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New Tip Pooling Guidelines For Employers

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The recent passage of the Consolidated Appropriations Act of 2018 ("H.R. 1625"), an 878-page omnibus spending bill, significantly changes the rules for tip pooling under the Fair Labor Standards Act (the "FLSA"). While the conditions for taking a tip credit toward federal minimum wage obligations remain essentially unchanged, H.R. 1625 appears to permit the inclusion of a larger group of employees in tip pools when a tip credit is not taken. At the same time, H.R. 1625 still prohibits an employer from keeping any portion of the tips received by its employees and expands the scope of remedies and penalties available for violations of the tip rules.

The Previous Tip Pooling Rule

Section 203(m) of the FLSA permits employers to satisfy their federal minimum wage obligations to tipped employees (those who work in occupations where they customarily and regularly receive more than $30.00 per month in tips) by counting a limited amount of the tips actually received by such employees as a credit toward the federal minimum wage. This tip credit is only available to employers if:

- The employer informs affected employees of Section 203(m)'s provisions; and
- Tipped employees either (a) retain all tips they receive or (b) participate in a valid tip pool, whereby tips are shared among employees who customarily and regularly receive tips.

Federal courts and the U.S. Department of Labor (the "DOL") have long permitted employers to require the pooling of tips. Since 2011, however, the DOL's regulations have interpreted the FLSA to prohibit employers from pooling tips for anyone other than those employees who "customarily and regularly" receive tips, regardless of whether the employer utilizes the FLSA's tip credit. Thus, employers have been permitted to mandate tip pooling among waiters, waitresses, bartenders, and bussers, but have been barred from including dishwashers, cooks, chefs, janitors, and other occupations not customarily and regularly receiving tips in the tip pool.

As this blog briefly noted in a 2016 post about tip pooling, the DOL's rule was enacted in response to Ninth Circuit's 2010 decision in Cumbie v. Woody Woo, Inc., which held that the FLSA only restricted the categories of employees who could be included in a tip pool if an employer intended to claim a tip

credit.

New Tip Pooling Rules

By enacting H.R. 1625, Congress explicitly repealed portions of the DOL's 2011 regulations restricting the group of employees whom an employer may include in a tip pool when not taking a tip credit, i.e., when paying a cash wage that is no less than the full federal minimum wage. Cutting short a controversial proposal by the Division's current Acting Administrator, H.R. 1625 also specifically forbids an employer from keeping tips received by its employees for any purposes, including for distributing portions of the tips to managers or supervisors, regardless of whether a tip credit is taken.

By repealing portions of the DOL's 2011 regulations, H.R. 1625 appears to permit employers who pay at least the full federal minimum wage to include employees in a tip pool even if they do not customarily and regularly receive tips. That is likely true in the Ninth Circuit, where the repeal of the 2011 regulations should make Cumbie good law once again. But because Cumbie was the only federal Court of Appeals decision to address the legality of including non-tipped employees in a tip pool not being utilized for a tip credit, the question is hypothetically open to dispute in other jurisdictions. That said, a DOL press release characterized H.R. 1625 as ensuring that workers in the back of the house, i.e., cooks, bussers, dishwashers, can participate in tip pools in appropriate circumstances, which suggests that DOL may issue regulations adopting the Cumbie decision in the near future.

Penalties Increased

H.R. 1625 also increases the remedies available and penalties imposed for violating the FLSA's tip rules. Previously, the FLSA authorized employees who were injured by violations of the tip credit and tip pooling rules to recover the unpaid balance of wages and an additional equal amount as liquidated damages. As a result of H.R. 1625, employers who unlawfully keep any portion of an employee's tips shall now be liable to injured employees for the amount of tip credit taken and the amount of the tip unlawfully taken, plus an additional equal amount as liquidated damages. H.R. 1625 also authorizes the Secretary of Labor to assess a civil penalty of $1,100 per violation in addition to the foregoing damages.

Takeaways

Although H.R. 1625 does not change the criteria for utilizing the FLSA's tip credit rules, H.R. 1625 should provide employers who directly pay employees at least the federal minimum wage with the option to implement tip pooling arrangements that include a greater number of employees, such as "back of the house" employees at restaurants. However, employers who wish to implement such tip pooling arrangements should proceed cautiously for at least two significant reasons.

First, the correctness of the position taken by the DOL in its 2011 regulations is still unsettled. A petition filed by the National Restaurant Association in 2016 to challenge the 2011 regulations is still pending before the U.S. Supreme Court as of the date of this post. The repeal of those regulations by H.R. 1625 and the views articulated by the current DOL leadership may render the petition moot, but it is hypothetically possible for the U.S. Supreme Court to take up the issue of whether the FLSA imposes limits on tip pooling outside of the tip credit provisions. As noted above, the existence of such limits also remains an open question outside of the Ninth Circuit.

Second, state laws often prohibit practices otherwise permitted under the FLSA, so the removal of tip pooling restrictions under the FLSA should not be interpreted to mean that tip pooling arrangements are immune from restrictions imposed by state laws. California, for example, does not permit tip credits and has limited tip pooling to those non-management employees that belong to the chain of service, i.e., those who contribute to the service of a tipping patron. That is broader than the FLSA's definition of a tipped employee, but it is not unbounded. On the one hand, a 2009 decision by the California Court of Appeal in Etheridge v. Reins International California, Inc.recognized that the "chain of service" at a restaurant may include dishwashers and "other kitchen staff." On the other hand, the California Labor Commissioner has previously stated that it is not permissible to include a cashier in a tip pool at a car wash. Additionally, the California Labor Commissioner requires any tip pooling arrangement to reflect a reasonable relationship between the distribution of pooled tips and the degree to which an employee provides the services that earn the tips.

Therefore, employers considering a tip pooling arrangement are strongly encouraged to consult with legal counsel before implementing one.

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