

HR COMPLIANCE BULLETIN



DOL FAQs: Final Rule on Tip Regulations Under the FLSA

On Dec. 22, 2020, the U.S. Department of Labor (DOL) announced a final rule revising its tipped employee regulations to address amendments made to section 3(m) of the Fair Labor Standards Act (FLSA) by the Consolidated Appropriations Act of 2018 (CAA).

The CAA amendment prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit. It also prohibits employers from allowing managers or supervisors to keep any portion of employee's tips. In addition, the final rule codifies the DOL's guidance regarding the tip credit—how that credit applies to employees who perform tipped and non-tipped duties and which non-tipped duties are related to a tip-producing occupation.

The CAA did not affect longstanding regulations that apply to employers that take a tip credit under the FLSA. For example, employers that claim a tip credit must ensure that a mandatory "traditional" tip pool includes only workers who customarily and regularly receive tips. This means, for example, that employees such as cooks or dishwashers cannot be part of such a tip pool. However, the CAA removed the regulatory restrictions on an employer's ability to require tip pooling when it does not take a tip credit; those employers may now implement mandatory, "nontraditional" tip pools, which may include employees such as cooks and dishwashers.

Action Steps

The DOL has published these answers to frequently asked questions (FAQs) regarding the final rule to help employers understand their new obligations. Employers with tipped employees should become familiar with these new regulations and adjust their timekeeping, tip pooling and payroll practices to comply with this rule by its effective date.

Tipped Wages

- ☑ The FLSA also allows employers to pay a subminimum wage rate to individuals who are engaged in an occupation in which they "customarily and regularly" receive **at least \$30 in tips per month**.
- ☑ Employers are allowed to collect all the tips employees receive into a common employee tip pool.

Important Dates

Dec. 22, 2020

DOL announces a new final rule to harmonize tip wage regulations with the CAA and Executive Order 13658 (Establishing a Minimum Wage for Contractors).

Effective Date

The new rule will become effective 60 days after its publication in the Federal Register. Publication is currently pending.



JP Griffin Group



1. What does the Fair Labor Standards Act (FLSA) require employers to pay tipped employees?

The FLSA generally requires covered employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour. Under section 3(m)(2)(A) of the FLSA, however, an employer is permitted to credit at least some of the tips that tipped employees receive toward its federal minimum wage obligations. Specifically, an employer can satisfy its obligation to pay those employees the federal minimum wage by paying a lower direct cash wage (currently no less than \$2.13 per hour) and counting a limited amount of its employees' tips (no more than \$5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage paid and the federal minimum wage (known as a "tip credit") if the employer follows certain requirements.

Employers that take a tip credit under the FLSA must ensure that tipped employees receive at least the federal minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least \$2.13 per hour do not equal at least the federal minimum wage of \$7.25 per hour, the employer must make up the difference on the regular pay day for the pay period. For example, if an employer pays a tipped employee \$3.00 per hour in direct wages, the tipped employee must receive at least \$4.25 per hour in tips to satisfy the federal minimum wage requirement.

2. Why did the Department change its tip regulations?

The Department revised its regulations to implement changes made by the Consolidated Appropriations Act of 2018 (CAA) to section 3(m) of the FLSA. The law prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit under the FLSA. The law also prohibits managers and supervisors from keeping employees' tips or participating in a tip pool. The revision also allows employers that pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit to include workers who do not customarily or regularly receive tips, such as cooks or dishwashers, in a mandatory "nontraditional" tip pool.

The CAA amendments did not affect regulations that have been in place for employers that take a tip credit under the FLSA. Therefore, employers that claim a tip credit still can require only workers who customarily and regularly receive tips to participate in a "traditional" mandatory tip pool. This means employees such as cooks or dishwashers cannot be in such a tip pool.

The Department also amended its regulations to reflect recent guidance regarding how the tip credit applies to employees who perform both tipped and non-tipped duties. Under the Final Rule, an employer may take a tip credit for hours that an employee in a tipped occupation performs related non-tipped duties contemporaneously with or for a reasonable time immediately before or after performing the tipped duties. The revised regulation also addresses which non-tipped duties are related to a tip-producing occupation.

3. What are the changes made to the FLSA by the Consolidated Appropriations Act of 2018 (CAA)?

The CAA made several changes to section 3(m) of the FLSA. For example, the law:

- Prohibits employers from keeping tips received by their employees for any purpose, regardless of whether the employer takes a tip credit under the FLSA.
- Prohibits managers and supervisors from receiving or keeping employees' tips, including from a tip pool.
- Suspends regulatory language that restricted an employer's use of employees' tips when the employer does not take a tip credit. Employers that do not take a FLSA tip credit may now include a broader group of workers, such as cooks or dishwashers, in a mandatory tip pool.
- Imposes new civil money penalties not to exceed \$1,100 when employers unlawfully keep employees' tips.



