DOL Gives Employers New Nontraditional Tip Pooling Option

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The Department of Labor (DOL) has expanded tip pooling options for employers to include mandatory "nontraditional" tip pools. Through a nontraditional tip pool, employers may require customarily tipped employees (such as servers) and customarily non-tipped employees (such as dishwashers and cooks) to pool their tips and split the proceeds. But there is a catch: employers cannot take a tip credit if they institute a nontraditional tip pool.

On December 22, 2020, the DOL issued a new Final Rule that in part:

- Allows employers to create a mandatory "nontraditional" tip pool that includes both customarily and regularly tipped and non-tipped employees, provided employers do not claim a tip credit.[1]
- Prohibits employers from including managers and supervisors in any tip pools, regardless of whether it is a traditional or nontraditional tip pool.[2]
- Requires employers to redistribute tips collected as part of any mandatory tip pool no later than when employers pay wages to employees.
- Creates new recordkeeping obligations for those employers who operate a mandatory tip pool but do not take a tip credit, which include identification of tipped employees on payroll records and maintenance of weekly or monthly tip amounts received by each employee.
- Incorporates civil penalties established by the Consolidated Appropriations Act of 2018 (CAA) for employers who unlawfully keep employee tips.
- Codifies the guidance set forth in the DOL's November 8, 2018 Opinion Letter, which abolished the "20 Percent Rule" and established guidelines for determining if tipped or non-tipped duties related to the employee's tipped occupation. For a full analysis, see our prior Alert: Department of Labor Rescinds 20 Percent Rule for Tipped Employees.

In issuing the Final Rule, the DOL considered the impact of the CAA's amendments to section 3(m) of the Fair Labor Standards Act (FLSA) regarding tipped employees and adjusted the regulatory scheme accordingly.[3]

The DOL considered the policy impact of tip pools, noting that a nontraditional tip pool could improve morale, recruitment, and retention of non-tipped workers by increasing their overall compensation. The nontraditional tip pool also provides employers increased flexibility to incentivize non-tipped and tipped employees alike to improve the customer experience.

With this Final Rule, employers that currently take a tip credit should evaluate the tip credit against the nontraditional tip pool option. Some employers may decide that the benefit of including non-tipped workers in a tip pool outweighs the benefit of claiming the tip credit. Those employers that do not take a tip credit (or are prohibited by state or local law from doing so) should consider if a nontraditional tip pool makes business sense.[4]

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But, whether employers ultimately choose to implement a nontraditional tip pool, employers must be cognizant of the new regulations under the Final Rule that apply to both traditional and nontraditional tip pools. These regulations include an express prohibition against including managers or supervisors in a tip pool, a requirement to timely redistribute pooled tips, and new recordkeeping requirements. Employers should revisit current policies and practices in light of these new requirements.

The Final Rule will become effective 60 days after the date it is published in the Federal Register.

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[1] The FLSA guarantees non-exempt workers a federal minimum wage of $7.25 per hour, but it allows employers to claim a "tip credit" and pay a "tipped employee" a reduced hourly cash wage so long as that hourly cash wage, plus the tips received by the employee, equals or exceeds the federal minimum wage.

[2] According to the DOL's Frequently Asked Questions on the Final Rule, a manager or supervisor may keep tips received from a customer for services directly provided by the manager or supervisor.

[3] The Final Rule does not eliminate any of the existing requirements for employers who claim a tip credit.

[4] However, these employers need to consider state and local laws regarding mandatory tip pools as the DOL's Final Rule does not preempt more restrictive state and local law.

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