While many of the proposed regulatory changes were expected, some were not, and even the expected changes will require employers to recalibrate some of their policies assuming that USDOL ultimately adopts the proposals into final law. Employers wishing to comment on these proposals have until December 7, 2019 to submit their comments.

Legal Backdrop
As a reminder, the FLSA permits an employer to take a "tip credit" for the amount between the direct cash wage it pays to an employee (at least $2.13 per hour) and the federal minimum wage (currently $7.25). If an employee does not receive a sufficient amount in tips to equal the tip credit amount, the employer must makeup any difference. Employers may only take this credit for employees who are "engaged in an occupation in which he customarily and regularly more than $30 per month in tips."

There has been considerable activity with regard to the tip credit in recent years in the courts, at the agency level, and at the Congressional level. For example, substantial litigation has resulted over USDOL's notorious "20% Rule," a sub-regulatory provision in its Field Operations Handbook which purported to place burdensome limitations on an employer's ability to take the tip credit for time spent performing duties that are related to the tipped occupation but which are not directly tip-producing themselves. We have covered this issue extensively here and here, among other places.

There has also been much regulatory and now Congressional activity addressing the "tip pooling" scenario. The genesis of this activity was a regulation published by USDOL in 2011 that prohibited an employer for implementing a mandatory tip pool that included non-tipped employees even if the employer paid full minimum wage and did not take the tip credit. We addressed these developments here and here.

Through today's proposed rule-making, USDOL now seeks to comprehensively update the tip credit regulations and close the loop on these and related tip-credit issues.

The Proposed Changes
The following are the most significant aspects of the today's proposed rules:

- Employers would be allowed to implement mandatory tip pools that include non-tipped or "back of house" employees (i.e. dishwashers) provided that the employer does not take a tip credit and pays the full minimum wage. However, managers and supervisors would not be allowed to participate in the tip pool regardless of whether the tip credit is taken. And employers would not be allowed to keep a portion of the tips under any scenario.
- To determine whether an individual constitutes a "manager or supervisor," USDOL would utilize the job duties test for the "executive exemption" under the FLSA. Notably, however, USDOL would not consider the "salary basis" requirement as a factor in this analysis. Thus an employee could be a "supervisor" for purposes of determining her ineligibility to participate in a tip pool because of her job duties even though she would not be considered executive-exempt because she was not paid on a salary basis.
- Employers would be required to maintain records of the tips received by employees if the employer operates a mandatory tip pool even if the employer does not take a tip credit.
- Employers with a mandatory tip pooling arrangement would be required to "fully distribute any tips the employer collects no later than the regular payday for the workweek in which the tips were collected, or when the pay period covers more than a single workweek, the regular payday for the period in which the workweek ends." For example, an employer with a two-week pay period must fully distribute tips that the employer collects during those two weeks on the regular payday for that period. However, USDOL also signaled its understanding that there might be occasions where it is impossible to ascertain the amount or distribution of tips by that payday. In those scenarios, distribution would be required "as soon as possible following that payday."
- Employers would be able to take the tip credit for <u>all</u> of the time spent by an employee performing "related duties" (i.e. work that is not directly tip-producing itself) provided that such duties are performed contemporaneously with the tipped duties "or for a reasonable time immediately before or after performing the tipped duties." <u>This would represent the final demise of the 20% Rule</u>.
- To help employers understand the type of work that constitutes "related duties," (think of a server making coffee or toasting bread) USDOL would include any task listed in a tip-producing occupation within the Occupational Information Network ("O*NET") website. For example, the O*NET website lists "rolling silverware and filling salt and pepper shakers" as tasks for the Waitress and Waiter position. Thus employers would be able to require tipped employees to perform these tasks, without any time limitation, provided that the tasks were performed contemporaneously with tipped duties or for a reasonable time immediately before or after performing the tipped duties.

The Bottom Line

If some of these "changes" do not sound new, it is because key aspects of the proposed rule are <u>not</u> new, but rather would be made "official" by regulation. Regardless, employers should take this opportunity to examine their tip credit policies to determine if they will be in compliance under the proposed regulatory changes. In particular management should make sure that it does not operate a mandatory tip pool that includes supervisor or managers. And while the 20% Rule has sustained another mortal wound, employers should nonetheless evaluate the tasks performed by their tipped employees to ensure compliance with the proposed regulations. These and other issues in the proposed rule changes are likely to get significant media coverage in the coming months.

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