Tips Belong To Tipped Employees, Regardless Of Whether Employer Takes Tip Credit, Says A Federal Appellate Court

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The U.S. Court of Appeals for the Ninth Circuit upheld a U.S. Department of Labor (DOL) rule prohibiting employers from requiring employees to share tips with non-tipped employees, even if the employer does not take the tip credit and pays the full minimum wage to its tipped employees. The FLSA and some state laws allow employers to take a credit against the minimum wage for employees who customarily and regularly receive tips. This is commonly referred to as the "tip credit." In 2011, the DOL issued a rule prohibiting employers from distributing tips to employees who do not customarily receive tips, even if the employer opts not to take the tip credit. In other words, employers must comply with the tip credit requirements of the FLSA regardless of whether the employer actually takes the tip credit or not. Before 2011, there was a widely-held belief that employers who did not take the tip credit could distribute tips to both tipped and non-tipped employees, like cooks and managers. The 2011 DOL rule was collectively challenged by a number of restaurant associations, and the Ninth Circuit recently entered its decision on the topic. While this decision is only binding in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, employers should exercise caution, because other federal courts may find this decision persuasive, and no other federal appellate court has decided the issue.

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