Note: The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. No. 114-74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified formula.

4. What are the key proposals in the Final Rule?

To implement the CAA's changes to FLSA section 3(m), the Department issued this Final Rule, which:

- Removes the portions of the regulations that prohibited employers that do not take a tip credit from implementing mandatory “nontraditional” tip pools—that is, tip pools that include employees who do not customarily and regularly receive tips;
- Explicitly prohibits employers—regardless of whether they take a tip credit—from keeping employees’ tips for any purpose, which includes prohibiting managers and supervisors from keeping tips received by employees;
- Amends its regulations to state that an employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips no less often than when it pays wages to avoid “keep[ing]” the tips in violation of section 3(m)(2)(B);
- Incorporates the CAA’s new requirements regarding civil money penalties (CMP) into its regulations and revises additional portions of its CMP regulations to address courts decisions that have raised concerns;
- Incorporates a new recordkeeping requirement for employers that do not take a tip credit but collect employees’ tips to operate a mandatory tip pool;
- Codifies recent guidance explaining that an employer may take a tip credit for time that an employee in a tipped occupation performs related non-tipped duties either contemporaneously with or for a reasonable time immediately before or after performing tipped duties; the Final Rule also states that, in addition to the examples listed in the regulation, a non-tipped duty is presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET;
- Amends the regulations that address the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) to reflect the corresponding changes in the FLSA regulations and to otherwise align those regulations with the Executive Order.

5. Can an employer that pays the full minimum wage and does not take a tip credit include non-tipped workers in a tip pool?

Yes, employers that pay the full minimum wage and do not take a tip credit may include all workers in a mandatory tip pool. This includes workers who do not customarily and regularly receive tips, such as cooks and dishwashers.

6. Do the amendments to the FLSA allow employers that take a tip credit to include non-tipped workers in a tip pool?

No. The amendments to section 3(m) of the FLSA do not eliminate any of the pre-existing requirements for employers that take a tip credit. Employers that take a tip credit under the FLSA may require a tip pool composed of only those employees in occupations that customarily and regularly receive tips (for example, servers and bussers). As mentioned above, employers, managers, and supervisors may not participate in the tip pool or keep employees’ tips regardless of whether the employer takes a tip credit. However, a manager or supervisor may keep tips that he or she receives directly from customers based on the service that the manager or supervisor directly provides.

7. Does the Final Rule require employers to distribute tips from the tip pool to employees daily?

No. The Final Rule does not require that employers distribute employees’ tips daily. Employers that facilitate tip pooling by collecting and redistributing employees’ tips do not violate the prohibition on keeping tips if they fully and promptly



distribute any cash and credit card tips collected on the regular payday or, in certain cases, as soon as practicable after the regular payday.

8. What recourse do employees have if their employer keeps tips?

The CAA amended sections 16(b) and 16(c) of the FLSA to permit private parties and the Department to recover tips unlawfully kept by an employer, plus an equal amount in liquidated damages. Accordingly, employees may sue an employer that keeps tips or file a complaint with the local Wage and Hour Division district office by calling 1-866-4US-WAGE.

9. Does the Final Rule address the Department's requirements concerning employers taking a tip credit for non-tip producing activities related to the tipped occupation?

Yes. The Final Rule reflects the Department's recent guidance removing the 20 percent limitation on the amount of time that an employee for whom an employer takes a tip credit can perform related, non-tipped duties. See WHD Opinion Letter FLSA2018-27 (Nov. 8, 2018). The Final Rule explains that an employer may take a tip credit for time that an employee in a tipped occupation performs related non-tipped duties—as long as those duties are performed contemporaneously with or for a reasonable time immediately before or after the tipped duties.

10. Why did the Department issue guidance concerning employers taking a tip credit for non-tip producing activities related to the tipped occupation and when did it become effective?

The Department has in the past advised that an employer may not take a tip credit for the time a tipped worker spends performing non-tipped duties related to a tipped occupation when that time exceeded 20 percent of the employee's workweek. This policy was difficult for employers to administer and it led to confusion because employers lacked guidance to determine whether a particular non-tipped duty is "related" to the tip-producing occupation. On November 8, 2018, the Department issued Opinion Letter FLSA 2018-27 to address these concerns, and subsequently issued new guidance to its field personnel reflecting the interpretation of related duties in this opinion letter. The new guidance, issued as Field Assistance Bulletin 2019-2, explained that the Department would no longer prohibit an employer from taking a tip credit for time an employee in a tipped occupation performs related non-tipped duties—as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after the tipped duties.

