

## The DOL Proposes to Cut Tip-Pooling Restrictions

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The U.S. Department of Labor (DOL) is proposing new rules that would provide some employers with more flexibility to count tips toward the federal minimum wage—particularly important for hospitality industry businesses such as restaurants and hotels that rely on large groups of tipped employees.

The DOL has announced a Notice of Proposed Rulemaking regarding tip regulations under the Fair Labor Standards Act (FLSA). The proposal would remove rules in effect since 2011 that have frustrated employers that do not take a "tip credit"—counting tips toward the minimum wage—by significantly limiting their ability to share tips with employees who are not ordinarily tipped. The proposal would allow these employers to include customarily non-tipped employees—such as cooks and dishwashers—in tip pools, providing increased flexibility in compensating workers.

Employers can pay their employees the required federal minimum wage of \$7.25 per hour in two ways: with a direct cash wage of the full amount or with a minimum of \$2.13 per hour wage plus counting a limited amount of an employee's tips, up to \$5.12 per hour, to satisfy the remainder. An employer may take this tip credit under section 3(m) of the FLSA if the employer's tipped employees are allowed to retain all of their tips. Employers are allowed to create a tip pool for employees to share tips, but only employees who "customarily and regularly receive tips." In 2011, the DOL expanded this tip pooling restriction to all employers—even those who pay employees the full federal wage up front and do not take a tip credit.

Recent trends—such as state laws requiring higher up-front wages and conflicting litigation rulings—have cast doubt on whether such broad tip pooling restrictions are viable or desirable. For example, state laws in California, Montana, Nevada, Oregon, and Washington require covered employers to pay tipped employees a direct cash wage at least equivalent to the federal minimum wage. The result has been burdensome restrictions on employers who would otherwise more broadly pool employee tips to increase employee earnings.

The DOL's Notice of Proposed Rulemaking solicits input regarding whether the agency should rescind portions of the 2011 tip regulations under 29 C.F.R. §§ 531.52, 531.54, and 531.59. Again, this proposed rule would only lift the tip-pooling restrictions on employers who do not claim tip credits. The public comment period is open until January 5, 2018.

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