



Jill K Bigler

Partner
Columbus
614.227.2312
jbigler@bricker.com

Changes in store for tipped employees: DOL proposes host of new tip regulations

October 16, 2019

On October 8, 2019, the U.S. Department of Labor (DOL) proposed [changes](#) to the Fair Labor Standards Act (FLSA) regulations governing the wages of tipped employees, specifically, tip credits and tip pools. Overall, the proposed rule gives employers more flexibility in determining pay practices and brings needed clarity to the various tip-related legislation and guidance employers have seen over the past several years.

Tip Credits

The FLSA generally requires employers to pay non-exempt employees at least the federal minimum wage (currently \$7.25 per hour). However, employers can treat “tipped employees,” defined as those employees who customarily and regularly receive more than \$30 per month in tips, differently. Because tipped employees receive additional compensation from tips, the FLSA allows employers to pay tipped employees a direct wage of \$2.13 per hour and take a “tip credit” for the tips the employee receives from customers (a maximum of \$5.12 per hour) to reach the federal minimum wage.

The proposed rule codifies recent DOL guidance that an employer may take a tip

credit for any amount of time an employee in a tip-earning occupation performs related non-tipped duties “contemporaneous with” or “for a reasonable time immediately before or after” performing tipped duties. Examples of related non-tipped duties include “cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.” This standard is more flexible than the DOL’s previous guidance, which required employers to pay the federal minimum wage for time spent on non-tipped duties if such work exceeded 20 percent of the employee’s workweek.

Tip Pools

Often, employers that take a tip credit will also implement a “tip pool” in which all tips received from customers are pooled together and distributed equally among their tipped employees. Employers that take a tip credit have long been prohibited by DOL regulations from requiring tipped employees to pool their tips with workers who do not regularly and customarily receive tips, such as cooks or dishwashers. The proposed regulation does not change this longstanding rule.

However, for employers who choose not to take a tip credit, the proposed rule will allow employers to include traditionally non-tipped employees, such as cooks or dishwashers, in the tip pool. This change will give employers more flexibility in determining pay practices and offers a way to reduce wage disparities between customer-facing and “back of the house” employees.

The proposed rule also makes clear that it is unlawful for employers (including managers and supervisors) to keep any portion of the tips employees receive from customers.

The 60-day period to comment on the proposed rule closes on December 9, 2019. Any affected employers concerned or dissatisfied with the proposed rule should consider submitting comments to the DOL, which can be done electronically [here](#).