



# USDOL's Tipped-Employee "Subminimum Wage" Fiction

Insights

7.01.16

A recent U.S. Labor Department [blog post](#) [link now inactive] re-casts the agency's long-running campaign against an alleged "subminimum wage for tipped workers" under the federal Fair Labor Standards Act. Although this latest pitch introduces a different phrase, USDOL also recycles last year's [canard](#) that "[t]he current federal tipped minimum wage . . . still stands at just \$2.13 per hour."

USDOL's premise was and continues to be flatly untrue. There is *no* "subminimum wage for tipped workers" under the FLSA. It is *not so* that the "current federal tipped minimum wage" is \$2.13 per hour, and it never has been.

## One More Time . . .

We have pointed out before that the FLSA's minimum wage for tipped employees is exactly the same as for all other non-exempt workers: \$7.25 an hour at present. Under today's version of the FLSA's 50-year-old "tip credit" provision, the \$2.13-per-hour figure is simply the lowest *cash* wage that may be paid to a tipped employee, *provided that* the worker also receives enough in tips to bring his or her wages to \$7.25 an hour.

If the tipped employee does not receive enough in tips to produce that amount, then the employer *must pay the worker additional wages* to bring his or her rate up to \$7.25. The employer must do this even "if business is slow or the weather is bad", as USDOL's post puts it. And if as the agency says tipped employees are "subject to the whim of customers who may not be feeling generous", then so is the employer, because management still must ensure that the worker receives not less than the \$7.25-an-hour FLSA minimum wage.

USDOL's post also decries what it describes as "grave financial uncertainty" for tipped workers and what it sees as the need for tipped employees "to budget for their expenses based upon low wages that constantly fluctuate." However, even taking these considerations at face value for now, USDOL's own cited compensation figures show that neither concern has anything to do with a purported "subminimum wage" or even with the *full* minimum wage. For example, the agency says that the tip-adjusted "average wages for waiters and waitresses are just \$11.07 an hour," that is, the average is "just" \$3.82 an hour more (or about 53% higher) than the FLSA minimum-wage rate common to all non-exempt workers.

## The Bottom Line

The truth is that USDOL has seized upon the FLSA's tip-credit as another means to advocate for new legislation:

- Substantially increasing the FLSA minimum wage, and
- Requiring employers to pay that higher rate to tipped employees in cash, without regard to the fact that the nature of the jobs these employers have created puts those workers in a position to receive appreciable supplemental income from customers.

Whether these are desirable policy outcomes are questions for another day. But the discussions should at least be conducted in light of accurate representations about the current state of the law.

As we have said before, tipped-worker employers act at their peril if they elect to remain passive in the face of a public-relations campaign that fosters government policymaking based upon bad information.

**Editor's Note:** The USDOL content referred to in this post apparently was removed from the agency's website at a later date.