

THE FLSA'S TIP RESTRICTIONS

In March 2018 Congress revised the federal Fair Labor Standards Act to further protect employees' tips. As a result, increased damages and some of the federal "tip credit" concepts now apply to *all* tip scenarios. Nonetheless, federal law still only prohibits mandatory tip-sharing in limited circumstances.

FLSA Tip Principles	Comments
<p>An employer cannot "keep" any portion of an employee's tips under <i>federal law</i>.</p>	<p>This has been the case under some state and local laws, but now it is so for any employee covered by the FLSA (which is almost every employee of a restaurant, hotel, etc. nationwide).</p> <p>Employers should determine whether they are "keeping" an employee's tips even in an indirect manner such as requiring a deduction or payment (through payroll, tips, or simply out-of-pocket) under circumstances where a deduction could not cut into FLSA wages. Presumably this will not change the USDOL's position with respect to the allocation of credit card fees.</p> <p>Keep in mind that service charges (automatic amounts) are not "tips".</p>
<p>A "manager" or "supervisor" likewise cannot keep any portion of an employee's tips.</p>	<p>While we are awaiting definitions (and clarification regarding tips received by these individuals) an employer might analogize this to analyzing whether a particular employee could participate in a tip pool with tip credit employees.</p>
<p>An employee can <i>voluntarily</i> share tips.</p>	<p>Nonetheless, there is a risk of the arrangement being characterized as <i>mandatory</i> tip sharing, particularly when arguable members of management are involved.</p>
<p><i>Non-Tip Credit Employees Only:</i> An employer can <i>require</i> an employee for whom it does <i>not</i> take the <i>federal</i> tip credit to share tips ("tip out", "pool") with other employees aside from those referenced above.</p>	<p>The FLSA, despite confusion over the last several years, has never prohibited this sharing (for example, with "back of the house" employees such as dishwashers). Even so, we are hoping that USDOL will put forth an affirmative statement to this effect.</p>
<p><i>Tip Credit Employees Only:</i> If taking the federal tip credit, then an employee only can be required to share tips (tip out, pool) with employees in occupations typically meeting the definition of "tipped employees".</p>	<p>The definition of "tipped employee" is relevant only if taking the tip credit. Employers should review any mandatory tip-sharing scenarios (whether an official pool or not) and evaluate whether any of the participants might be characterized as a "manager" or "supervisor".</p>
<p><i>Tip Credit Employees Only:</i> The tip notice requirement only applies if the federal tip credit is taken.</p>	<p>Nevertheless, employers should consider formalizing any mandatory arrangements.</p>
<p>If an employee's tips are "kept" in any of the above ways, then the employer should anticipate that hefty damages will apply.</p>	<p>Civil money penalties can apply (no repeated or willful showing required) to direct violations or, arguably, certain indirect violations (for example, a uniform deduction that brings an employee below the minimum wage). Moreover, to the extent that an employer relied upon the tip credit, the employer will owe the equivalent of the credit taken for that employee.</p>

These principles apply to all employees who receive tips, except where noted above. A summary of the "tip credit" is available through your Fisher Phillips attorney.

These materials are for general-information uses only and may not be construed to be legal advice, a legal opinion, or a comprehensive compilation of all pertinent considerations. Numerous authorities must be evaluated in applying the relevant provisions. You are urged to consult legal counsel competent in such matters concerning your specific situation and questions.