

National Restaurant Association Update: New Federal Regulations for Employers with Tipped Employees

Last updated: May 4, 2011 (Document will be updated as information becomes available. Visit www.restaurant.org/tips for the latest.)

New U.S. Department of Labor amended regulations, issued April 5, 2011, and effective May 5, 2011, address a number of areas under the federal Fair Labor Standards Act (FLSA) that particularly impact tip credit requirements for employers. The DOL's Final Rule announcing the new regulations can be found at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-05/pdf/2011-6749.pdf>.

Generally, the amended tip regulations pertain to three basic areas: (1) the ownership of tips; (2) tip-pooling arrangements; and (3) the required notice employers must give to tipped employees for the employer to utilize the FLSA's tip credit provisions. And while the FLSA is federal law, and not state law, employers need to keep in mind that to the extent your state has a state law on these same provisions, BOTH the FLSA and the state law still apply, and Congress provided in section 18 of the FLSA that the state law supersedes the federal law on any particular provision which is more beneficial to the employee, and vice versa.

While the National Restaurant Association cannot give you legal advice, we provide the following suggested compliance guidelines for you to share and discuss with your own legal counsel. We recommend immediate attempts to try to comply in good faith with the new requirements, while we await further clarification. Visit www.restaurant.org/tips for ongoing updates from the National Restaurant Association.

The following is the latest information the National Restaurant Association has on how these new regulations may be interpreted by the DOL as of May 5, 2011.

The Ownership of Tips

Federal law declares that "tips" (or "gratuities") are the property of the employee, at least to the extent the employer uses the tips to take a tip credit to meet the minimum wage obligations. This is not new. [NOTE: "Service charges," on the other hand, are technically the property of the business because they are added to the patron's bill by the business, even though they may be distributed to the employees. Services charges given to employees by the business are considered to be wages for income tax purposes, and may not be used to take a tip credit. Service charges are generally

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subject to state and local sales taxes, and are considered to be part of the establishment's gross receipts.]

What is new in the regulations published April 5, however, is DOL's interpretation (formed in opinion letters in the past) that tips are owned by the server, except for tips contributed to a valid tip pool, **even if the employer does not take a tip credit or use tips to meet its minimum wage obligations.**

Tip-Pooling Arrangements

Federal law allows mandatory, employer-run tip pooling arrangements that meet certain requirements, including that participants are not required to contribute a greater percentage of their tips to the pool than is "customary or reasonable." As an enforcement position, DOL has in the past said it will not question pool contributions that do not exceed 15 percent of the employee's tips. The new regulations remove DOL's 15 percent limitation on tipped employee contributions to the tip pool but DOL has not indicated if the "customary and reasonable" standard as to a required contribution remains in effect. [NOTE: Employer-run tip pools that allow participation of customarily non-tipped employees such as management or kitchen staff in distributions from the pool may be required to reimburse their tipped employees for amounts given to non-eligible employees.]

Required Notice to Employees

This section is new and very important. Section 3(m) of the statute, 29 USC 203(m), states simply that the available tip credit may not be taken unless the "employee has been informed by the employer of the provisions of this subsection [203(m), the tip credit]." This provision in the prior regulations has always been somewhat unclear as to what an employer must do, which has important consequences because the employer's failure to give the employees the appropriate notice means the employer must pay the full minimum wage (without any tip credit) for all hours worked. Litigation has occurred in the past on issues such as whether the employer notice must be in writing, and whether (and to what extent) the tip credit must be explained or simply disclosed.

The new amended regulations, 29 CFR sections 531.54 and 531.59(b), now specifically require employers to "inform" employees, in advance of taking the tip credit, of certain information, which includes:

- the amount of the cash wage to be paid by the employer to the tipped employee;

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- the amount of tips to be credited as wages toward the minimum wage (a federal maximum tip credit of \$5.12 per hour, but lower in some states, not to exceed the value of tips actually received);
- that all tips received by the employee must be retained by the employee except for tips contributed to a valid tip pool limited to employees who customarily and regularly receive tips;
- that the tip credit shall not apply to any employee who has not been informed by the employer of the provisions for a tip credit; and
- for employers that require tip pools, any required tip pool contribution amount or percentage, including notice that the tip credit may be taken only as to the amount the server actually receives, and that the employer may not retain any of the server's tips for any other purpose.

It is important to note that DOL continues to allow under the new, amended regulations that this notice may be oral or in written form, although in its preamble discussion to the Final Rule it strongly encourages the employer to provide notice in writing in order to establish, if challenged, that the proper notice was actually given.

NRA recommends that, as of May 5, 2011, its members provide the notice to each tipped employee **in writing**, and that each employee sign and date the notice, affirming that they understand the notice.

If you are an employer using the tip credit provisions, we recommend that you provide notice to tipped employees as soon as possible. In light of the new regulations, we suggest for discussion with your legal counsel the following notices – the first for employers who do not require sharing of tips in a tip pool, and the second for those employers who do.

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VERSION A: NOTICE TO TIPPED EMPLOYEES WHERE THERE IS NO EMPLOYER-REQUIRED TIP POOL

The U.S. Department of Labor recently amended its tip credit notice regulations, effective May 5, 2011, to require employers to inform tipped employees of certain tip credit information. We are informing you of the following as a result of this new requirement:

- The amount of cash wage to be paid to you per hour will be \$ [fill in hourly cash wage amount here].
- Assuming you have received a sufficient amount of tips to cover the tip credit, the amount of your tips per hour to be credited as wages will be \$ [fill in hourly tip credit amount here].
- You have the right to retain all the tips you receive, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips.
- The tip credit shall not apply unless you have been informed of these requirements.

You are being provided this information in accordance with Section 203 (m) of the Fair Labor Standards Act. Please sign and date this notice indicating that you understand it, and return it to _____. Contact _____ at _____ if you have any questions.

Thank you.

Employee's Name (Print)

Employee's Signature

(Date)

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VERSION B: NOTICE TO TIPPED EMPLOYEES PARTICIPATING IN AN EMPLOYER-REQUIRED TIP POOL

The U.S. Department of Labor recently amended its tip credit notice regulations, effective May 5, 2011, to require employers to inform tipped employees of certain tip credit information. We are informing you of the following as a result of this new requirement:

- The amount of cash wage to be paid to you per hour will be \$ [fill in hourly cash wage amount here].
- Assuming you have received a sufficient amount of tips to cover the tip credit, the amount of your tips per hour to be credited as wages will be \$ [fill in hourly tip credit amount here].
- You have the right to retain all the tips you receive, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips. Your required tip-pool contribution or percentage is [fill in required tip-pool contribution amount/percentage here]. The tip credit being taken is only on the amount you actually receive and your tips will otherwise not be retained except for your contribution to the tip pool.
- The tip credit shall not apply unless you have been informed of these requirements.

You are being provided this information in accordance with Section 203 (m) of the Fair Labor Standards Act. Please sign and date this notice indicating that you understand it, and return it to _____. Contact _____ at _____ if you have any questions.

Thank you.

Employee's Name (Print)

Employee's Signature

(Date)