

New Law Prevents Employers from Taking Tips

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In the restaurant industry, "tip-pooling" is the practice of sharing tips between front-house tipped-employees (servers and waiters), and back-house non-tipped employees (cooks and dishwashers). Traditionally, employers have not been allowed to require tip-pooling under most circumstances.

In December 2017, the Department of Labor (DOL) proposed a new rule that has allowed employers to require tip-pooling among these groups, including even allowing employers to keep employees' tips for themselves, so long as employees were paid the federal minimum wage (\$7.25). For Michigan employers to tip-pool, employers would have to pay the state minimum wage (\$9.25).

On March 23, 2018, the new Congressional budget, laid out in the Consolidated Appropriations Act, 2018 (the "Act"), was signed into law. The Act, among many other things, rejects part of the DOL's proposed new rule on tip-pooling. Specifically, it amends the Fair Labor Standards Act (FLSA) to prohibit employers, managers, or supervisors from keeping employees' tips. The Act adds the following language to the FLSA: "[a]n employer may not keep tips received by its employees for any purposes, including allowing managers and supervisors to keep any portion of employee's tips, regardless of whether or not the employer takes a tip credit."

However, the Act fails to define the terms "manager" or "supervisor," which may create some uncertainty going forward. For instance, the Act does not address whether employees with any supervisory authority are prohibited from sharing tips, even if they are in positions that traditionally have done so. Further guidance from the DOL on this issue may be necessary.

Although the Act amends the FLSA to prevent employers from pocketing tips, it doesn't completely void the DOL's proposed tip-pool rule. If implemented, the new rule would still allow employers to pool employees' tips and share such tips with back-house employees, provided all employees in the pool are paid the minimum wage.

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