11. What non-tipped duties are related to the tipped-producing occupation?

The current regulation states that non-tipped duties related to a tip-producing occupation include a server spending part of their time performing such non-tipped duties as "cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses." In addition to these examples listed in the regulation, the Final Rule provides that a non-tipped duty is presumed to be related to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET at www.onetonline.org).

12. What are the benefits of the Final Rule?

The Final Rule allows employers that do not take a tip credit to distribute tips to larger tip pools that include non-tipped workers, such as cooks and dishwashers. This will potentially increase the earnings of those employees who are newly added to the tip pool. The Final Rule additionally gives employers and employees greater flexibility in arranging their pay practices. It may allow for a reduction in wage disparities among employees who contribute to the customers' experience.

13. Does this Final Rule require employers to make changes to their pay practices?

No. Employers may choose to take, or not take, a tip credit under the FLSA and may also choose to implement, or not, a mandatory tip pool. The Final Rule eliminates certain regulatory restrictions on an employer's use of tips if the employer



pays at least the full federal minimum wage and does not take a tip credit. This allows employers to include non-tipped employees, such as cooks and dishwashers in a restaurant, in the tip pool.

14. What if a state or city has its own laws addressing tipped employees?

The FLSA sets minimum wage and hour standards for covered workers but does not preempt states or localities from establishing more protective standards. If a state or locality establishes a standard more protective than the FLSA, an employer in that state or locality must follow the higher standard. Just as some states and localities have minimum wage rates higher than the current federal minimum wage of \$7.25 per hour, certain states and localities have enacted their own restrictions on an employer's ability to claim a tip credit, use tips, or set up a mandatory tip pool. This Final Rule does not preempt or otherwise affect any of those state or local laws.

15. What is the projected economic impact of this Final Rule?

The Department estimates a potential transfer of \$109 million between employees, as tip pools expand from front-of-the-house employees alone to include back-of-the-house employees. Transfers would arise when employers that do not take a tip credit and previously did not have a mandatory tip pool or only had a traditional tip pool institute nontraditional tip pools whereby tipped employees are required to share their tips with employees who do not customarily and regularly receive tips (e.g., janitors, cooks, and dishwashers). Directly observable transfers will occur only among employees because employers, managers, and supervisors are prohibited from being included in these tip pools and from otherwise keeping employees' tips by the CAA and these regulations. However, assuming the shared tips are large enough to maintain wage levels for all workers in the tip pool, the Department acknowledges that some employers could potentially offset some of the increase in total compensation received by back-of-the-house workers by reducing the direct wage that they pay those workers (as long as they do not reduce their wage below the applicable minimum wage). The rule may also result in transfers from employers to workers as employers who adopt tip pools containing back-of-the-house workers may not take a tip credit for their front-of-the-house staff and will be required to increase direct or cash wages paid to those employees. The Department also acknowledges the possibility that some transfers could occur as a result of the changes to the regulations involving when an employer may take a tip credit, but the Department is unable to estimate the likelihood or magnitude of these transfers.

16. What are the potential costs or cost savings of the Final Rule?

The Department estimates regulatory familiarization cost of \$3.86 million in the first year for more than 290,063 establishments nationwide employing tipped workers. Due to many variables and assumptions needed to estimate how employers will respond to the regulatory changes, the Department has not quantified a monetary value for any additional costs or cost savings in this Final Rule.

The flexibility and cost savings associated with this Final Rule, which the Department discusses qualitatively, will outweigh any increased rule familiarization and recordkeeping costs. The cost savings associated with this rule will result from the increase in earnings for non-tipped employees. Higher earnings for these employees could result in reduced turnover, which reduces hiring and training costs for employers. This Final Rule will also result in greater efficiency for the employer when it comes to tip pooling, because it may reduce effort spent ensuring that the tip pool is only limited to customarily and regularly tipped employees.

17. Are the CAA amendments to the tip language of the FLSA already effective?

Yes. Changes to FLSA section 3(m) became effective on March 23, 2018, when the CAA was enacted. This means employers are prohibited from keeping employee tips, regardless of whether the employer takes a tip credit. The Act also prohibits



managers or supervisors from keeping employees' tips, either directly or indirectly, such as via a tip pool. Employers who do not take a tip credit are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools.

Although the above changes have been in effect, the Department needs to revise its regulations to implement these changes, including by defining the terms “managers and supervisors,” and describing how the Department will implement the new civil money penalty language. The existing tip regulations also need to be revised to conform to the CAA amendments.

18. When does the Final Rule take effect?

The Final Rule is effective sixty days after publication in the Federal Register.

Source: [U.S. Department of Labor](#)

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