# USDOL Changes Tip-Credit Interpretations

Insights
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The federal Fair Labor Standards Act's "tip credit" was among the many topics addressed by the U.S. Labor Department's recent Final Rule. DOL's tip-related pronouncements are a mixed-bag for employers.

**The General Principles**

The FLSA's Section 3(m) allows an employer to credit a portion of a tipped employee's tips toward the FLSA-required minimum wage (currently $7.25 per hour). Employers taking an FLSA tip credit must pay a cash wage of not less than $2.13 per hour, so at present they are limited to a tip credit of no more than ($7.25 – $2.13) = $5.12 per hour. The FLSA defines "tipped employees" as those who are engaged in occupations in which they customarily and regularly receive more than $30 a month in tips. For FLSA tip credit purposes, a "tip" is a payment the patron decides in his or her discretion whether to make, and as to which the patron can decide how much to give and for whom to leave it; not all "gratuities" are "tips".

Section 3(m) says that an employer may take a tip credit only if (i) the tipped employee has been "informed" by the employer of Section 3(m)'s provisions; and (ii) the employee has retained all of the tips he or she received, except for amounts pooled among employees who customarily and regularly receive tips.

**What Does "Informed" Mean?**

DOL's position is that an employer must tell the employee that it intends to take a tip credit and must also specifically notify the employee *in advance*:

♦ Of the amount of the direct cash wage the employer will pay to the employee;

♦ Of the amount the employer is taking as a credit against tips received, which cannot exceed the difference between the FLSA minimum wage and the actual cash wage the employer pays the employee;

♦ That the additional amount the employer claims as a tip credit may not exceed the value of the tips the employee actually receives;

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the employee actually receives;

♦ That the tip credit shall not apply with respect to any tipped employee unless the employee has been informed of Section 3(m)'s tip-credit provisions; and

♦ That all tips the employee receives must be retained by the employee, except for the pooling of tips among employees who customarily and regularly receive tips.

DOL says that the employer is not required to provide these notifications in writing, but it observes that doing so would provide evidence that the employer has in fact given them.

**No Limit On Pool Contributions**

In the past, DOL's enforcement position was that an otherwise-valid tip-pool arrangement could not require employees to contribute a greater percentage of their tips than was "customary and reasonable". DOL said that it would not question pool contributions of 15% or less of the employee's tips.

DOL now acknowledges that the FLSA "does not impose a maximum contribution percentage on valid mandatory tip pools". However, DOL takes the position that an employer "must notify its employees of any required tip pool contribution amount . . .."

**Time For A Check-Up**

As with other areas affected by the Final Rule, employers can expect DOL investigators and plaintiff's lawyers to be scrutinizing tipped-employee pay practices even more than they already were. Management should take a fresh look at where tipped-employee compensation stands. This review should include not only DOL's recent changes, but also other potential FLSA tipped-employee issues, as well as any state or local requirements and limitations.

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