

> Client Alert

U.S. Department of Labor Final Rule Permits Tip Pooling Among Front and Back-of-the-House Hospitality Workers

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Yesterday, the U.S. Department of Labor ("DOL") issued its long-awaited [Final Rule](#) allowing employers who do not take a tip credit to establish "nontraditional" tip pools that include back-of-the-house employees (for example, cooks and dishwashers) and others who do not traditionally receive tips. The Fair Labor Standards Act ("FLSA") generally requires covered employers to pay their employees at least the federal or other applicable minimum wage (the federal minimum currently remains \$7.25 per hour). However, the FLSA allows an employer which satisfies certain requirements to count a portion of tips received by its "tipped employees" as a credit toward its minimum wage obligation (otherwise known and referred to as a "tip credit").

Under the DOL's new Rule, an employer that elects to pay the applicable minimum wage, rather than take advantage of the subminimum wage allowed for workers who receive tips from customers (a/k/a the "tip credit"), is now permitted to establish a "nontraditional" tip pool that includes cooks, dishwashers, and other employees who under the FLSA are ordinarily not permitted to share tips. Moreover, the Final Rule also explicitly:

- prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit;
- prohibits employers from allowing managers or supervisors to "keep" any portion of employees' tips; and
- amends its regulations to require that an employer that collects tips in order to facilitate a mandatory tip pool must fully redistribute the tips no less often than when it pays wages to avoid its being deemed as "keeping" the tips.

As a practical matter, the Final Rule means that restaurant operators in most states -- including certain states that do not permit a tip credit (California, Oregon, Washington, Nevada, Minnesota, Montana, and Alaska) may now ask servers to share its tips with back-of-the-house employees provided that the restaurant operators pay employees at least the full minimum wage for all hours worked. It should be noted that some state laws, such as those in New York and Massachusetts, still directly prohibit sharing tips with back-of-the-house employees even if the restaurant does not avail itself of the tip credit (at least and until such time as these states amend their wage and hour laws for the hospitality industry to permit the same).

For the sake of complete clarity, although the Final Rule references the federal minimum wage, restaurant employers are bound by the local minimum wage provided under state law as well as the tip credits provided by state law to the extent that they exceed the federal minimum.

The Rule is set to become effective in 60 days, i.e., after the change in administrations. According to a variety of media sources, however, the incoming Biden administration may seek to delay implementation of the Final Rule and begin work to produce its own Rule. Alternatively, the Biden Administration could simply elect not to defend the Final Rule in any prospective legal challenge.

Takeaway for Employers

Employers should take note that the applicable law in the states in which they operate may have greater requirements than those under federal law both as to minimum wage and permissible tip pooling. For example and as noted, New York law prohibits front-of-house employees from sharing tips with back-of-house employees irrespective of whether or not a tip credit is taken. Thus, at least in New York, the Final Rule will have no impact on restaurant or other employers in the hospitality industry, unless and until New York modifies its wage and hour laws which is not expected to happen.

As such, employers should consult with Morrison Cohen's Labor & Employment Law Department to determine whether the states and municipalities in which they operate will permit implementation of nontraditional tip pools as described herein.