

# New Rules for Tipped Employees to Take Effect in February 2021

## Labor & Employment Law Update

on December 28, 2020

On December 22 the Federal Department of Labor (DOL) published a Final Rule changing the FLSA regulations for tipped employees. The Final Rule takes effect 60 days after publication. A caveat before we dig into the Final Rule; the change affects only federal law. As with all things wage-and-hour-related, many states, and some local governments, enforce more stringent requirements. Some jurisdictions prohibit tip credits entirely. This post focuses on the federal standard only. Employers must adhere to the requirements applicable to their particular business in each location in which they operate.

The FLSA has long allowed a “tip credit” to cover a portion of the minimum wage an employer would otherwise be required to pay certain employees who regularly receive gratuities. One requirement is that the tipped employees retain all of their tips with the exception of a qualified tip pool. The regulations surrounding tip pools have changed over the years due to a range of court rulings, legislative action, and agency rule making. The Final Rule is the latest iteration of regulations surrounding the “tip credit provision” [29 USC § 203(m)(2) (A) often referred to as simply “section 3(m)”].

Under the newly published Final Rule:

- Employers may continue to enforce mandatory tip pooling arrangements;
- If the tip credit is taken, the employer may not include employees who do not routinely receive tips (i.e. kitchen staff) in a mandatory tip pool;
- Employers that do not take the tip credit (i.e. those that pay tipped employees a set hourly wage that is at or above the applicable minimum wage for non-tipped employees) may include employees who do not routinely receive tips in mandatory tip pools;
- Managers and supervisors (as determined based on the duties portion of the test for the FLSA's executive exemption) are prohibited from participating in tip pools (regardless of whether a tip credit is taken);
- Tip pool funds must be paid out at least as frequently as the employer pays out base hourly wages; and
- Finally, employers may take a tip credit for time spent performing tasks that do not generate tips (i.e. cleaning, stocking, rolling silverware, etc.) as long as

the non-tip generating duties relate to the tipped occupation and are performed contemporaneously with, or immediately before or after, the duties for which the employee does receive tips. The Rule expressly rejects the 80/20 rule referenced in some opinion letters and court decisions.

A final reminder that is particularly relevant in light of the massive sustained blow the service industry has taken of late; the tip credit *cannot exceed the amount of tips the employee actually receives*. Also, if an employee's base hourly rate, plus the tips actually received, adds up to less than the applicable minimum wage for any particular shift, the employer must make up the difference.

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