



Employment Law Note

April 2018

Sharing is Caring: FLSA Amendment on Tips



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The Fair Labor Standards Act requires that non-exempt employees be paid a minimum of \$7.25 per hour and overtime pay at time and one-half of the regular rate of pay for all hours worked over 40 in a workweek. If an employee earns tips, the employer is permitted to pay a minimum wage of \$2.13 per hour and credit the employee's earned tips to meet the minimum wage of \$7.25 per hour. This is referred to as a "tip credit."

A contentious issue that often arises for employers of tipped, "front-of-house," workers like bartenders and servers and non-tipped, "back-of-house," employees like cooks and dishwashers, is whether the employee's earned tips, once exceeding the \$7.25 minimum wage threshold, can be shared with employees who do not receive tips.

2011 Regulations on Tips

In 2011, the Obama Administration issued a regulation that limited the ability to share tips with "back-of-house" employees and the employer. The 2011 regulation provided that only "customer service" employees were allowed to share tips, even if the employer was not taking a "tip credit." Whether this regulation was binding law was disputed, and courts applied the regulation differently. Despite this, the regulation resulted in a great pay disparity between the "front-of-house" and "back-of-house." The tipped servers and bartenders earned significantly more money than the hourly cooks and dishwashers. While tipped employees have seen a 300% increase in their pay over the last 30 years, non-tipped employees have only seen a 20% increase in their pay.

The New Administration's Proposed Regulation

In an effort to bridge the gap and reduce regulations on businesses, the new administration sought to reverse the 2011 regulation. The new administration proposed a rule that would significantly limit the restriction on sharing tips with "back-of-house" employees and the employer. The proposed rule specifically sought to allow employers not taking a tip credit to allocate tips earned as they deem fit. The purpose of this regulation was to allow employers to take the tips and distribute them to all the employees that provide the customer service, not just those the customer interacts with. Critics of the regulation feared that once the tips would become the property of the employer, the employer would not distribute the tips and instead keep them to increase their profits. The comment period for the proposed regulation closed on February 5, 2018.

Amendment to the FLSA

On March 23, 2018, as part of the new laws enacted to avoid the government shut-down, an amendment to the FLSA as it relates to tips passed. Congress enacted the amendment to preempt the new administration's proposed regulation. The new FLSA amendment prohibits an employer from keeping or sharing any tips received by its employees. The rule applies regardless of whether the employer takes a tip credit. Now, even if the new administration passes a regulation allowing an employer to participate in tip sharing, the FLSA amendment would override any such regulation and employers will remain prohibited

from sharing an employee's tips. The law is clear that employers cannot take an employee's tips, whether a tip credit is being used or not. The door remains open for a regulation to be passed for tip-sharing with "back-of-house" employees without the employer taking possession of the tips.

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