

## DOL Wades Deeper Into the Tip Pool: Announces New Proposed Rules

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On April 6, 2018, the U.S. Department of Labor (DOL) issued [Field Assistance Bulletin No. 2018-3](#) in an effort to clarify the tip pooling amendments in the Fair Labor Standards Act (FLSA). The DOL bulletin provides that employers that pay the full minimum wage under the FLSA (currently \$7.25 per hour) are no longer prohibited from allowing employees who are not customarily and regularly tipped employees—such as cooks and dishwashers—to participate in tip pools. This presents good news for restaurants that have struggled to increase the wages of back-of-house employees while the income of front-of-house employees has steadily increased because of the retention of tips. The Field Assistance Bulletin came following Congress's passage of the Consolidated Appropriations Act, which contained a little-noticed amendment to the FLSA in March 2018.

On October 7, 2019, the DOL announced its proposed rules that it suggested in its Field Assistance Bulletin. The DOL confirmed its interpretation that employers that do not take a tip credit are now permitted to include back-of-house employees in the tip pool. This change gives employers a new tool to manage their labor budgets as they continue to face minimum wage increases.

The proposed rules also modify the frequently litigated 80/20 rule related to side work performed by service employees. The proposed rule explains that an employer may take a tip credit for any amount of time that a tipped employee performs work related to non-tipped duties contemporaneously with his or her tipped work, or for a reasonable time immediately before or after performing the tipped duties.

The proposed rules are not final but they would represent a pro-employer change to the frequently litigated regulations governing restaurant employers. The DOL's proposed rules are scheduled to be published in the [Federal Register](#) on October 8, 2019, and will be available for review and comment for 60 days.

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